

***THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA
AND
*THE HON'BLE JUSTICE GADI PRAVEEN KUMAR
+ COMMERCIAL COURT APPEAL No. 35 OF 2024**

% 24-04-2026

M/s. Ramky Elsmex Hyderabad Ring
Road Limited

...Appellant

vs.

\$ M/s. Hyderabad Metropolitan Development
Authority and 4 others.

... Respondents

!Counsel for the Appellant: Mr. A.Venkatesh, learned Senior Counsel
Ms.Pratusha Bopanna

^Counsel for Respondents: Mr. C.V. Mohan Reddy, learned Senior Counsel
Mr. Dhananjaya Naidu Kolla

<Gist :

>Head Note :

? Cases referred

1. 2009(9) SCC 384
2. (2000) 8 SCC 15
3. (2006) 2 SCC 638
4. (2013) 4 SCC 35

HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA
AND
THE HON'BLE JUSTICE GADI PRAVEEN KUMAR
COMMERCIAL COURT APPEAL No. 35 OF 2024

DATE: 24.04.2026

Between:

M/s. Ramky Elsmex Hyderabad Ring Road Limited

... Appellant

And

M/s. Hyderabad Metropolitan Development
Authority and 4 others.

...Respondents

Mr. A. Venkatesh, learned Senior Counsel representing Ms. Pratusha Boppana, learned counsel appearing for the appellant.

Mr. C.V. Mohan Reddy, learned Senior Counsel representing Mr. Dhananjaya Naidu Kolla, learned counsel appearing for the respondent Nos.1 and 2.

JUDGMENT: (Per Hon'ble Justice Moushumi Bhattacharya)

1. The present Commercial Court Appeal (COMCA) is filed under section 37 of The Arbitration and Conciliation Act, 1996 ('A&C Act') against an order dated 05.08.2024 passed by the learned Commercial Court at Hyderabad whereby the Commercial Court allowed an application (COP No.100 of 2018) filed by the

respondent Nos.1 and 2 under section 34 of the A&C Act, setting aside an Arbitral Award dated 18.06.2018.

2. The appellant was the claimant before the Arbitral Tribunal consisting of three learned arbitrators. The Arbitral Tribunal, by the Award dated 18.06.2018, directed the respondent Nos.1 and 2 to pay Rs.168,36,97,859/- within 3 months from the date of the Award, failing which, the respondent Nos.1 and 2 were directed to pay interest as per the State Bank of India Prime Lending Rate on the aforesaid amount till its realization.

3. The respondent Nos.1 and 2 filed the Commercial Original Petition for setting aside the Award dated 18.06.2018. By the impugned order dated 05.08.2024, the Commercial Court allowed the C.O.P and set aside the Award dated 18.06.2018 on the ground that the constitution of the Arbitral Tribunal was improper as the presiding arbitrator could not have been appointed during pendency of the section 11(6) application before the erstwhile High Court of Andhra Pradesh.

4. The appellant/claimant has filed the present COMCA aggrieved by the order dated 05.08.2024 passed by the Commercial Court whereby the Award in its favour was set aside.

5. Learned Senior Counsel appearing for the appellant submits that section 11(6) of the A&C Act does not contain any bar on a consensual appointment of the presiding arbitrator, particularly where such appointment was brought to the notice of the High Court and the High Court permitted the appellant to withdraw the application filed under section 11(6) of the A&C Act on that basis. Senior Counsel further submits that the parties in the present case had already exercised their right to appoint their nominee arbitrators and that the only remaining step was the appointment of the presiding arbitrator, which was duly carried out with the consent of both nominee arbitrators. It is further submitted that the respondent did not raise any objection at the relevant point of time with regard to the appointment of the presiding arbitrator and that a plea of invalidity of the appointment cannot be taken at this belated stage.

