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Termination of mandate of an Arbitrator must be within the rigors of Section 14(1)(a) and not Section 11(6) of the Arbitration and Conciliation Act, 1996

Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal & Ors.

Citation	2022 SCC OnLine SC 556
Date	05 May 2022
Court	Supreme Court of India
Coram	Hon'ble Mr. Justice M.R. Shah, Hon'ble Ms. Justice B.V. Nagarathna

1. FACTUAL MATRIX & PROCEDURAL HISTORY:

- 1.1 The facts occasioning the disputes arose out of partition of the properties within the family that were referred to a Sole Arbitrator. On one of the given occasions, the Sole Arbitrator was unable to conduct the proceedings due to his absence. This led Dinesh Kumar Agarwal (“**Respondent**”) to revoke the mandate of the Ld. Sole Arbitrator. Accordingly, the Respondent filed applications under Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 (“**the Act**”) before the concerned Ld. District Court praying for termination of the mandate of the Ld. Sole Arbitrator on the ground of delay in concluding the proceedings.
- 1.2 Consequently, Swadesh Kumar Agarwal (“**Appellant**”) filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (“**CPC**”) for dismissal of the application under Section 14 of the Act that was filed by the Respondent. Vide order dated 15 July 2010, the Ld. District Court dismissed the application of the Appellant. Aggrieved by the same, the Appellant preferred a Writ Petition before the Hon’ble Madhya Pradesh High Court (“**High Court**”), and the Respondent filed a petition under Section 11(6) of the Act praying for the appointment of an arbitrator and requesting for termination of the mandate of the Ld. Sole Arbitrator.
- 1.3 The High Court allowed the petition under Section 11(6) of the Act and concluded that there was an undue and unreasonable delay on part of the Ld. Sole Arbitrator. Thus, the mandate of the Ld. Sole Arbitrator stood terminated under Section 14(1)(a) of the Act. In this light, the Writ Petition of the Appellant was also dismissed.
- 1.4 Distraught by the decision of the High Court, the Appellant filed an appeal before the Hon’ble Supreme Court of India (“**Supreme Court**”) challenging the termination of the mandate of the Ld. Sole Arbitrator under Section 14(1)(a) of the Act, on an application filed under Section 11(6) of the Act.

2. ISSUES:

- 2.1 Whether the High Court in exercise of powers under Section 11(6) of the Act, can terminate the mandate of the sole arbitrator?
- 2.2 Whether in the absence of any written contract containing an arbitration agreement, will an application under Section 11(6) of the Act be maintainable?
- 2.3 Whether there exists any difference and distinction between Sections 11(5) and (6) of the Act?
- 2.4 Whether an application under Section 11(6) shall be maintainable where the parties have mutually appointed the sole arbitrator?
- 2.5 Whether the High Court was justified in terminating the mandate of the sole arbitrator in an application under Section 11(6) of the Act?
- 2.6 Whether the Ld. District Court was justified in dismissing the application under Order VII Rule 11 of CPC?

3. CONTENTIONS ON BEHALF OF THE APPELLANT:

- 3.1 Whilst assailing the decision of the High Court, the Appellant argued that where an arbitrator was already appointed by the parties themselves, no application under Section 11(6) of the Act would be maintainable. Further, the Appellant contended that in the absence of any written contract containing an arbitration agreement, Section 11(6) of the Act shall not be applicable. The Appellant relied upon the judgments in

*Antrix Corporation Ltd.*¹ and *S.P. Singla Constructions Pvt. Ltd.*² to buttress his submissions.

- 3.2 It was argued that, in any case, the termination of the mandate of the arbitrator can only be in accordance with the provisions of the Act and not otherwise. Moreover, if the eventualities under Section 14 of the Act were to be attracted, the aggrieved party is required to approach the 'court' as defined under Section 2(1)(e) of the Act.

4. CONTENTIONS ON BEHALF OF THE RESPONDENT:

- 4.1 The Respondent opposed the Appellant on the premise that as per Section 14(1) of the Act, the wording employed is 'shall' that indicates the mandate of the arbitrator 'shall' be terminated, if he, *due jure* or *de facto* becomes unable to perform his functions or fails to act without undue delay.
- 4.2 In sum, the Respondent's contention envisaged that once an arbitrator is unable to perform his functions due to eventualities under Section 14(1) of the Act, there shall be an automatic termination of the mandate of the arbitrator. In this regard, the Respondent placed reliance on the judgments in *ACC Ltd.*³ and *Uttar Pradesh State Bridge Corporation Ltd.*⁴
- 4.3 The Respondent further argued that, as per the settled position of law, at the stage of deciding the application under Order VII Rule 11 of CPC, only the averments in the application/plaint are to be considered.

