Swadesh Kumar Agarwal vs Dinesh Kumar Agarwal on 5 May, 2022

Author: M. R. Shah

Bench: B.V. Nagarathna, M. R. Shah

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2935–2938 OF 2022

Swadesh Kumar Agarwal ..Appellant (S)

Versus

Dinesh Kumar Agarwal & Ors, etc., etc. ..Respondent (S)

JUDGMENT

M. R. Shah, J.

1. The present appeals arise out of impugned common judgment and order dated 07.09.2017 passed by the High Court of Madhya Pradesh Principal Seat at Jabalpur in Arbitration Case (AC) No. 29/2015 and in Writ Petition Nos. 11258/2010 and 11259/2010 and the order dated 17.11.2017 passed in Review Petition No. 655/2017, by which, the High Court in exercise of powers under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, 1996) has terminated the mandate of sole Arbitrator appointed by the parties themselves and has substituted the sole Arbitrator and has appointed a fresh Arbitrator on the ground that the mandate of the sole Arbitrator stood terminated in view of section 14(1)(a) of the Act, 1996. This is on the basis that there was undue and unreasonable delay in proceeding with the arbitration proceeding by the Sole Arbitrator. By the impugned judgment and order, the High Court has also confirmed the order passed by the learned Trial Court dismissing the application filed under Order VII Rule 11 of Code of Civil Procedure (CPC) preferred by the appellant herein.

2. The facts leading to the present appeals in a nutshell are as under: □2.1 That a dispute between the parties which as such is a family dispute for partition of the properties arose. It was referred to the sole Arbitrator. The learned Arbitrator was appointed as a sole Arbitrator by the parties

themselves on 04.08.2008. The learned Arbitrator directed the parties to appear on 14.03.2009 for deciding the pending applications. On the request of the parties, the Arbitrator adjourned the hearing on 30.03.2009. No proceedings were undertaken on 30.03.2009 due to the fact that the sole Arbitrator was not available in town. Respondent No. 1 and 3 herein – parties to the arbitration proceedings revoked the mandate of the sole Arbitrator vide letters dated 11.07.2009. The letters were replied to by the sole Arbitrator. Thereafter, respondent No. 1 and 3 herein, parties to the arbitration proceedings filed applications under section 14(1)(a) of the Act, 1996 before the concerned Court (District Court) to terminate the mandate of the sole Arbitrator on the ground of delay in concluding the arbitration proceedings. The appellant herein filed an application under order VII Rule 11 of CPC for dismissal of the said applications under section 14 of the Act, 1996, submitting that there was no delay at all on the part of the sole Arbitrator and therefore, there was no question of terminating the mandate of sole Arbitrator under section 14(1)(a) of the Act, 1996. Vide order dated 15.07.2010, the learned Trial Court dismissed the application filed under order VII Rule 11 of CPC preferred by the appellant herein. 2.2 Feeling aggrieved by the order passed by the learned Trial Court, rejecting the application under order VII Rule 11 of CPC, the appellant herein preferred present writ petition Nos. 11259/2010 and 11258/2010 before the High Court and pending the applications under section 14(1)(a) of the Act, 1996 one of the parties – Dinesh Kumar Agarwal preferred an arbitration case before the High Court under section 11(6) of the Act, 1996 and requested to terminate the mandate of the sole Arbitrator and to appoint a fresh Arbitrator. By the impugned judgment and order, the High Court has allowed Arbitration Case No. 29/2015 and has observed and held that there was undue and unreasonable delay on the part of the sole Arbitrator in concluding the arbitrating proceedings and his mandate stood terminated under section 14(1)(a) of the Act, 1996. Consequently, the High Court has appointed a fresh Arbitrator. By the impugned judgment and order, the High Court has also dismissed the writ petitions preferred by the appellant herein, in which the appellant challenged the order passed by the learned Trial Court rejecting the application under Order VII Rule 11 of CPC.

2.3 Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court terminating the mandate of sole Arbitrator under section 14(1)(a) of the Act, 1996, on an application filed under section 11(6) of the Act, 1996 and dismissing the writ petitions confirming the order passed by the learned Trial Court rejecting the application under Order VII Rule 11 of CPC, the appellant has preferred the present appeals.

