

IN THE HIGH COURT OF BOMBAY AT GOA

**APPLN. FOR APPOINTMENT OF ARBITRATOR
NOS. 14 AND 15 OF 2014**

SHOFT SHIPYARD PVT LTD. THR. ITS
MR.M SUDARSHAN S. G.

... Applicant

Versus

GOA SHIPYARD LIMITED

... Respondent

Mr. Nikhil Pai, Advocate for the Applicant.

Mr. S. G. Desai, Senior Advocate with Mr. Pavithran AV, Advocate
for the Respondent.

Coram:- F. M. REIS, J.

Date:- 5th May, 2015

ORAL ORDER

Heard Shri Pai, learned Counsel appearing for the Applicant
and Shri S. G. Desai, learned Senior Counsel appearing for the
Respondent.

2. The above application filed by the Applicant under Section
11(6) of the Arbitration and Conciliation Act, 1996, for appointment of
an Arbitrator. Both the above applications were taken up together at the
request of both the learned Counsel as it was pointed out that the issues
involved therein to decide the appointment of an Arbitrator under Section

11(6) of the Arbitration and Conciliation Act, 1996, (herein after referred to as the "said Act") are identical.

FACTS IN ARBITRATION APPLICATION NO. 14 OF 2014

3. Briefly, the facts of the case are that on 05.09.2007, the Respondents floated a tender for hull construction including part pre-launch out fitting of two 90mtr Offshore Patrol Vessels. The process which was submitted by the Applicant on 14.09.2007 was ultimately approved after technical negotiations and discussions by a letter of intent issued in favour of the Applicant on 26.10.2007. The work Order was issued by the Respondents in favour of the Applicant and, subsequently, there were some amendments therein. It is further the contention of the Applicant that various letters were addressed to the Respondents demanding payment of the amounts due on such contracts and ultimately on 03.07.2013, the Arbitration Clause was invoked by the Applicant under clause XXVIII contained in the work Order no. 700118D. Thereafter, on 30.09.2013, the Applicant issued a legal notice re-invoking Arbitration Clause and calling upon the Respondent to appoint an Arbitrator within thirty days. The Respondent however contended that the claim was pre-matured as it was yet to realise its insurance claim in

relation to the concerned Vessel. Thereafter, a reminder was sent by the Applicant denying that the dispute is premature and further requesting it to take steps towards nominating an Arbitrator. Subsequently, the Applicant addressed a letter dated 19.12.2013 to the Respondent seeking some clarification on the appointment of Arbitration. Even thereafter on 11.02.2014, another letter was sent seeking further clarifications. As no Arbitrator was appointed, the Applicant filed the above application to appoint an Arbitrator.

FACTS IN ARBITRATION APPLICATION NO. 15 OF 2014

4. On 25.07.2008, the Respondents floated a tender bearing no. GSL/OS/1204-05/E-GEN/01 for installation of equipment and pre-launch work of OPV yard 1204 and 1205. The Applicants submitted their Techno Commercial Offer No. C/GSL/OPVadd work/Tech bid on 28.08.2008 and a work/price bid was also submitted on the same date. After meetings were held on 08.09.2008 and 19.09.2008, a supplementary price bid for addition/deletion of jobs was submitted by the Applicant on 20.09.2008. After a meeting on 08.10.2008, the letter of Intent no. GSL/OS/1204&05/E-Gen/01/5166 was issued in favour of the Applicant and, subsequently on 10.10.2008, the Work Order no. 700214

was issued by the Respondents in favour of the Applicant to which there were subsequent amendments made therein on 14.10.2009 and 15.11.2009. There was correspondence addressed by the Applicants by different letters demanding the payment under the said contract and ultimately on 03.07.2013, the Applicants invoked the Arbitration under Clause XXI contained in the Work Order no. 700214C dated 05.11.2009. Thereafter, a legal notice was issued on 30.09.2013 re-invoking the Arbitration and calling upon the Respondent to appoint or nominate an Arbitrator within thirty days. On 25.11.2013, a reminder was sent to the Respondent to take steps towards the nomination of an Arbitrator and, accordingly, the Applicant addressed a letter dated 19.12.2013 seeking clarification on the appointment of the Arbitrator as no Arbitrator was appointed. On 11.02.2014 the Applicants addressed letter to the Respondents seeking clarification and ultimately filed the above application for the appointment of an Arbitrator.

5. The Respondents filed their affidavit in reply in the above Arbitration Application no. 14 of 2014 inter alia, contending that the application is misconceived in law as Mr. Justice A. P. Lavande (Retd.) has already been appointed as a sole Arbitrator in respect of Work Order

no. 700302 dated 21.05.2009 (first contract) for Yard 1196, Work Order no 70016 dated 22.11.2007 (Second Contract) for Yard no. 1204 and Work Order no. 700213 dated 09.10.2008 (Third Contract) in respect of Yard 1204 pursuant to invocation of the Arbitration Clause in the aforesaid three contracts by the Applicant vide letters dated 30.09.2013 and 19.10.2013. It is also their contention that the learned Arbitrator is already adjudicating upon the dispute raised by the Applicant in respect of the aforesaid three Contracts after the Applicant filed its three statements of claims. It is further their case that by way of counter statement of defence and counter claim, the Respondent has already referred the disputes regarding the remaining two contracts which are subject matter of the above two applications and, as such, according to the Respondents, there is no occasion to file the above two application which deserve to be dismissed. It is also their case that the Applicant by two letters both dated 11.02.2014 requested to appoint the same learned Arbitrator for the subject matter of the remaining two contracts which was not done in view of the counter claim filed by the Respondent taking note of the claims of the Applicant in the remaining two contracts and believing that all the five contracts have become subject matter of the three proceedings before the learned Arbitrator. It is also their case

