AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBP No.15 of 2024
CNR No.ODHC010241252024

Core Minerals represented by its authorized signatory Mr. R. Muralidharan .... **Petitioner**

-Versus-

Himanghini Singh .... **Opposite Party**

Advocates appeared in this case:

For Petitioner : Mr. Partha Mukherji, Advocate

For Opposite Party : Mr. Lalitendu Mohapatra, Advocate

CORAM:

HON' BLE THE CHIEF JUSTICE

J U D G M E N T

12.11.2026

HARISH TANDON, CJ.

1. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the 'Act') for appointment of an Arbitrator on the premise that two of the Arbitrators constituting an Arbitral Tribunal died.

2. The salient features pleaded in the said petition are succinctly narrated hereunder. Two agreements dated 15th May, 2002 were entered into between the predecessor-in-interest of petitioner and the predecessor-in-interest of opposite party for raising of an iron ore and sale of iron ore respectively. The predecessor of the opposite party was seized and possessed of an iron ore mine upon execution of a lease by the Government in his favour and was carrying on the mining business as a sole proprietor of M/s. K.J.S Ahluwalia. The aforesaid agreements were entered into with the petitioner by the said proprietor being a partnership firm, which contain an arbitration clause in both the agreements whereby and whereunder the parties have agreed to get the dispute determined through an Arbitral Tribunal. Since the arbitration clauses in both the agreements are identical, therefore, reproduction of one would be sufficient enough for the instant purpose. The said arbitration clause runs thus:

> "15. If at any time any dispute or question arises between the parties touching the meaning, construction or effect of this agreement or of any clause or thing herein contained or regarding the respective liabilities and rights under this agreement then every such dispute or question except where

specifically provided shall be referred to arbitration, as per the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time, to, two arbitrators, one each to be appointed by each party hereto, within one month from the date of notice invoking this arbitration clause is issued to the opposite party and the arbitrators shall enter upon reference within one month from the date of their respective appointment and the arbitrators/ umpire shall give a speaking award. The place of arbitration or sitting shall be at BHUBANESHWAR."

3. It is averred in the instant petition that father of opposite party in contravention of the various terms and conditions embodied in the aforesaid agreements demanded higher amount than what was agreed upon, which created hindrance in working at the mines thereby impeded not only the raising of the ores but also selling thereof. Thus, the dispute cropped up with regard to the respective obligations contained in the aforesaid agreements, and the letter was issued on 16th August, 2009 invoking arbitration clause. The petitioner herein immediately approached the District Court, Bhubaneswar under Section 9 of the Act for interim relief, which gave rise to registration of Arbitration Petition

No.180 of 2009. Since no interim relief was granted in the said proceeding by the District Judge, the approach was made to this Court by filing ARBA No.93 of 2009. The High Court also did not interfere with the order passed by the District Judge under Section 9 of the said Act, which led the petitioner to file a Special Leave Petition being SLP No.24007 of 2010 before the Apex Court. Amidst the pendency of the said SLP, the petitioner caused a letter appointing an Arbitrator on its behalf and the predecessor-in- interest of opposite party also responded thereto by appointing the Arbitrator on its behalf in terms of the said arbitration clause. The said SLP came up before the Bench on 22nd November, 2011 when the Apex Court disposed of the same taking into notice the facts that both the parties have nominated their Arbitrators in terms of the said arbitration clause, therefore, it becomes necessary to appoint a third Arbitrator. Ultimately, the Apex Court appointed the third Arbitrator to act as a Chairman of the Arbitral Tribunal, and the liberty was also granted to the petitioner herein to move the Arbitral Tribunal for interim relief under Section 17 of the Act. After constitution of the Arbitral Tribunal in terms of the order passed by the Supreme Court, the petitioner filed a statement of claim, but despite the

service of notice as well as copy of the statement of claim, no counter claim was filed by the predecessor-in-interest of the opposite party.