6. Learned Senior Counsel appearing for the respondent Nos.1 and 2 (who sought for setting aside of the Award before the Commercial Court) submits that the two nominated arbitrators proceeded to nominate the presiding arbitrator during pendency of the application filed under section 11(6) of the A&C Act by the appellant, which was impermissible in law. Senior Counsel relies

on decisions to urge that the right to appoint an arbitrator stands forfeited once an application is filed under section 11(6) of the A&C Act. It is further submitted that the two nominee arbitrators had failed to agree upon the presiding arbitrator which led to the appellant filing an application for appointment of an Arbitrator under section 11(6). Senior Counsel submits that since the appointment of the presiding arbitrator was barred under section 11(6), the constitution of the Arbitral Tribunal was not in accordance with the A&C Act and the Award was rightly set aside by the Commercial Court on that ground.

7. We have considered the arguments advanced by Senior Counsel appearing for the parties, as well as the dates relevant to the present adjudication.

8. The only question which falls for consideration is whether the two nominee arbitrators were authorized to appoint the presiding arbitrator during pendency of the application under section 11(6) of the A&C Act. In other words, whether the right of the two nominee arbitrators to appoint the presiding arbitrator stood forfeited once the application under section 11(6) of the A&C Act was filed before the High Court? Consequently, it must be

determined whether the Commercial Court was correct in accepting the contention of the respondent Nos.1 and 2 that the Arbitral Tribunal was improperly constituted and that the Award was liable to be set aside on that ground.

9. Senior Counsel appearing for both the parties have argued only on the aforesaid issue, namely, whether the right of the two nominee arbitrators to appoint the presiding arbitrator stood forfeited upon filing of the application under section 11(6) of the A&C Act? The parties have not advanced arguments on any other ground for assailing/defending the impugned order passed by the Commercial Court.

10. The dates relevant to the present adjudication are briefly set out below:

- 23.07.2012 - The appellant invoked Arbitration.
- 09.07.2013 - The Arbitral Tribunal was constituted, consisting of three retired Judges of the erstwhile High Court of Andhra Pradesh.
- 24.01.2015 - The Arbitral Tribunal was disbanded.
- 27.10.2015 - The appellant issued a notice for the constitution of a fresh Arbitral Tribunal and appointed its nominee arbitrator.

- 05.02.2016 The respondent Nos.1 and 2 appointed their nominee arbitrator.
- 16.11.2016 The appellant filed Arbitration Application No.134 of 2016 under section 11(6) of the A&C Act for appointment of the presiding arbitrator since there was a delay in such appointment.
- 02.06.2017 The nominee arbitrators of the appellant and the respondent Nos.1 and 2 arrived at a consensus and appointed the presiding arbitrator.
- 03.06.2017 The presiding arbitrator issued a letter to the parties fixing the primary hearing on 23.06.2017. However, the respondents failed to appear before the Arbitral Tribunal on 23.06.2017.
- 16.06.2017 The above fact was brought to the notice of the Chief Justice of the High Court of Andhra Pradesh in the presence of counsel appearing for the respondent No.1. The Chief Justice permitted the appellant to withdraw the Arbitration Application and granted liberty to the appellant to file a fresh application if the arbitration did not proceed.
- 06.07.2017 The respondent Nos.1 and 2 filed an application (I.A.No.1 of 2017) under section 13 of the A&C Act assailing the appointment of the presiding arbitrator during the pendency of section 11(6) Application.

17.07.2017	The Arbitral Tribunal dismissed the application filed by the respondent Nos.1 and 2.
10.02.2018	The respondent Nos.1 and 2 once again contested the appointment of the presiding arbitrator under section 16 of the A&C Act. This application was also dismissed.
18.06.2018	The Arbitral Tribunal passed the Award. The appellant/claimant was awarded a sum of Rs.168,36,97,859/-.
15.09.2018	The respondent Nos.1 and 2 filed C.O.P.No.100 of 2018 under section 34 of the Act setting aside of the Award dated 18.06.2018.
05.08.2024	The Commercial Court passed the impugned order allowing the C.O.P. filed by the respondent Nos.1 and 2 and setting aside the Award dated 18.06.2018.