3. Shri Divyakant Lahoti, learned counsel appearing on behalf of the appellant has strenuously submitted that in the facts and circumstances of the case the High Court has materially erred in terminating the mandate of the Arbitrator under section 14(1)(a) of the Act, 1996 on an application filed under section 11(6) of the Act, 1996. 3.1 It is further submitted that in a case, where an Arbitrator was already appointed by the parties themselves, subsequently, no application under section 11(6) of the Act, 1996 was maintainable either to terminate the mandate of the sole Arbitrator and/or to substitute the Arbitrator.

3.2 It is contended by Shri Lahoti, learned counsel that the mandate of the Arbitrator can be terminated and/or may come to an end only as per the provisions of the Arbitration and Conciliation Act, 1996. Reliance is placed upon sections 13, 14, 15, 25(a), 30 and 32 of the Act, 1996.

It is submitted that other than the aforesaid provisions under the Act, 1996, there is no provision to terminate the mandate of the Arbitrator. 3.3 It is submitted that in case of the eventualities mentioned in section 14(1)(a) of the Act, 1996, the remedy available to the aggrieved party would be to approach the "court" as defined under section 2(e) of the Act, 1996. 3.4 Shri Lahoti, learned counsel appearing on behalf of the appellant further submitted that in the present case as such respondent No. 1 and 3 herein – parties to the arbitration proceedings, in fact, did submit the applications under section 14(2) of the Act, 1996, which were pending before the concerned court at the time when the present applications under section 11(6) of the Act, 1996 was filed.

3.5 It is further urged that in fact, there is a difference and distinction between section 11(5) and section 11(6) of the Act, 1996.

3.6 That in the absence of any written contract containing the arbitration agreement, section 11(6) of the Act, 1996 shall not be applicable and therefore, an application under that provision shall not be maintainable.

3.7 That even otherwise, there was no undue delay in the arbitration proceedings on the part of the sole Arbitrator which could have led to termination of his mandate that too, in exercise of powers under section 11(5) and section 11(6) of the Act, 1996.

3.8 It is further submitted by Shri Lahoti, learned counsel appearing on behalf of the appellant that as there was no undue delay on the part of the sole Arbitrator therefore, section 14(1)(a) would not be attracted. Therefore, application under section 14 of the Act, 1996 was liable to be dismissed and the learned Trial Court ought to have allowed the application filed by the appellant, to reject the application under section 14 of the Act, 1996 in exercise of powers under Order VII Rule 11 of CPC. It is submitted that the High Court committed a grave error in dismissing the writ petitions and confirming the order passed by the learned Trial Court in dismissing the application under Order VII Rule 11 of CPC.

3.9 Shri Lahoti, learned counsel appearing on behalf of the appellant heavily relied upon the decision of this Court in the case of Antrix Corporation Limited v. Devas Multimedia Private Ltd.; (2014) 11 SCC 560 (para 31 &

33) and the subsequent decision of this Court in the case of S.P. Singla Constructions Private Limited v. State of Himachal Pradesh and Anr.; (2019) 2 SCC 488 in support of his submissions that once the parties have invoked the arbitration proceedings and the Arbitrator has been appointed, subsequent application under section 11(6) of the Act, 1996 shall not be maintainable.

4. The present appeal is vehemently opposed by Shri Ashok Lalwani, learned counsel appearing on behalf of respondent No. 1 and Shri Rajesh Inamdar, learned counsel appearing on behalf of respondent No. 2. Shri Lalwani, learned counsel appearing on behalf of respondent No. 1 has vehemently submitted that in the facts and circumstances of the case, when it was found that there was an undue delay on the part of the Arbitrator in concluding the arbitration proceedings, his mandate was rightly terminated considering section 14(1)(a) of the Act, 1996.

