

IN THE HIGH COURT OF BOMBAY AT GOA

APPLICATION FOR APPOINTMENT OF ARBITRATOR NO. 7 OF 2015

M/s. Enas United Services,
through its Partner
Mr. Dashrath Singh

.... Applicant

V e r s u s

The Material Superintendent and Anr.

.... Respondents

Mr. B. M. Khandeparkar, Advocate for the Applicant.

Mr. Mahesh Amonkar, Central Government Standing Counsel for the Respondents.

Coram :- F. M. REIS, J

Date : 21st September, 2015

ORAL ORDER

Heard Shri Khandeparkar, learned Counsel appearing for the Applicant and Shri Mahesh Amonkar, learned Central Government Standing Counsel appearing for the Respondents.

2. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator in terms of an Agreement executed between the parties dated 30.09.2013.

3. Shri Mahesh Amonkar, learned Central Government

Standing Counsel appearing for the Respondents, has raised two objections opposing the appointment of the Arbitrator. Learned Counsel pointed out that in terms of the Agreement, parties had to mutually settle the dispute before invoking for Arbitration. He further submitted that the supply Order was issued in terms of the Agreement on 06.08.2014 and the delivery date was to be within ninety days which expired on 04.11.2014. According to the learned Counsel, as such goods were not supplied within the time stipulated, the order itself became void and, as such, making of any payment would not arise.

4. On the other hand, Shri Khandeparkar, learned Counsel appearing for the Applicant has submitted that the Respondents by their conduct and action did not permit the Applicants to make the supply in terms of such Order. The learned Counsel further submits that the correspondence on record clearly suggests that even on 06.11.2014, a reminder was sent to the Respondents to effect the payment of the outstanding dues and no reply was received to that effect by the Applicants. Learned Counsel further pointed out that a notice was issued on 22.02.2015 calling upon the Respondents for appointment of an Arbitrator but, however, in view of the failure on the part of the Respondents to appoint such Arbitrator, the above application was filed to appoint an Arbitrator.

5. With regard to the first contention of Mr. Mahesh Amonkar, learned Central Government Standing Counsel appearing for the Respondents, I find that the correspondence between the parties discloses that in fact a claim was put forward by the Applicant from time to time to make the payments of the amounts by the Respondents. There is also correspondence to suggest that the Respondents did not accept the claim of the Applicant. I have also gone through the fax notice sent to the Applicant on 06.11.2014, wherein it has been, inter alia, stated that directives have been recently received informing that dealings with the Applicant are kept in abeyance on account of inquiries. In such circumstances, the question of demand that the matter has to be resolved by mutual settlement would not arise. It is not a case that any specific authority is to be appointed as a Conciliator to examine the grievances of the parties raised by the parties.

6. Considering and having gone through the correspondence of the parties, I find that the contention of Mr. Mahesh Amonkar, learned Central Government Standing Counsel appearing for the Respondents, that the matter has still to be settled by mutual agreement, is not at all justified. As the dispute on the claim put forward by the Applicant continues to subsist, the Applicant are entitled to get the matter adjudicated by an Arbitrator. Admittedly, after receipt of the notice, no Arbitrator was appointed

and, consequently, the Applicant are entitled to file the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996. On perusal of the rate contract executed between the parties, it clearly provides that all disputes or differences arising out of or in connection with the contract shall be settled by bilateral discussions. It further provides that any dispute, disagreement or question arising out of or relating to the contract or relating to the construction or performance which cannot be settled amicably, may be resolved through Arbitration. In the present case, the correspondence produced by the Applicant discloses that the claims put forward by the Applicant were not accepted by the Respondents. When the parties contemplate an amicable discussion as a first step towards the dispute resolution, it cannot be said that the parties wanted to avoid dispute resolution through alternate means or procedures. It cannot be overlooked that the parties provided for arbitration also as the next step in such direction. The initial step provided for solution by discussion shows the confidence which the parties had in each other. But the very fact that the parties had provided for arbitration in the contract would also suggest the manner in which the dispute was agreed to be resolved. The scheme of the said clause does not suggest that arbitration can be resorted only after the mutual discussion to resolve the dispute has failed. When the record suggest that one of the parties have avoided such means of discussion, it does not mean that the other

party is rendered a helpless spectator. On going through the said clause, it provides that the aim of the clause is discussion resolution method and it cannot be frustrated by any unwilling party by negative response or no response at all. As such, the said Arbitration clause does not give a right to the Respondents to frustrate the dispute redressal mechanism agreed to between the parties. The conduct of the Respondents in stating that the contracts are kept in abeyance and not responding to resolve the dispute raised by the Applicant would clearly suggest that the amicably resolving the dispute would be impossible and as such, the aggrieved party cannot be left but to resort to appoint an Arbitrator. In such circumstances, looking into the conduct of the Respondents, I find that the contention of Mr. Amonkar, learned Central Government Standing Counsel appearing for the Respondents that the Arbitration could be resorted to only in case the dispute could not be amicably settled cannot be accepted in the facts of the present case.

