

**RAJASTHAN SMALL INDUSTRIES CORPORATION LIMITED V. GANESH
CONTAINERS MOVERS SYNDICATE (2019)
3 SCC 282**

Supreme Court of India; 2-judge bench, **R. Banumathi** & Indira Banerjee
JJ; decided on 23 January 2019

Appointment of an arbitrator must be following the term of the agreement, and substitution by the rules by which the arbitrator was originally appointed

**(A) THE HIGH COURT TERMINATED THE MANDATE AND APPOINTED
AN ‘INDEPENDENT’ ARBITRATOR**

The contract between the parties provided for arbitration by the Chairman-cum-Managing Director (“CMD”) of RSICL or a person nominated by him.

Disputes arose, and arbitration by a sole arbitrator appointed by the CMD commenced in 2005. Since “the progress of the sole arbitrator was not satisfactory,” he “was removed” in March 2009 at the “joint request of the parties.”¹⁵ Then the CMD began to arbitrate. The records of the case were reconstructed, and final arguments heard in part. Then Ganesh wanted to go back to the original arbitrator, but later reposed faith in the CMD, then was not represented on some dates, and some hearings were spent on clarifications. By this time, it was August of 2011.

In July 2013, Ganesh sent a notice saying there was a settlement in April 2011 despite which no award had been passed. RSICL denied there was any settlement. In May 2015, Ganesh filed an application in the High Court under Section 11(6) and Section 15 ACA seeking appointment of an “independent arbitrator.” The CMD then notified the parties of a hearing, but Ganesh did not appear on the ground that its petition was pending. An award was passed *ex parte* while the matter was pending.

¹⁵ It appears RSICL passed an order removing the arbitrator. It is not clear from the judgment under what procedure was this done.

The High Court allowed the application and appointed a retired judge as sole arbitrator.¹⁶

(B) THE SUPREME COURT

1. Abide by the Terms of the Contract. Cannot Turn Around on the Agreement

The first question framed by the court was: “[I]n deviation from the terms of the agreement, whether the respondent was right in filing arbitration petition under Section 11 of the Arbitration Act?”¹⁷ The court concluded that

¹⁶ According to the Supreme Court, the High Court held “that the respondent contractor had to approach the High Court due to prolongation of the matter before the sole arbitrator who kept on changing one after another and only after the notice of the arbitration petition was served upon the appellant Corporation, the arbitrator speeded up the proceedings and the *ex parte* award was passed ... without hearing the respondent contractor. The High Court was of the view that the arbitrator hurried up to conclude the proceedings with a view to frustrate the arbitration application”.

A review of the judgment of the High Court, delivered on 22 April 2016, reveals that Mohammad Rafiq J, sitting singly discussed several issues. Among others, he relied on *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.*, (2008) 10 SCC 240 for the proposition that “[I]nvariably the court should first appoint the Arbitrators in the manner provided for in the arbitration agreement...but where the independence and impartiality of the Arbitrator/s appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment”. He noted that under Section 11 (8) ACA, it was necessary to “have “due regard” to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator”. He explained what “due regard” meant. He then referred to *Union of India v. Uttar Pradesh State Bridge Corporation Limited*, (2015) 2 SCC 52 for the proposition that “when there is a failure on part of Arbitral Tribunal to act and it is unable to perform its function either *de jure* or *de facto*, it is open to a party to arbitration proceedings to approach the Court to decide on termination of its mandate and seek appointment of substitute arbitrator”. He then examined the facts closely and noted nothing happened for a long time and then proceedings were expedited with whatever material was on record and an *ex parte* award passed to ‘frustrate’ the petition. He also noted the 2015 Amendments, the Fifth Schedule and the Seventh Schedule and ultimately concluded that in the peculiar facts of the case the arbitrator had lost his mandate.

¹⁷ This question was framed at another earlier paragraph as follows: “Whether the respondent was right in approaching the High Court under Section 11 read with Section 15 ACA for appointment of a substitute arbitrator under section 11 of the ACA even as the arbitration was pending”.