4.1 It is submitted that as per section 14(1) of the said Act, the word used is “shall”. It is submitted that it provides that the mandate of an arbitrator “shall” terminate and he shall be substituted by another arbitrator, if he, de jure or de facto is unable to perform his functions or for other reasons fails to act without undue delay. It is submitted that therefore, once it is found that the arbitrator is unable to perform his functions due to eventualities mentioned in section 14(1) of the Act, 1996, there shall be an automatic termination of the mandate of the arbitrator and he shall be substituted by another arbitrator. Reliance is placed upon the decisions of this Court in the cases of ACC Limited v. Global Cements Limited; (2012) 7 SCC 71 and Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited; (2015) 2 SCC 52. 4.2 Shri Lalwani, learned counsel appearing on behalf of respondent No. 1 has further submitted that in the facts and circumstances of the case, the learned Trial Court did not commit any error in rejecting the application under Order VII Rule 11 of CPC. It is urged that whether or not there was undue delay on the part of the sole Arbitrator is a question which is to be adjudicated by the Court and at the most the same can be said to be a defence. 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 required to be considered and not the defence and/or the case stated in the written statement and/or reply to any application. It is submitted that therefore, the learned Trial Court rightly rejected the application under Order VII Rule 11 of CPC and rightly refused to reject the application submitted under section 14 of the Act, 1996. That in any case, after passing the impugned order, the original applicants □respondents have already withdrawn their applications under section 14(2) of the Act, 1996.

4.3 Making the above submissions and relying upon the above decisions, it is prayed to dismiss the present appeals.

5. We have heard learned counsel appearing on behalf of the respective parties at length.

6. The following questions arise for our consideration: □

(i) Whether the High Court in exercise of powers under section 11(6) of the Act, 1996, can terminate the mandate of the sole arbitrator?

(ii) Whether in the absence of any written contract containing the arbitration agreement, the application under section 11(6) of the Act, 1996 would be maintainable?

(iii) Is there any difference and distinction between sub□section (5) of section 11 and sub□section (6) of section 11 of the Act, 1996?

(iv) Whether the application under sub□section (6) of section 11 shall be maintainable in a case where the parties themselves appointed a sole arbitrator with mutual consent?

(v) Whether in the facts and circumstances of the case the High Court was justified in terminating the mandate of the sole arbitrator on the ground that there was undue delay on the part of the sole arbitrator in concluding the arbitration proceedings which would lead to the termination of his mandate, in an application under section 11(6) of the Act, 1996?

(vi) Whether in the facts and circumstances of the case, the learned Trial Court was justified in dismissing the application submitted by the appellant, submitted to reject the application under section 14(2) of the Act, 1996 in exercise of powers under Order VII Rule 11 of CPC?

Question No. (i) to (v) are interconnected. Therefore, all are considered and decided together.

6.1 In the present case the sole Arbitrator was appointed by the parties themselves by mutual consent. There was no written agreement/contract containing the arbitration clause.

6.2 As per sub□section (2) of section 11, subject to sub□section (6), the parties are free to agree on a procedure for appointment of the arbitrator or arbitrators. Sub□section (5) of section 11 provides that in an arbitration with a sole arbitrator, failing any agreement referred to in sub□section (2), if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the court may appoint an arbitrator. However, in a case where there is an arbitration agreement and the written contract and the appointment procedure is agreed upon by the parties, sub□section (6) of section 11 of the Act, 1996 shall be attracted and on the eventualities occurring in sub□section (6) of section 11, a party may approach the High Court and request for appointment of an arbitrator, in exercise of powers under sub□section (6) of section 11 of the Act, 1996. Therefore, sub□section (5) of section 11 shall be attracted in a case where there is no procedure for appointment of an arbitrator agreed upon as per sub□section (2) of section 11 and sub□section (6) of section 11 shall be applicable in a case where there is a contract containing an arbitration agreement and the appointment procedure is agreed upon. Thus, while referring the matter for arbitration there need not be any written contract containing any arbitration agreement. But the parties may themselves decide to refer the dispute for arbitration to the sole arbitrator by mutual consent. In that case or eventuality, sub□section (6) of section 11 shall not be attracted at all and therefore, in such a situation, the application under sub□section (6) of section 11 shall not be maintainable. An application under sub□section (6) of section 11 shall be maintainable only in a case where there is a contract between the parties containing the arbitration agreement and the appointment procedure is prescribed and is agreed upon in writing. 6.3 In the present case, the sole arbitrator was appointed by the parties themselves by mutual consent and in the absence of any written contract containing the arbitration agreement. Therefore, application under section 11(6) of the Act, 1996 in absence of any written agreement containing arbitration agreement was not maintainable at all.

