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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 27.01.2023

\+ O.M.P. (T) (COMM.) 121/2022 & I.A. 20288/2022

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

Through: Mr. Manish K. Bishnoi, Mr. Nirmal Prasad, Advocates.

versus

THIRD ROCK CONSULTANTS PRIVATE LIMITED ..... Respondents

Through: Mr. Himanshu Gupta, Mr. Aditya Sikka, Ms. Padamja Sharma, Ms. Vasudha Vijaysheel, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. By way of the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner-National Highways Authority of India ["NHAI"], seeks termination of the mandate of the learned sole arbitrator who is in *seisin* of the disputes between the parties under a Contract Agreement dated 29.10.2014 ["the Agreement"].

Submissions of learned counsel for the parties

2. Mr. Manish K. Bishnoi, learned counsel for the petitioner, submits that the arbitrator has been appointed without following the

procedure prescribed in the Agreement. The controversy between the parties is outlined in the order of this Court dated 02.12.2022, by which notice was issued to the respondent and a limited *ad interim* order passed.

3. As noted in the said order, however, Mr. Himanshu Gupta, learned counsel for the respondent, has taken a preliminary objection with regard to the maintainability of the present petition in this Court on the ground of pecuniary jurisdiction. It is the admitted position that the dispute in the arbitration involves a sum of approximately ₹32 lakhs, whereas the ordinary original civil jurisdiction of this Court is only in respect of disputes of a value of ₹2 crores or more. Mr. Gupta submits that the "Court" referred in Section 14(2) of the Act must be ascertained with reference to the definition in Section 2(1)(e) thereof, which would render the present petition maintainable before the District Court, and not this Court. He relies in this connection upon the judgment of the Supreme Court in *Swadesh Kumar Agarwal vs. Dinesh Kumar Agarwal*[1].

4. Mr. Bishnoi, on the other hand, submits that the power to terminate the mandate of an arbitrator under Section 14 of the Act, read with Section 15 thereof, also has the potential consequence of substitution of the arbitrator by another arbitrator, which function can be exercised only by the Supreme Court or the High Court, and not by a civil court. He submits that the power of appointment of an arbitrator under Section 11 of the Act has been vested only in the Supreme

[1] (2022) 10 SCC 235.

Court (in the case of international commercial arbitrations) or otherwise in the High Court, which suggests that the power of termination and substitution under Sections 14 and 15 also ought to be exercised only by the said courts. Mr. Bishnoi contends that it is inappropriate to apply the definition in Section 2(1)(e) strictly in such a case. He argues that the word "Court" in Section 14(2) clearly requires a different contextual interpretation, which is permitted by the opening words *["unless the context otherwise requires"]* found in Section 2(1) of the Act itself. Mr. Bishnoi draws sustenance for this argument upon the judgment of this Court in *DDA vs. Tara Chand Sumit Construction Co.*[2]. He draws my attention to the ground taken in paragraph 18N of the petition, wherein the jurisdiction of this Court is sought to be invoked only on the contention that the termination of the mandate of the arbitrator can only be granted by this Court.

Statutory Provisions

5. Before dealing with the respective contentions of the parties in this regard, the relevant provisions of the Act are set out below: -

> *"**2. Definitions.**—(1) In this Part, unless the context otherwise requires,-*
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> *xxxx xxxx xxxx*
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> *(e) "Court" means—*
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> *(i) in the case of an arbitration other than international commercial arbitration,* ***the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions***

[2] (2020) 269 DLT 373.

forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, *but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*

(ii) in the case of international commercial arbitration, ***the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court****;*

xxxx xxxx xxxx

14. Failure or impossibility to act.*—(1) The mandate of an arbitrator shall terminate* ***and he shall be substituted by another arbitrator,*** *if—*

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) ***If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate****.*

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section(3) of section 12.

15. Termination of mandate and substitution of arbitrator.*—(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—*

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) ***Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced****.*

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held maybe repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."[3]

Analysis

6. Having heard learned counsel for the parties, I am of the view that the preliminary objection taken by Mr. Gupta must succeed.

7. The judgment of the Coordinate Bench in *DDA*[4] was delivered on 12.05.2020, and was rendered in the context of Section 29A of the Act. Section 29A also uses the term "Court" for the purposes of making an application for extension of the mandate of an arbitral tribunal beyond the time originally provided under the section. Having regard to the fact that Section 29A(6) also provides for substitution of the tribunal, this Court came to the conclusion that the power can be exercised only by the Supreme Court or the High Court, and not by a civil court. The Court agreed with the view taken by the Gujarat High Court in *Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel*[5]

[3] Emphasis supplied.
[4] Supra (note 2).
[5] Misc. Civil Application (O.J.) No. 1 of 2018 in Petition under Arbitration Act No. 56 of 2016,

and the judgment of the Bombay High Court in *Cabra Instalaciones Y Servicios, S.A. vs. Maharashtra State Electricity Distribution Company Limited*[6].