4. After securing several adjournments, the counter claim was filed at a belated stage with the prayer for acceptance thereof, and the Arbitral Tribunal mechanically accepted the counter claim without adverting to the objection raised by the petitioner. The said order accepting the counter claim belatedly was assailed before this Court in a writ petition being W.P.(C) No.20900 of 2012. The writ petition was entertained by the High Court and all further proceeding of the Arbitral Tribunal was stayed. During the pendency of the said writ petition, several opportunities were given to the predecessor-in-interest of opposite party to file counter affidavit, but the same was filed belatedly. In the interregnum, the petitioner came to know that the tenure of the lease granted in favour of the father of opposite party has expired by efflux of time and also the Presiding Arbitrator as well as the Arbitrator appointed by the petitioner have also died in the meantime. Even the father of opposite party also died during pendency of the said writ petition, which was not communicated to the petitioner. The aforesaid facts led the petitioner to withdraw the said writ petition with liberty to raise all points of dispute before the newly appointed Arbitral Tribunal,

which, in fact, was granted by the High Court on 30th October, 2023. Subsequently, the petitioner issued a further notice intimating the facts that since two of the Arbitrators have expired in the meantime, the petitioner choses to appoint another Arbitrator and calling upon the opposite party to name its Arbitrator. Since there was no response to the said letter despatched on 5th October, 2023, further letters were caused on 28th November, 2023 and 20th December, 2023 in furtherance thereto calling upon the opposite party to confirm the appointment of its nominated Arbitrator and also to take steps for appointment of Presiding Arbitrator. Perceiving the apathetical attitude having shown by opposite party, the instant petition is taken out by the petitioner for appointment of Arbitrators.

5. The opposite party contested the instant petition by filing a counter affidavit, and the major defence taken therein that once the time within which the award is to be published under Section 29A of the said Act expires, in absence of any extension of time, the petition has become time barred.

6. It is argued on behalf of the petitioner that since two of the Arbitrators have passed away during pendency of the writ petition

before this Court, and opposite party having not responded to the letters issued in this regard, it is a fit case where the appointment has to be made to the Presiding Arbitrator. It is further submitted that once two of the Arbitrators died, the question of applicability of Section 29A does not arise as the mandate of the Arbitral Tribunal gets terminated under Section 15 of the said Act. The reliance is placed upon a judgment of the Apex Court in ***Huawei Technologies Company Limited v. Sterlite Technologies Limited*** reported in ***(2016) 1 SCC 721*** for the proposition that once the procedure for appointment of the Arbitrator is provided in the arbitration agreement/clause, the appointment procedure under Section 15 of the said Act is to be adhered to. It is further submitted that mere death of an Arbitrator does not invalidate the arbitration agreement, and there is no fetter on the part of the Court in constituting an Arbitral Tribunal, and placed reliance upon a judgment of the Apex Court in ***Khorshed E. Nagarwalla v. Daryus Soley Panthakey*** reported in ***2010 (4) Mh. L. J. 936***. It is further submitted that in a recent decision rendered in ***Shailesh Dhairyawan v. Mohan Balkrishna Lulla*** reported in ***(2016) 3 SCC 619*** (Civil Appeal No.8731 of 2015 decided on October 16, 2015), the Apex Court further held that in the event two Arbitrators out of three died, substituted Arbitrator can

be appointed in terms of the arbitration clause. It is, thus, submitted that since one of the Arbitrators nominated by the opposite party is alive, the petitioner has named the Arbitrator in terms of the said arbitral clause, the Court may appoint a Presiding Arbitrator.

7. Section 15 of the Act contains an exhaustive provision relating to the termination of the mandate of an Arbitrator. It is indicated in the said Section that where the Arbitrator withdraws from his office for any reason or on an agreement of the parties, the mandate of the Arbitrator would terminate, and substituted Arbitrator may be appointed according to the 'rules' applicable to the appointment of an Arbitrator being replaced. In ***Yashwith Construction P. Ltd. v. Simplex Concrete Piles India Ltd.*** reported in ***(2006) 6 SCC 204***, the question arose that once the arbitral clause reserves power upon the Managing Director of the Company to appoint and/or nominate the Arbitrator on behalf of the Company and if the Arbitrator withdraws from an office, whether the said Managing Director would be competent to substitute the Arbitrator under the said clause. Sub-Section 2 of Section 15 of the said Act came for an active consideration, which provides that the substituted Arbitrator can only be appointed according to the rules. What would be the meaning of the word 'rules' appearing in the said Section was

answered with clarity that whatever the procedures agreed upon the party under the arbitration agreement such procedures shall partake a character of a rule in the following:

> "4. xxx. It is true that in the arbitration agreement there is no specific provision authorising the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the originally appointed arbitrator withdraws from the arbitration. But, this so-called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. xxx."