11. The respondents' entire argument is premised on section 11(6) of The Arbitration and Conciliation Act, 1996 which empowers the High Court, in case of arbitrations, other than international commercial arbitrations, to appoint an arbitrator(s) on the occurrence of any of the three conditions under any of the situations under Clauses (a), (b), and (c) of section 11(6). The respondents rely on Clause (b) which stipulates that the section 11(6) Court can appoint the arbitrator/s where the parties or the

two arbitrators fail to reach an agreement in accordance with the appointment procedure agreed by the parties. The relevant part of section 11(6) is set out below.

“.....

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure;

....

a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court]to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

12. In the present case, neither of the parties before us has disputed the appointment procedure. The appointment procedure agreed upon is contained in Clause 39.2 of the Chapter XXXIX of the Agreement dated 18.08.2007 entered between the parties. Clause 39.2 refers to ‘Board of Arbitrators’. The parties agreed that the arbitration shall be held in accordance with the Rules of Arbitration of the India Council of Arbitration and shall be subjected to The Arbitration and Conciliation Act, 1996. Clause 39.2.2 requires the Board to consist of three arbitrators, of whom, each party shall select one arbitrator and the third

arbitrator/presiding arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

13. As stated above, the respondents have not disputed the procedure but have sought for setting aside of the Award dated 18.06.2018 passed by the Arbitral Tribunal on the ground of improper constitution of Arbitral Tribunal under section 34(2)(a)(v) of the A&C Act. The substratum of the ground is that the presiding arbitrator was appointed during the pendency of section 11(6) application before the High Court.

14. A careful reading of section 11(6)(b) of the A&C Act would show that the High Court can step in and make the appointment under that provision on the failure of the parties or the two appointed arbitrators to reach an agreement in that regard. Section 11(6)(b) is an independent, stand-alone condition - which would be evident from the disjunctive language used in the three conditions – (a), (b) and (c) of section 11(6) of the A&C Act. In other words, as on the date of the High Court making the appointment, there must be a disagreement, or a failure of agreement on the part of the two appointed arbitrators, to appoint the presiding arbitrator. The foundational fact of an application for appointment

of an arbitrator under section 11(6)(b) is the continuing disagreement between the two appointed arbitrators in selecting/appointing a presiding arbitrator.

15. In the present case, the admitted dates would make it clear that the appellant as well as the respondents appointed their nominee arbitrators on 27.10.2015 and 05.02.2016, respectively. The appellant thereafter filed the section 11(6)(b) application for appointment of the presiding arbitrator on 16.11.2026. However, during pendency of the section 11(6)(b) application, the nominee arbitrators of the appellant and the respondents subsequently arrived at a consensus on 02.06.2017 and appointed the presiding arbitrator. These undisputed facts are also reflected in the order passed by the Arbitral Tribunal on 17.07.2017 dismissing the respondents' application challenging appointment of the presiding arbitrator. The very first paragraph of the said order clearly records the following:

'Both the Arbitrators having agreed for appointment of Sri D.Sree Rama Murthy, Former Chief Engineer [Roads and Buildings, Government of A.P.] to be the Presiding Arbitrator, constitution of

the Arbitral Tribunal and intimated all concerned parties vide his letter dated 2nd June 2017'

16. Notably, neither the appellant nor the respondents withdrew their nominee arbitrators after the appointment of the presiding arbitrator. This fact is of significance since the respondents now seek to argue on the alleged absence of consensus between the two nominee arbitrators with regard to appointment of the presiding arbitrator. Moreover, the lack of consensus between the two nominee arbitrators is belied by the fact that the respondents, being represented by their nominee arbitrators, participated in the appointment of the presiding arbitrator. Hence, the respondents cannot be permitted to resile from their consent/participation in the appointment of the presiding arbitrator only for the purpose of dislodging the Award.