5. JUDGMENT:

- 5.1 At the outset, the Supreme Court delineated the nature and scope of Sections 11(5) and (6) of the Act. Notably, it was observed that Section 11(5) of the Act will be attracted when there is an absence of the procedure for appointment of an arbitrator. Whereas, Section 11(6) of the Act will be attracted when there is a contract containing an arbitration agreement and the appointment procedure is agreed upon as well. Thus, it was held that an application under Section 11(6) of the Act will 'only' be maintainable where there is a contract between the parties containing the arbitration agreement and appointment procedure is prescribed.
- 5.2 The Supreme Court then moved onto examining the scheme of Sections 13, 14 and 15 of the Act to determine and decode the legislative intent behind termination of the mandate of an arbitrator. It was held that on a conjoint reading of afore-stated provisions, a challenge to the arbitrator under Section 12 of the Act will lie before the arbitrator itself. Whereas, if a party mounts a challenge under Section 14(1)(a) of the Act and the mandate is sought to be terminated, the aggrieved party must approach the concerned 'court' as defined under Section 2(1)(e) of the Act.
- 5.3 The primary reasoning behind the same was found to be deep-rooted in the fact that the eventualities under Section 14(1)(a) of the Act lead to disqualification of the sole arbitrator that warrant an adjudication by the courts.
- 5.4 In view of the facts and circumstances and making a pointed reference to the distinction between Sections 11(5) and (6) of the Act, the Supreme Court held an

¹ *Antrix Corporation Limited v. Devas Multimedia Private Ltd.*, (2014) 11 SCC 560.

² *S.P. Singla Constructions Private Limited v. State of Himachal Pradesh and Anr.*, (2019) 2 SCC 488.

³ *ACC Limited v. Global Cements Limited*, (2012) 7 SCC 71.

⁴ *Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited*, (2015) 2 SCC 52.

application under Section 11(6) to terminate the mandate of the arbitrator in view of Section 14(1)(a) of the Act was not maintainable. It was further held that to request for termination of the mandate, the aggrieved party has to only approach the concerned court.

- 5.5 The Supreme Court concluded by observing the following: (i) there is a difference and distinction between Sections 11(5) and (6) of the Act; (ii) in the absence of a written agreement, the parties are free to agree on a procedure by mutual consent and in case of any failure thereto, only Section 11(5) will be attracted; (iii) when there exists a written contract containing an arbitration agreement, any failure between a mutual agreement would only attract Section 11(6) of the Act; (iv) if a sole arbitrator is appointed by mutual consent, the arbitration agreement cannot be invoked for the second time; and (v) all disputes/controversies on the mandate of the arbitrator under Section 14(1)(a) of the Act must only be raised before the concerned court.
- 5.6 Lastly, the Supreme Court observed that the Ld. District Court had rightly dismissed the application under Order VII Rule 11 of CPC since the dispute/controversy regarding the grounds for termination of the mandate of the sole arbitrator were to be considered only by the competent court under the Act.
- 5.7 Accordingly, the decision of the High Court was quashed and set aside by the Supreme Court. Additionally, to do complete justice between the Appellant and Respondent, the Supreme Court revived the applications under Section 14(1)(a) of the Act and directed the concerned court to consider the same on merits and further follow the binding ratio of the instant judgment.

6. PSL OPINION:

- 6.1 Faced with peculiar questions of law, the Supreme Court has pronounced a landmark judgment that has succinctly delineated the distinction between Section 11(5) and (6) of the Act. Discerning the legislative intent behind the two provisions, the Apex Court has clarified that the doors of arbitration are not closed for the parties that are unable to effectuate their own procedure that they may have agreed upon under Section 11(2) of the Act. This bolsters the confidence of the parties seeking an appointment of an arbitrator via Section 11(5) of the Act and also eliminates the confusion prevailing qua incorrect and interchangeable invocation of provisions.
- 6.2 It is no longer *res integra* that termination of the mandate of the arbitrator is not tenable under Section 11 of the Act and parties must resort to the envisaged scheme of the Act while raising such challenges by approaching the 'jurisdictional court'. Sections 14 and 15 of the Act enunciate a crystal clear procedure to be followed by a party seeking to terminate the mandate of the arbitrator. This will specifically negate parties from preferring frivolous petitions with an intent to cause turbulence at the pre-arbitral stage and thereafter.