8. The same view was expressed in a subsequent decision rendered in ***Huawei Technologies Company Limited*** (supra) in the following:

> "8. Clause 22.3 of the supply contract contemplates appointment of a sole arbitrator by the parties by mutual consent. In a situation where the original arbitrator i.e. Shri Justice S.K. Dubey had recused himself the substitute or new arbitrator is required to be appointed according to the rules that were applicable to the appointment of the original arbitrator. This is the mandate of Section 15(2) of the Act. It was, therefore, incumbent on the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent and only on failure thereof the present application under Section 11(6) of the Act could/should have been filed. The above recourse is required to be followed by virtue of the provisions of Section 15(2) of the Act and the decision of this Court in Yashwith Constructions (P) Ltd. [(2006) 6 SCC 204] Admittedly, the same had not been followed. In these circumstances, the Court will understand the present application/arbitration petition to be premature. It is accordingly not entertained leaving it open for the petitioner to act appropriately, if so

advised, in terms of the present order and thereafter seek its remedies as provided by law."

9. In ***Shailesh Dhairyawan*** (supra), the Apex Court after noticing the above noted decisions held that if the fresh appointment is not made despite the written notice having given in this regard, there is no fetter on the part of the Court to step in, provided the procedure for appointment has been strictly complied with in the following:

> **"19.** The scheme of Section 8 of the 1940 Act and the scheme of Section 15(2) of the 1996 Act now need to be appreciated. Under Section 8(1)(*b*) read with Section 8(2) of the 1940 Act if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2)

ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8 of the 1940 Act is resurrected while construing Section 15(2) of the 1996 Act. The arbitration agreement between the parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or otherwise, such a substitution must take place. In fact, sub-sections (3) and (4) of Section 15 also throw considerable light on the correct construction of sub-section (2). Under sub-section (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly-appointed

Tribunal, unless the parties have agreed otherwise. Equally, orders or rulings of the earlier Arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be subserved by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off.

20. On the facts of the present case, it is clear that there is nothing in Clause 8 of the consent terms extracted above to show that the resignation of Justice Sujata Manohar would lead to her vacancy not being supplied. All that the parties have done by the said clause is to agree to refer their disputes to the arbitration of an independent retired Judge belonging to the higher judiciary. There is no personal qualification of Mrs Justice Sujata Manohar that is required to decide the dispute between the parties. In fact, she belongs to a pool of independent retired High Court and Supreme Court Judges, from which it is always open to the appointing authority to choose a substitute arbitrator. One example will suffice to show that Clause 8 in the present case cannot be construed to either expressly or by

necessary implication exclude the appointment of a substitute arbitrator. Take the case of a family dispute in which the arbitration clause clearly specifies that a particular grand-uncle of a joint family is the only person in whom all members of the family have confidence as a result of which he has been appointed arbitrator to resolve their disputes. In the case of resignation or death of such grand-uncle, it could possibly be contended that by necessary implication no other person was competent to arbitrate disputes between the family members and that, therefore, on such resignation or death, the arbitration clause would spend its force. In the present case, as has been noted above, we do not have any such factual scenario nor do we have expressions such as "only" which would indicate that the confidence of the parties was in only the named arbitrator and in nobody else.