17. The records in the present Appeal corroborate that the appointment of the presiding arbitrator was consensual. The order passed by the Arbitral Tribunal dated 17.07.2017, consisting of all the three arbitrators including the presiding arbitrator, record that both the nominee arbitrators agreed in the matter of appointment of the presiding arbitrator and the presiding arbitrator accordingly affirmed his willingness to act as the presiding arbitrator. The

parties were duly intimated of the constitution of the Arbitral Tribunal by the presiding arbitrator's letter dated 02.06.2017.

18. As stated above, the Chief Justice of this Court, as his Lordship then was, recognized and acknowledged the appointment of the presiding arbitrator by the two nominee arbitrators and accordingly permitted withdrawal of section 11 application on 16.06.2012. The respondents have not challenged the said order till date. In any event, the appointment of the presiding arbitrator was made before any order was passed in the Arbitration Application¹.

19. Last and most significant is the principle of party autonomy which forms the bedrock of The Arbitration and Conciliation Act, 1996. The Act embodies the fundamental principles of Alternative Dispute Resolution and underscores that the intention of the parties to the arbitration shall prevail over all procedural considerations. In the present case, the parties duly nominated their arbitrators and the nominee arbitrators in turn appointed the presiding arbitrator by consensus in full compliance of the Arbitration Agreement and the procedure contemplated therein.

¹ Union of India v. Premier Files, 2009(9) SCC 384

This appointment was brought to the notice of the Chief Justice and the Court permitted the appellant to withdraw the Arbitration Application on that ground alone, i.e., that the presiding arbitrator had already been appointed.

20. It is crucial that the respondents were represented by their counsel on that date. Counsel was present during the hearing but did not raise any objection before the Court, thus unequivocally indicating that the respondents had no objection to the appointment of the presiding arbitrator. The issue of appointment of the presiding arbitrator thus stood judicially concluded and could not be reopened in proceedings under section 34 of the A&C Act. A plea of invalidity of the appointment of the presiding arbitrator cannot subsequently be taken only to avoid the directions passed in the Award.

21. The respondents' reliance on section 34(2)(a)(v) of the A&C Act with regard to the Arbitral Tribunal being improperly constituted does not strictly fall within a purposive construction of the said provision. Section 34 (2)(a)(v) contemplates setting aside of an Arbitral Award only in cases where the applicant establishes, on the basis of records, that the composition of the Arbitral

Tribunal was not in accordance with the agreement of the parties. In the present case, the Arbitration Agreement (Clause No.39.2.2 of the Agreement dated 18.08.2007) provides for a Board of three arbitrators, two of who would be selected by the parties as their nominees and the third appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration (ICA). Rule 23 of the ICA Rules provides for the mechanism of appointment of a Sole Arbitrator/Three Arbitrators. Rule 23(b) authorises the Registrar to appoint the presiding arbitrator in consultation with the Chairman of the Committee or members of the Governing Body designated by the Chairman from the Panel upon receipt of nominations from the respective parties.

22. We wish to reiterate that the respondents did not take any objection to the mode of appointment or any infraction of the Rules of Arbitration of the Indian Council of Arbitration at any point of time either during the course of the arbitration or even before the section 34 Court. The respondents' only argument is that the presiding arbitrator could not have been appointed during the pendency of the section 11 application.

23. We are of the considered view that the respondents' argument runs contrary to the *leitmotif* of the A&C Act which roots for party autonomy. The essence of the respondents' argument is that the Court can force its choice of presiding arbitrator on the party overriding a consensus arrived between the parties or the arbitrators, once an application under section 11(6) is filed in Court. Such a construction is anathema to the A&C Act which gives primacy to the intention of parties at every stage of the arbitration process. There is nothing on record to suggest that the nominee arbitrators were at variance with regard to the appointment/selection of the presiding arbitrator. The impugned order overlooked the fact that the nominee arbitrators arrived at a consensus with regard to the appointment of the presiding arbitrator on 02.06.2017 which was duly informed by counsel appearing for the parties to the section 11 Court on 16.06.2017. Thus, the Commercial Court came to the erroneous conclusion that the arbitrators had forfeited their right to nominate the presiding arbitrator only by reason of pendency of section 11(6) application.

