

IN THE HIGH COURT OF BOMBAY AT GOA

APPLICATION FOR APPOINTMENT OF ARBITRATOR NO. 9 OF 2015

M/S. ENAS UNITED SERVICES,
THROUGH ITS PARTNER DASHRATH SINGH, Applicant

V e r s u s

THE MATERIAL SUPERINTENDENT AND ANR. Respondents

Mr. B. Khandeparkar, Advocate for the Applicant.

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

Coram :- F. M. REIS, J

Date : 14th September, 2015

ORAL ORDER :

Heard Shri Khandeparkar, learned Counsel appearing for the Applicant and Shri 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. On perusal of the Agreement executed between the parties, it cannot be disputed that there is an Arbitration Clause. The claim sought to be put forward by the Applicant is covered by the Arbitration Clause.

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3. Shri Amonkar, learned Central Government Standing Counsel appearing for the Respondents has pointed out that in terms of the Arbitration clause, it is the right of the respondents to appoint a Arbitrator. The learned counsel as such submits that the question of appointing such Arbitrator would not arise.

4. On perusal of the record, I find that before filing the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 the Applicant had served a notice on the Respondents invoking the Arbitration clause between the parties, but however, the Respondents have failed and neglected to appoint an Arbitrator in terms thereof. Thereafter, the Applicant filed the present application.

5. The contention of Mr. Amonkar, learned Central Government Standing Counsel that despite of such failure the Respondents are entitled to appoint an Arbitrator even after the above application has been filed in this Court cannot be accepted. 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 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

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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"

6. Taking note of the said observations by relying upon the judgment of the Apex Court referred to therein, the question of the Respondents now contending that in terms of the Arbitration clause, the Respondents are entitled to appoint an Arbitrator cannot be accepted.

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

ORDER

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

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

(iii) Application stands disposed of accordingly.

F. M. REIS, J

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