8. While Mr. Bishnoi may be right in submitting that this reasoning would apply equally to the power of substitution under Sections 14 and 15 of the Act, I am of the view that this argument cannot survive the decision of the Supreme Court in *Swadesh Kumar Agarwal*[7], cited by Mr. Gupta.

9. In *Swadesh Kumar Agarwal*[8], the Court was considering proceedings which arose out of a judgment of the High Court under Section 11(6) of the Act, wherein the High Court had terminated the mandate of an arbitrator and appointed a substitute arbitrator, during the pendency of an application under Section 14 of the Act filed before the concerned civil court. The Supreme Court reversed the view taken by the High Court upon a consideration of the statutory scheme of Sections 11, 13, 14 and 15 of the Act, as also the definition of "Court" in Section 2(1)(e) of the Act.

10. The relevant extracts of the judgment of the Supreme Court are as follows: -

> *"**21.** Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself.* ***However,***

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decided on 14.09.2018.
[6] (2019) SCC Online Bom 1437
[7] Supra (note 1).
[8] Ibid.

in case of any of the eventualities mentioned in Section 14(1)(a) of the 1996 Act and the mandate of the arbitrator is sought to be terminated *on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay,* ***the aggrieved party has to approach the "court" concerned as defined under Section 2(1)(e) of the 1996 Act.*** *The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act.*

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22. *So far as the termination of the mandate of the arbitrator and/or termination of the proceedings mentioned in other provisions like in Section 15(1)(a) where he withdraws from office for any reason; or (b) by or pursuant to an agreement of the parties, the dispute need not be raised before the court concerned. For example, where the sole arbitrator himself withdraws from office for any reason or when both the parties agree to terminate the mandate of the arbitrator and for substitution of the arbitrator, thereafter, there is no further controversy as either the sole arbitrator himself has withdrawn from office and/or the parties themselves have agreed to terminate the mandate of the arbitrator and to substitute the arbitrator. Thus, there is no question of raising such a dispute before the court. Therefore, the legislation has deliberately provided that the dispute with respect to the termination of the mandate of the arbitrator under Section 14(1)(a) alone will have to be raised before the "court".* ***Hence, whenever there is a dispute and/or***

controversy that the mandate of the arbitrator is to be terminated on the grounds mentioned in Section 14(1)(a), such a controversy/dispute has to be raised before the "court" concerned only and after the decision by the "court" concerned as defined under Section 2(1)(e) of the 1996 Act *and ultimately it is held that the mandate of the arbitrator is terminated, thereafter, the arbitrator is to be substituted accordingly, that too, according to the rules that were applicable to the initial appointment of the arbitrator. Therefore, normally and generally, the same procedure is required to be followed which was followed at the time of appointment of the sole arbitrator whose mandate is terminated and/or who is replaced.*

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30. *Now so far as reliance being placed upon the decisions of this Court by the learned counsel appearing on behalf of Respondent 1 in ACC [ACC Ltd. v. Global Cements Ltd., (2012) 7 SCC 71 : (2012) 4 SCC (Civ) 60] and U.P. State Bridge Corpn. [Union of India v. U.P. State Bridge Corpn. Ltd., (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732] are concerned as such there cannot be any dispute with respect to the position of law laid down by this Court in the aforesaid decisions to the effect that in case of any of the eventualities occurring as mentioned in Sections 14 and 15 of the 1996 Act, the mandate of the arbitrator shall stand terminated.* ***However, the question is in a case where there is a dispute/controversy on the mandate of the arbitration being terminated on the ground set out in Section 14(1)(a) of the Act, whether such a dispute shall have to be raised before the "court" concerned defined under Section 2(1)(e) of the Act or such a dispute can be considered on an application under Section 11(6) of the Act? Before this Court in the aforesaid decisions such a controversy was not raised.*** *Therefore, the aforesaid decisions shall not be of any assistance to the respondents and/or the same shall not be applicable to the facts of the case on hand, while*

deciding the issue, whether termination of the mandate of the arbitrator on the ground mentioned under Section 14(1)(a) of the 1996 Act can be decided under Section 14(2) or under Section 11(6) of the 1996 Act.