6.4 Now the next question which is posed for consideration of this Court is, whether, in exercise of powers under sub□section (6) of section 11 of the Act, 1996, the High Court can terminate the mandate of the sole arbitrator and substitute the arbitrator in view of section 14(1)(a) of the Act, 1996 on the ground that he has failed to act without undue delay and in such a situation aggrieved party has to approach the “court” to terminate his mandate. 6.4.1 While answering the aforesaid question/issue, the relevant provisions of the Act, 1996 on termination of the mandate of the arbitrator and the procedure to be followed are required to be referred to: □“11. Appointment of arbitrators□(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub□section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub□section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43□I, for the purposes of this Act:

> Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule: Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.] (4) If the appointment procedure in sub□section (3) applies and— (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be;] (5) Failing any agreement referred to in sub□section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree 11[the appointment shall be made on an application of the party in accordance with the provisions contained in sub□section (4);] (6) Where, under an appointment procedure agreed upon by the parties,□(a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
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> (6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.] (8) The

arbitral institution referred to in sub-sections (4), (5) and (6)], before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to-(a) any qualifications required for the arbitrator by the agreement of the parties; and (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, 16[the arbitral institution designated by the Supreme Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.

(12) Where the matter referred to in sub-sections (4), (5), (6) and (8) arise in an international commercial arbitration or any other arbitration, the reference to the arbitral institution in those subsections shall be construed as a reference to the arbitral institution designated under sub-section (3A).

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

Explanation.-For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.]

12. Grounds for challenge-(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months. Explanation 1.-The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an

arbitrator. Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.] (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him. (3) An arbitrator may be challenged only if—(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties. (4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

13. Challenge procedure.— (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

14. Failure or impossibility to act.—(1) 3 [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 may be 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.

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25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant 3 [and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited].

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

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30. Settlement.—(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

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32. Termination of proceedings.—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings." Except the aforesaid provisions, there is no other provision under the Act, 1996 dealing with termination of the mandate of the arbitrator and/or termination of the arbitral proceedings.

6.4.2 Section 13 provides that subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator and failing any agreement on a procedure for challenging an arbitrator, a party who intends to challenge an arbitration shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. As per sub-section (3) of section 13, unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, it is for the arbitral tribunal to decide on the challenge. If a challenge to the arbitrator is not successful in that case, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award and when an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34 of the Act, 1996. Therefore, as per section 13 of the Act, the challenge to the arbitrator shall be made before the arbitral tribunal itself. However, section 13 of the Act, 1996 shall be applicable only in a case where the arbitrator is challenged on the grounds mentioned in section 12 of the Act, 1996. 6.5 Sections 14 and 15 provide for termination of the mandate of the arbitrator. Section 14 of the Act, 1996 provides that the mandate of the arbitrator shall terminate and he shall be substituted by another arbitrator in case of any eventuality mentioned in section 14(1)(a). As per sub-section (2) of section 14, if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a

party may, apply to the "court" to decide on the termination of the mandate. The expression "court" is defined under section 2(e) of the Act, 1996, which reads as under: □"(e) "Court" means—

(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 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;]" 6.6 Section 15 provides other grounds for termination of the mandate of the arbitrator. It provides that 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 an agreement of the parties.

Where the mandate of an arbitrator is terminated on the aforesaid grounds mentioned in section 15(1)(a) and (b) in such a situation a substitute arbitrator shall have to be appointed and that too, according to the rules that were applicable to the appointment of the arbitrator being replaced.