“having participated in the entire arbitration proceedings and acquiesced in the proceedings, Ganesh was estopped from challenging the competence of the arbitrator.”

These were the court’s reasons: -

- (i) First, the court said, “[i]n order to appreciate the points, it is necessary to refer to the details of various proceedings before the arbitrator, before the respondent contractor approached the High Court.” It then closely looked at the facts.
- (ii) Then the court referred to a clause in the contract under which: -

“parties have agreed that all disputes and differences arising out of or in any way concerning the contract, shall be referred to the Managing Director himself or his nominees for the sole arbitration and that there will be no objection to any such appointment on the ground that the person so appointed is an employee of the Corporation and that he has dealt with the matter to which the contract relates”.
- (iii) The court then said that having agreed to this clause consciously and having participated in the arbitral proceedings for quite some time, Ganesh “cannot turn round and seek for appointment of an independent arbitrator.”
- (iv) The court cited *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520. It reproduced two passages from it and emphasized this sentence “[T]he legislative intent is that the parties should abide by the terms of the arbitration agreement.”
- (v) The court also observed that Ganesh did not place any material to show that the arbitrator had not acted independently or impartially.

2. The 2015 Amendments Do Not Apply

The question was: “whether by virtue of section 12 as amended by the 2015 amendments, the managing director has become ineligible to act?”

The court did not apply the 2015 Amendments because arbitration had commenced earlier in 2009 [citing to *Aravali Power Company Limited v. Era*

Infra Engineering Limited, (2017) 15 SCC 32 and *Board of Control for Cricket in India v. Kochi Cricket Private Limited*, (2018) 6 SCC 287].

Similarly, *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377 was held not applicable as it was based on the amended law.

3. Substitution Can Only be Under the Rules Applicable to Original Appointment

The court held that delay in passing the award or neglect of an arbitrator was not a ground of removal, and substitution can only be made only under the rules applicable to the appointment of the arbitrator being replaced: -

- (i) The court first distinguished *Union of India v. Uttar Pradesh State Bridge Corporation Limited*, (2015) 2 SCC 52, which was relied on by the High Court and cited by Ganesh. It said that the delay in passing the award, in that case, was found intentional. In this case, proceedings continued till August 2011, after which it was deferred because the arbitrator noted that “file regarding arbitration appears tampered/missing papers are incomplete and therefore the chronological events need to be ascertained, and reconstitution will be required.” It is true the court remarked that there was some delay in passing the award. However, between 2011 and 2013, Ganesh, too, did not file any application.
- (ii) The court then referred to the following passage from *Law Relating to Arbitration and Conciliation*, 09th Edn., P.C. Markanda, pg. 620 attributed to Russell on Arbitration, 20th Edn: -

“Mere neglect of an arbitrator to act, as distinct from refusal or incapacity, does not of itself give the court power to appoint another arbitrator in his place. It does, however, give the court power to remove him, whereupon there is a power to replace him.”
- (iii) It then referred to two cases on the point that under Section 15 (2) ACA, the substituted arbitrator must be appointed under terms applicable to the original appointment [*SBP & Co. (2) v. Patel Engg. Ltd.*, (2009) 10 SCC 293; *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles (India) Ltd.*, (2006) 6 SCC 204]. It concluded relying on *Yashwith* that

Section 11 “would come into play only when there was failure to appoint an arbitrator in terms of the arbitration agreement”.

4. What Remedy is Available to Ganesh?

The court observed the arbitrator should not have passed the award *ex parte*, especially when the matter was pending before the High Court. Not only was it not clear whether the records had been reconstructed, but Ganesh had not been given a reasonable opportunity to be heard.

Exercising its powers under Article 142 of the Constitution, the court set aside the award and ordered that the “present Managing Director” shall continue the proceedings “and afford sufficient opportunity to both the parties to adduce further evidence and to make oral submissions and pass the final award within a period of four months”.