

**ARBITRATION APPLICATION NO: 48 of 2023**

Alliance Enterprises

...Applicant

Vs.

Andhra Pradesh State Fiber Net Limited (APSFL)

...Respondent

Advocate for Applicant : Mr. Udit Seth
for Ms. Kotharu Vijayeswari

Advocate for Respondent : Mr. A.Tulsi Raj Gokul

CORAM : THE CHIEF JUSTICE DHIRAJ SINGH THAKUR**DATE : 20th February, 2025****P C :**

This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of a sole Arbitrator for adjudicating the disputes arising out of and in connection with the Work Contract, dated 05.08.2016, entered into between the parties.

2. Briefly stated, the material facts are as under:

The applicant claims to be a company engaged in the construction and infrastructure development activities. The respondent, Andhra Pradesh State Fiber Net Limited, had floated a rate contract tender for inviting eligible service providers for commissioning and maintenance of last mile optical fiber

connectivity to Government Offices in the districts of Anantapur and Kadapa in the State of Andhra Pradesh.

3. The applicant was allotted the work and contract agreement came to be signed between the two parties on 05.08.2016. Various work orders were issued to the applicant from time to time for a total value of Rs.12,26,63,520/-. The applicant claims that even when work orders were executed, payment was not made to the applicant to the tune of Rs.2,82,60,159/-. Several reminders are also stated to have been sent, which did not elicit any response from the respondent.

4. Finally, it is stated that, instead of making payments, the respondent terminated the contract vide its order, dated 02.01.2019, which was communicated vide communication, dated 09.01.2019. The applicant claims that, on several occasions, the representatives of both the parties tried to resolve the issues, however, despite efforts, the amount due to the applicant was not released which finally led the applicant to invoke the arbitration clause by virtue of its letter, dated 17.10.2022.

Clause 25 of the agreement envisaged resolution of disputes through the mechanism of arbitration and envisaged as follows:

“25. Arbitration Clause:-

1. Except as otherwise provided elsewhere in the contract, if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning,

operation, effect, interpretation or out of the contract or breach thereof, the same shall be decided by Sole Arbitrator to be appointed by the Managing Director of APSFL.

2. If the Arbitrator so appointed dies, resigns, incapacitated or withdraws for any reason from the proceedings, another Arbitrator shall be appointed by the Managing Director of APSFL. The Arbitrator so appointed shall proceed with the reference from the stage, where his predecessor had left if both parties consent for the same, otherwise, he shall proceed de novo.

.....”

5. The applicant's case is that, despite service of notice, the respondent did not appoint a sole arbitrator. It is also urged that the procedure for appointment of arbitrator as mentioned in the Clause 25 of the agreement is otherwise contrary to the ratio of the judgment of the Apex Court rendered in the case of ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***¹ as also the judgment of the Constitution Bench in the case of ***Central Organisation for Railway Electrification Vs. ECI SPIC SMO MCML (JV)***² and, hence, prays for the appointment of an independent sole arbitrator.

6. While the respondent does not dispute the existence of the arbitration clause in the agreement, yet, the only objection raised is with regard to limitation. It is stated that the cause of action, if at all, had accrued to the applicant in the year, 2019, when the agreement was terminated, whereas the present arbitration application had filed in the year, 2023.

¹ (2020) 20 SCC 760

² 2024 SCC OnLine SC 3219

7. It is stated that, as per Article 137 of the Limitation Act, 1963, the Arbitration Application had to be filed within three years from the date when the right to apply accrues. It was, thus, stated that the right to apply for appointment of an arbitrator accrued to the applicant in 2019 and, therefore, having been filed beyond the three years prescribed limit, the present application is hopelessly time barred.

8. We have heard learned counsel for the parties.

9. The objection raised by learned counsel for the respondent that the present Arbitration Application is time barred is without any basis.

10. In **Arif Azim Co. Ltd. v. Aptech Ltd.**,³ it was held:

“53. It has been held in a catena of decisions of this Court that the limitation period for making an application seeking appointment of arbitrator must not be conflated or confused with the limitation period for raising the substantive claims which are sought to be referred to an Arbitral Tribunal. The limitation period for filing an application seeking appointment of arbitrator commences only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on the part of the other party to make an appointment as per the appointment procedure agreed upon between the parties.”

11. This view was subsequently followed in **Aslam Ismail Khan Deshmukh v. ASAP Fluids (P) Ltd.**,⁴ wherein it was held:

³ (2024) 5 SCC 313

⁴ (2025) 1 SCC 502

“47. In view of the above discussion, we must restrict ourselves to examining whether the Section 11 petitions made before us are within limitation. The petitioner herein issued a notice invoking arbitration on 23-1-2017 and the same was delivered to both the respondents on 24-1-2017. However, the respondents failed to reply to the said notice within a period of 30 days i.e. within 23-2-2017. Therefore, the period of limitation of three years, for the purposes of a Section 11(6) petition, would begin to run from 23-2-2017 i.e. the date of failure or refusal by the other party to comply with the requirements mentioned in the notice invoking arbitration.”

12. Testing the facts of the present case on the touchstone of the principles laid down in the aforementioned judgments, it can be seen that the notice invoking arbitration clause was issued by the applicant only on 17.10.2022. Assuming that three years were to be calculated from the said date itself, the present petition which is filed on 31.08.2023, would squarely be within the period of prescribed three years in terms of Article 137 of the Limitation Act, 1963.

13. The argument that the present application is barred by limitation is, therefore, without any basis and is accordingly rejected.

14. Considering the fact that the respondent did not appoint the arbitrator within the time specified in the notice invoking the arbitration clause, the respondent must be deemed to have lost that right. There would be no legal impediment for this Court to appoint an independent arbitrator,

considering the ratio of the judgment of the Apex Court in **Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Another**⁵, which held as under:

*“19. So far as cases falling under Section 11(6) are concerned -
- such as the one before us -- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”*

15. Be that as it may, the present application is allowed. Justice U. Durga Prasad Rao, former Judge of the Andhra Pradesh High Court, is appointed as an Arbitrator, who shall enter upon the reference and adjudicate upon the disputes arising out of and in connection with the work contract, dated 05.08.2016, and render an Award within the statutory period. The question of arbitrability of the claims is left open to be decided by the

⁵2000 (7) Supreme 145

learned Arbitrator. The parties shall be free to file detailed claims and counter-claims, before the learned Arbitrator. The learned Arbitrator shall also be entitled to claim the fee in consultation with the parties, keeping in view the provisions of the Fourth Schedule of the Arbitration and Conciliation Act, 1996. No costs.

Pending miscellaneous applications, if any, shall stand closed.

A copy of this order be communicated to the learned Arbitrator on the address mentioned herein below:

Justice U. Durga Prasad Rao,
Flat No.505, 5th Floor,
Bhuvanavijayam Apartment,
near HDFC Bank,
Tadepalli Municipality,
Tadepalli, Guntur – 522501.

DHIRAJ SINGH THAKUR, CJ

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HON'BLE MR. JUSTICE DHIRAJ SINGH THAKUR, CHIEF JUSTICE

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Dt: 20.02.2025

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