7. This Court while disposing of Application for Appointment of Arbitrator Nos. 14 and 15 of 2014, by order dated 05.05.2015 has observed at para 13 thus :

"13. An application under sub-section (6) of Section 11 of the said Act can be filed when there is a failure of procedure for appointment

of an Arbitrator and such failure procedure can arise where a party who is bound to appoint an Arbitrator refuses to appoint such Arbitrator. After the party has defaulted despite of service of the notice to act in conformity of the procedure agreed between the parties for an appointment of a Arbitral Tribunal, it may not be just and fair to interpret the provisions of the said Act so as to place the defaulting party in advantageous position by accepting the contention of such defaulting party to accept the methodology in the appointment of the Arbitral Tribunal. Section 11(6) of the said Act clearly postulates the right to file an application for appointment of an Arbitrator in case of the failure on the part of a party to adhere to the procedure or any function entrusted to it for appointment of an Arbitral Tribunal. Such default is a sine qua

non for passing an Order by the Chief Justice or its designate upon presentation of a request in accordance with law. Section 11 of the said Act is a complete procedure in itself. It provides for consequences of default as well as the authority or forum before which such a Petition would lie. The Three Judge Bench of the Hon'ble Supreme Court in the Judgment reported in **2006(2) SCC 638** in the case of **Punj Lloyd Ltd. vs. Petronet Mhb Ltd.**, followed the decision of the Apex Court reported in the case of **Datta Switch Gears Ltd.** (supra) and held that once notice period of thirty days had lapsed and the party had moved to the Chief Justice under Section 11(6) of the said Act, the other party having a right to appoint an Arbitrator by the Arbitral Agreement, loses the right to do so. Thus, the right of the Respondent in the

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present case to appoint an Arbitrator in accordance with the Agreements when called upon ceases not on expiration of the period of thirty days from the date of the service of the requisition but continues till an application under Section 11(6) of the said Act is filed for Appointment of an Arbitrator and thereafter such right of the defaulting party stands forfeited where the present application was filed. On careful consideration of the provisions of Section 11 of the said Act, I am clearly of the opinion that under sub Section (6) of Section 11 of the Act, the Chief Justice or its designate should make the appointment himself and should not accept the claim, of the defaulting party to act in terms provided in the Agreement. Even an appointment of an Arbitrator made by such authority during the pendency of the application under

Section 11(6) of the said Act, would
be non-est”

8. Taking note of the said observations, I find that as the Respondents have defaulted in appointing an Arbitrator inspite of the notice served by the Applicant, this Court has to make the appointment of the Arbitrator himself and should not accept the claim of the defaulting party to act in terms provided in the agreement. It is also to be noted that it was the contention of the Respondents in Writ Petition filed by the Applicant that the exercise of jurisdiction under Articles 226 and 227 of the Constitution of India would not be justified as the Applicant herein had also sought for appointment of Arbitrator. In such circumstances, the question of the Respondents now contending that as the Writ Petition was filed, the Applicant cannot seek for appointment of Arbitrator would not at all be justified.

9. Considering the arbitration clause in the agreement between the parties and the material to be examined while considering an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, I find that the dispute raised by the Applicant arises from the contract and the fact that there is an arbitration clause in such contract is not disputed by the Respondents. It is also not disputed that such application has been filed before the

competent Court of jurisdiction. All other contentions sought to be raised by the Respondents are matters which can be examined by the Arbitrator while adjudicating the dispute between the parties. As such, all contentions raised by the parties on merits are left open including the contention of the Respondents that the claim of the Applicant cannot be adjudicated as the order put forward by the Respondents has become void.

10. In view of the above, I pass the following :

ORDER

(i) Shri M. S. Keni, Retired Judge of the City Civil Court at Mumbai, having office at Margao, is appointed as the sole Arbitrator to decide the dispute between the parties.

(ii) All the contentions of the parties are left open.

(iii) Application stands disposed of accordingly.

F. M. REIS, J

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