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***32. In view of the aforesaid discussion and for the reasons stated above, it is observed and held as under**:*

***32.1.** That there is a difference and distinction between Section 11(5) and Section 11(6) of the 1996 Act.*

***32.2.** In a case where there is no written agreement between the parties on the procedure for appointing an arbitrator or arbitrators, parties are free to agree on a procedure by mutual consent and/or agreement and the dispute can be referred to a sole arbitrator/arbitrators who can be appointed by mutual consent and failing any agreement referred to Section 11(2), Section 11(5) of the Act shall be attracted and in such a situation, the application for appointment of arbitrator or arbitrators shall be maintainable under Section 11(5) of the Act and not under Section 11(6) of the Act.*

***32.3.** In a case where there is a written agreement and/or contract containing the arbitration agreement and the appointment or procedure is agreed upon by the parties, an application under Section 11(6) of the Act shall be maintainable and the High Court or its nominee can appoint an arbitrator or arbitrators in case any of the eventualities occurring under Sections 11(6)(a) to (c) of the Act.*

***32.4.** Once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent and the arbitrator/arbitrators is/are so appointed, the arbitration agreement cannot be invoked for the second time.*

32.5. In a case where there is a dispute/controversy on the mandate of the arbitrator being terminated on the ground mentioned in Section 14(1)(a), such a dispute

> ***has to be raised before the "court", defined under Section 2(1)(e) of the 1996 Act*** *and such a dispute cannot be decided on an application filed under Section 11(6) of the 1996 Act."*[9]

11. Having so held, the Supreme Court restored the applications under Section 14(2) of the Act before the concerned civil court, which had been withdrawn following the impugned judgment of the High Court, and directed the concerned civil court to decide those applications on merits.

12. Mr. Bishnoi contends that the question raised by him here, namely, whether the High Court alone can consider a petition under Section 14 of the Act, did not arise for consideration before the Supreme Court in *Swadesh Kumar Agarwal*[10]. Although the questions formulated by the Court in paragraph 9 of the judgment do not expressly contain a question to this effect, it is evident from the extracts quoted above that the Supreme Court has considered the question of jurisdiction under Section 14(2) of the Act, and expressly held that the Court under Section 2(1)(e) of the Act can entertain such a petition.

13. Mr. Bishnoi's next submission is that as far as High Courts with ordinary original civil jurisdiction are concerned, the definition of "Court" in Section 2(1)(e)(i) of the Act implies that the High Court alone would consider all proceedings under the Act. He submits that Section 2(1)(e) of the Act does not incorporate distinctions between courts on the basis of their pecuniary jurisdiction and the phrase,

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[9] Emphasis Supplied.
[10] Supra (note 1).

"*…having jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been the subject matter of the suit…*", is incorporated only to address the question of territorial jurisdiction. In this context, Mr. Bishnoi argues that the definition in Section 2(1)(e)(i) of the Act expressly excludes civil courts of a grade below principal civil courts or Courts of Small Causes, even if those Courts would ordinarily have had jurisdiction to decide the dispute, if it were the subject matter of a suit. Similarly, he points out that in the context of international commercial arbitrations, Section 2(1)(e)(ii) restricts jurisdiction to High Courts, even if the pecuniary jurisdiction of the dispute is below that of the High Court in its ordinary original civil jurisdiction, or indeed even if the High Court is not vested with ordinary original civil jurisdiction at all.

14. I find this submission of Mr. Bishnoi entirely unmerited. While the definitions in Section 2(1)(e) do, to some extent, depart from the rules of pecuniary jurisdiction applicable to suits, the concept is not jettisoned altogether. At least in the context of arbitrations other than international commercial arbitration, Section 2(1)(e)(i) vests jurisdiction in the principal civil courts of original jurisdiction as well as in High Courts which exercise ordinary original civil jurisdiction, where applicable. The question of whether a particular case to be filed in one or the other of these two courts, is answered by the qualifying phrase, "*…having jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been the subject matter of a suit…*". This answer must, in my view, be determined with reference both to aspects of territorial and pecuniary jurisdictions. I

am unable to find any textual or contextual justification to hold that all proceedings under the Act must be exercised by the High Court, if the High Court has ordinary original civil jurisdiction, even if the value of the dispute falls below the pecuniary jurisdiction of the High Court.

Conclusion

15. For the aforesaid reasons, it being undisputed that in the present case, the dispute does not fall within the pecuniary jurisdiction of this Court, I find that this Court is not the jurisdictional Court which satisfies the definition in Section 2(1)(e)(i) of the Act, and the present petition is therefore not maintainable.

16. The petition is dismissed, with liberty to the petitioner to file proceedings on the same cause of action before the appropriate Court. The pending application is also disposed of.

17. It is made clear that this Court has not decided any question other than that of pecuniary jurisdiction, and all other contentions, as to maintainability and the merits of the dispute, are left open to be decided by the appropriate court.

18. There will be no orders of costs.

PRATEEK JALAN, J

JANUARY 27, 2023
'Bhupi'