6.7 Therefore, on a conjoint reading of section 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, in case of any of the eventualities mentioned in section 14(1)(a) of the Act, 1996 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 concerned "court" as defined under section 2(e) of the Act, 1996. The concerned court 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 concerned court as provided under section 14(2) of the Act, 1996.

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 concerned court. 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 concerned "court" only and after the decision by the concerned "court" as defined under section 2(e) of the Act, 1996 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.

7. Now the next question which is posed for consideration of this Court is, whether, in a case where the parties themselves have referred the dispute for arbitration and appointed and/or nominated the sole arbitrator by mutual consent and in the absence of any arbitration agreement and contract containing an arbitration agreement once the arbitrator is appointed, an application under section 11(6) of the Act, 1996 to terminate the mandate of the arbitrator and to substitute the arbitrator would be maintainable. 7.1 It is to be noted that in the present case as such the application under section 14(2) of the Act, 1996 to terminate the mandate of the arbitrator was already pending before the concerned court on the ground that his mandate stood terminated in view of section 14(1)(a) of the Act, 1996.

7.2 As observed hereinabove, there is a difference and distinction between the arbitrator to be appointed under section 11(5) and under section 11(6) of the Act, 1996. As observed above, even in the absence of any arbitration agreement in writing between the parties, with consent the parties may refer the dispute for arbitration and appoint a sole arbitrator/arbitrators by mutual consent and parties may agree mutually on a procedure for appointing an arbitrator or arbitrators even in the absence of any written agreement. In such a situation and failing an agreement referred to sub□ section (2), the aggrieved party may approach the High Court for appointment of an arbitrator under sub□section (5) of section 11 and in such a situation sub□section (5) of section 11 shall be attracted. However, where there is a written agreement on the appointment procedure agreed upon by the parties and there is a failure to appoint an arbitrator or arbitrators, in that case, sub□section (6) of section 11 shall be attracted and an aggrieved party may approach the High Court for appointment of an arbitrator under sub□section (6) of section 11 of the Act, 1996. Therefore, an application under section 11(6) of the Act, 1996 shall be maintainable only in a case where there is a written agreement and/or the contract containing the arbitration agreement and the appointment procedure agreed upon by the parties, application under section 11(6) of the Act, 1996 shall be maintainable. Otherwise, the application under section 11(6) of the Act, 1996 shall not be maintainable. 7.3 In the present case, the parties themselves agreed on a procedure for appointment of the arbitrator and appointed and nominated an arbitrator by mutual consent. Therefore, the application under section 11(6) of the Act, 1996 was not maintainable at all.

8. Even otherwise, once the arbitrator was appointed by mutual consent and it was alleged that the mandate of the sole arbitrator stood terminated in view of section 14(1)(a) of the Act, 1996, the

application under section 11(6) of the Act, 1996 to terminate the mandate of the arbitrator in view of section 14(1)(a) of the Act shall not be maintainable. Once the appointment of the arbitrator is made, the dispute whether the mandate of the arbitrator has been terminated on the grounds set out in section 14(1)(a) of the Act, shall not have to be decided in an application under section 11(6) of the Act, 1996. Such a dispute cannot be decided on an application under section 11(6) of the Act and the aggrieved party has to approach the concerned "court" as per sub-section (2) of section 14 of the Act. In the case of Antrix Corporation Limited (supra) in para 31 and 33, it is observed and held as under: -"31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement.

33. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act."

9. Following the aforesaid decision in the subsequent decision of this Court in the case of S.P. Singla Constructions Private Limited (supra), it is observed and held by this Court that once the arbitrator had been appointed as per clause 65 of the agreement (in that case) and as per provisions of the law, the arbitration agreement could not have been invoked for second time. 9.1 Now so far as reliance being placed upon the decisions of this Court by learned counsel appearing on behalf of respondent No. 1 in the cases of ACC Limited (supra) and Uttar Pradesh State Bridge Corporation Limited (supra) 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 section 14 and 15 of the Act, 1996, 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 concerned "court" defined under section 2(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 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 Act, 1996 can be decided under section 14(2) or under section 11(6) of the Act, 1996.