21. In fact, as has correctly been pointed out by the learned counsel for the respondent, Section 89 CPC specifically provides that a court hearing a suit may formulate terms of settlement between the parties and may either settle the same or refer the same for settlement by conciliation, judicial settlement, mediation or arbitration. On the facts in the present case, it is clear that following the mandate of Section

89, the Bombay High Court disposed of the suit between the parties by recording the settlement between the parties in Clauses 1 to 7 of the consent terms and by referring the remaining disputes to arbitration. In the present case therefore it is clear that it is the Bombay High Court that was the appointing authority which had in fact appointed Mrs Justice Sujata Manohar as arbitrator in terms of Clause 8 of the consent terms. We must remember, as was held in *C.F. Angadi* v. *Y.S. Hirannayya* [*C.F. Angadi* v. *Y.S. Hirannayya*, (1972) 2 SCR 515 at p. 523 : (1972) 1 SCC 191 at pp. 197-199] , that an order by consent is not a mere contract between the parties but is something more because there is superadded to it the command of a Judge. On the facts of the present case, it is clear that the Bombay High Court applied its mind to the consent terms as a whole and appointed Mrs Justice Sujata Manohar as arbitrator for the disputes that were left to be resolved by the parties. The said appointing authority has been approached by the respondent for appointment of a substitute arbitrator, which was then done by the impugned judgment. This would therefore be "according to the rules that were applicable to the appointment of the arbitrator being replaced" in accordance with Section 15(2) of the

> Act. We, therefore, find that the High Court correctly appointed another independent retired Judge as substitute arbitrator in terms of Section 15(2) of the Arbitration Act, 1996. The appeal is, therefore, dismissed."

10. It is, thus, manifest from the above decisions that even on the death of the Arbitrator, the mandate would terminate, and in view of Section 15(2) of the Act, there is no embargo on the part of the Court to appoint the Presiding Arbitrator. In the instant case, the Arbitrator nominated by the petitioner died during pendency of the writ petition so also the Presiding Arbitrator appointed by the Apex Court. The petitioner immediately caused a letter nominating and/or appointing an Arbitrator on its behalf, and since the surviving Arbitrator nominated and/or appointed by the opposite party is still alive, the confirmation and/or concurrence was also sought, which, in my opinion, was not warranted. By death of the Arbitrator, the mandate of the Arbitral Tribunal is terminated, but it does not terminate the arbitration clause. The said arbitration agreement/clause remains binding on the parties, and therefore, the parties cannot wriggle out of the same.

11. The applicability of Section 29A of the Act is misplaced for the simple reason that once the mandate of the arbitrator is terminated and the Arbitral Tribunal becomes defunct, the question of applicability of the said Section does not arise. The expression "mandate of the Arbitrator terminates" has to be understood that the composition of the Arbitral Tribunal gets affected, and therefore, there is no fetter on the part of the Court in appointing a substituted Arbitrator. In the instant case, since one of the Arbitrators appointed by the opposite party is alive and there is no letter caused to withdraw such appointment, it would be presumed that the opposite party continues to appoint the said Arbitrator. So far as the Arbitrator appointed on behalf of the petitioner is concerned, the name has been duly communicated, which is in tune with the said arbitration agreement/clause.

12. Since the Apex Court has appointed the Presiding Arbitrator, who also expired in the meantime, I do not find any fetter on the part of the Court to appoint a Presiding Arbitrator under Section 11(6) of the Act. Accordingly, ***Mr. Justice Ananga Kumar Patnaik,*** Former Judge of the Supreme Court of India, is hereby appointed as the Presiding Arbitrator along with the arbitrators nominated by the respective parties. The said Arbitral Tribunal shall immediately proceed with the

arbitration proceedings from the stage when the earlier Arbitral Tribunal becomes defunct. The arbitration shall take place under the ageis of the High Court of Orissa Arbitration Centre. Remuneration of the arbitrators shall be equally paid by the parties as may be agreed upon. The Arbitral Tribunal shall make effort to adhere the time limit set forth in Section 29A of the said Act.

13. The arbitration petition is disposed of accordingly. A copy of this judgment be communicated to the learned Presiding Arbitrator forthwith.

(Harish Tandon)
Chief Justice

M. Panda

Signature Not Verified
Digitally Signed
Signed by: MRUTYUNJAYA PANDA
Reason: Authentication
Location: High Court of Orissa, Cuttack
Date: 12-Nov-2026 15:26:39