24. The Trial Court considered only the decisions relied on by the respondents on account of the decisions being Larger Bench

decisions. The Trial Court however failed to consider the applicability of these decisions to the case. We also do not find any discussion as to how the Commercial Court could set aside the Award dated 18.06.2018 under the grounds available under section 34 of the Arbitration and Conciliation Act, 1996.

25. The issue before the Supreme Court in *Datar Switchgears Limited v. Tata Finance Limited*² was whether the party, to whom a demand for appointment is made, forfeits his rights to do so if he does not appoint Sole Arbitrator within 30 days as contemplated under section 11(5) of the A&C Act. *Punj Llyod v. Petronet MHB Ltd.*³ followed *Datar Switchgears Limited* (Supra) to the extent of a right of a party to appoint an arbitrator before filing of an application under section 11 of the A&C Act.

26. The earlier decision of *Deep Trading Company v. Indian Oil Corporation*⁴ was whether the appointment of the arbitrator in proceedings under section 11(6) of the A&C Act has any legal consequences. The Supreme Court found that the respondents IOC had failed to act under the procedure agreed upon by the parties in

² (2000) 8 SCC 15

³ (2006) 2 SCC 638

⁴ (2013) 4 SCC 35

Clause 29 of the Agreement and also failed to make an appointment until the application was made under section 11(6) of the A&C Act.

27. The above decisions were decided on a wholly different factual conspectus. Besides, none of the decisions involved consensual appointments. Both *Datar Switchgears Limited* and *Punj Llyod* (Supra) were concerned with the right of a party to appoint a Sole Arbitrator beyond 30 days from the receipt of a request from the other party under section 11(5) of the A&C Act.

28. The Supreme Court reiterated the foundational requirement of section 11(6)(a)(b) of the A&C Act, namely, that the provision would apply where the parties failed to act in terms of the agreed procedure for appointment of the arbitrator; or the two appointed nominee arbitrators failed to reach a consensus with regard to the appointment of the presiding arbitrator in accordance with the procedure agreed by the parties. The cases relied upon by the respondents are premised on the parties failing to reach an agreement as to the appointment of an arbitrator and one of the parties proceeding to make the appointment notwithstanding such

disagreement after filing of Section 11(6) application. The facts of the present case are entirely different.

29. In the present case, the section 11(6) application was filed at a time when the nominee arbitrators could not agree to the choice of the presiding arbitrator. However, after filing of the 11(6) application, the nominee arbitrators concurred and agreed on the appointment of the presiding arbitrator. Hence, the substratum of section 11(6) of the A&C Act collapsed by the two arbitrators agreeing to the presiding arbitrator. This was duly brought to the notice of the section 11 Court and the Court acknowledged that nothing remains of the section 11 application by such consensual choice. The respondents did not object to the appointment of the presiding arbitrator despite being represented by counsel in the Court on that date. The Court's permission to the appellant to withdraw the section 11 application reflects that the application was rendered irrelevant once the two arbitrators agreed to the appointment of the presiding arbitrator.

30. Therefore, we are of the considered view that the cases cited on behalf of the respondents do not lend any assistance to the argument advanced on their behalf. The Commercial Court erred

in overlooking vital factual aspects and the basic premise of the A&C Act in the matter of party autonomy. Consequently, we disagree with the view that the consensual appointment of the presiding arbitrator was rendered incompetent upon filing of the application under section 11(6) of the A&C Act, particularly where the complaining party did not raise any objection to the agreed procedure of appointment. We accordingly hold that the impugned order calls for interference.

31. COMCA No.35 of 2024 is accordingly allowed by setting aside the impugned order dated 05.08.2024 in COP No.100 of 2018 on the file of the Commercial Court at Hyderabad. All connected applications are disposed of.

MOUSHUMI BHATTACHARYA, J

GADI PRAVEEN KUMAR, J

DATE: 24.04.2026
VA/TJMR