10. It is to be noted that as such in the present case the proceedings before the concerned court under section 14(2) of the Act, 1996 at the instance of respondent No. 1 and 3 herein to terminate the mandate of the sole respondent under section 14(1)(a) of the Act were already pending before the concerned court when respondent No. 1 moved an application under section 11(6) of the Act and such a dispute was at large before the court in a proceeding under section 14(2) of the Act.

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

(i) That there is a difference and distinction between section 11(5) and section 11(6) of the Act, 1996;

(ii) 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;

(iii) 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 section 11(6) (a) to (c) of the Act;

(iv) 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;

(v) 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(e) of the Act, 1996 and such a dispute cannot be decided on an application filed under section 11(6) of the Act, 1996.

12. Now the next question which is posed for consideration of this Court is whether the learned Trial Court was justified in rejecting the application submitted by the appellant, which was filed to reject the applications under section 14 of the Act, in exercise of powers under Order VII Rule 11 of CPC is concerned, having gone through the averments in the application under Order VII Rule 11 of CPC, it appears and it is not in dispute that the application under section 14(2) of the Act was sought to be rejected on the ground that there was no undue delay on the part of the arbitrator and therefore, his mandate is not required to be terminated under section 14(1)(a) of the Act, 1996. However, such a

dispute is to be adjudicated on merits by the concerned court before whom the proceedings under section 14(2) of the Act were initiated and at the most, it can be said to be the defence, which was to be adjudicated by the concerned court. As per the settled position of law, at the stage of deciding the application under Order VII Rule 11 of CPC only the averments and allegations in the application/plaint are to be considered and not the written statement and/or reply to the application and/or the defence. Therefore, as such the learned Trial Court rightly dismissed the application under Order VII Rule 11 of CPC.

13. In view of the aforesaid discussion and for the reasons stated above, the impugned judgment and order passed by the High Court is unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. The controversy and/or the dispute, whether the mandate of the sole arbitrator under section 14(1)(a) of the Act, 1996 stands terminated or not shall have to be considered by the court on an application filed under section 14(2) of the Act, 1996. It is reported that after the impugned order passed by the High Court, respondent Nos. 1 and 3 have withdrawn their applications under section 14(2) of the Act, 1996. To do substantial justice between the parties and to ensure that respondent Nos. 1 and 3 are not left remediless, we direct that the application/applications submitted by respondent Nos. 1 and 3 before the concerned court under section 14(2) of the Act, 1996 shall stand revived. Now the concerned court before whom, the application/applications under section 14(2) of the Act, 1996 were filed, shall consider the same in accordance with law and on their own merits at the earliest and preferably within a period of four months from the date of receipt of the present order. It goes without saying, that if, ultimately, it is held that the mandate of the sole arbitrator is terminated as per section 14(1)(a) of the Act, 1996 and more particularly on the ground that there was undue delay on the part of the arbitrator in concluding the arbitration proceedings, the arbitrator has to be substituted and a fresh arbitrator has to be appointed by following the same procedure which was followed earlier while appointing the present sole arbitrator. In case the parties do not agree to the name of the sole arbitrator, the aggrieved party may approach the appropriate court for appointment of an arbitrator under section 11(5) of the Act. In case application(s) under section 14(2) of the Act is/are dismissed and it is held that the mandate of the sole arbitrator is not terminated and there was no undue delay on his part, in such a situation the sole arbitrator to conclude the arbitration proceedings and declare the award within a period of nine months from the decision of the court that will be taken under section 14(2) of the Act, 1996. The impugned judgment(s) and order(s) passed by the High Court in AC No. 29/2015 and in Review Petition No. 655/2017 are hereby quashed and set aside. The appeals arising out of the aforesaid orders are hereby accordingly Allowed. However, the appeals challenging the impugned judgment and order passed in W.P. No. 11258/2010 and W.P. No. 11259/2010, confirming the order/orders passed by the learned Trial Court rejecting the application under Order VII Rule 11 of CPC are hereby dismissed. In the facts of the case, there shall be no order as to costs.

.....J. (M. R. SHAH) .....J. (B.V. NAGARATHNA) New Delhi, May 5, 2022.