without prejudice to their contention that disputes raised by the Applicant in all the five Contracts stand referred to the learned Arbitrator, that the Respondent would have no objection if the same learned Arbitrator is appointed in the aforesaid two applications if this Court is of the opinion that separate request for appointment of an Arbitrator was required more particularly as the Applicant themselves suggested that the same learned Arbitrator which would save time and costs to both the parties. For the other reasons stated therein, it was submitted by the Respondent that the above applications may be accordingly disposed of.

6. It is the contention of Shri Pai, learned Counsel appearing for the Applicant, that admittedly, there is an Arbitration Clause at clause no. 16 of the Agreement between the parties. The learned Counsel has thereafter taken me through the notice dated 30.09.2013 issued by the Applicant for appointment of Arbitrator. Learned Counsel further pointed out that by reply dated 28.10.2013, the Respondent refused to appoint an Arbitrator. Learned counsel has thereafter taken me through the legal notice dated 19.12.2013 to confirm whether Mr. Justice (Retd.) A. P. Lavande, would be appointed as the sole Arbitrator. Learned Counsel has thereafter taken me through another notice dated 11.02.2014, calling

upon the Respondents to agree to the appointment of Hon'ble Mr. Justice (Retd.) A. P. Lavande, as sole Arbitrator for the subject dispute. However, learned Advocate submitted that there was no response to such request, and, as such pointed out that the Applicant was forced to file the above application under Section 11(6) of the said Act and for appointment of an Arbitrator. The learned Counsel has relied upon the Judgment of the Apex Court reported in **2000(8) S.C.C. 151** in the case of ***Datta Switch Gears vs. Tata Finance Ltd., & anr.***

7. Shri S. G. Desai, learned Senior Advocate appearing for the Respondent, has disputed the said contentions. The learned Senior Advocate has pointed out that there were another three contracts between the Applicant and the Respondent wherein Justice Shri A. P. Lavande, (Retd), has already been appointed as an Arbitrator and the proceedings are in progress. Learned Senior Advocate further pointed out that though the Respondent has not acceded to the request of the Applicant to appoint the said Arbitrator but, however, the Respondents are now prepared to accept that Justice Shri A. P. Lavande, (Retd) be appointed an Arbitrator. Learned Senior Advocate further pointed out that in the other three matters which are pending adjudication before the sole Arbitrator, the

Respondents have filed a Counter Claim against the Applicant, inter alia, putting up the claim with regard to the subject matter of the Vessels of the other two Agreements including the subject agreement. Learned Senior Counsel further pointed out that as the Arbitrator is already ceased of the dispute raised in the Counter Claim, it would be appropriate that the same Arbitrator be appointed for the purpose of deciding the dispute. Learned Senior Advocate relied upon the Judgment of the Apex Court reported in *(2012) 12 SCC 581* in the case of *State of Goa vs. Praveen Enterprises*, to point out that in a Counter Claim before the Arbitrator any other claims matter which is beyond the dispute referred to the Arbitration, can be also raised by an opponent in the Counter Claim. Learned Senior Counsel as such points out that the question of appointing any other Arbitrator would not be justified.

8. Shri N. Pai, learned Counsel appearing for the Applicant, in reply has pointed out that the three contracts which are subject matters before the sole Arbitrator are independent of the said two contracts which are subject matter of this application. Learned Counsel further pointed that the alleged Counter Claim filed by the Respondent with regard to the subject matter of the Agreement are in any event not maintainable before

the said Arbitrator. Learned Counsel further pointed out that no issues have yet been framed nor points for determination in the proceedings before the Arbitrator. Learned Counsel further pointed out that the matter in issue before the sole Arbitrator in respect of the said three Agreements are completely different from the matter in controversy in the present Agreement as, according to him, in the present dispute, there is need of specialized knowledge on Marine Insurance Policies and Vessels which would have to be examined. Learned Counsel further pointed out that in such circumstances it would be appropriate to appoint Marine Expert as a sole Arbitrator. Learned Counsel has also brought to the notice of the Court the guidelines issued for International Arbitrations with regard to such marine disputes. Learned Counsel as such points out that any other Arbitrator may be appointed to adjudicate on the dispute in the present Agreement.

9. I have carefully considered the submissions of the learned Counsel and with their assistance, have also gone through the records. The undisputed facts are that there are two Work Orders in favour of the Applicant which are the subject matter of the above application. The fact that there is an Arbitration Agreement in both the Agreements and that

the Applicant had in fact issued a notice for appointment of an Arbitrator, is not disputed. Apart from that, the Respondents also do not dispute that after receipt of the notice for appointment of an Arbitrator, the Respondents did not in fact appoint any such Arbitrator to adjudicate on the dispute raised by the Applicant in respect of the subject two Agreements. In such circumstances, the only point for consideration is to ascertain whether the same Arbitrator who is in the process of deciding the dispute in respect of the other three Agreements should also be appointed as an Arbitrator in the present case as the dispute in connection with the subject Agreements have already been allegedly raised by the Respondents therein.

10. The relevant Arbitration clause in both the aforesaid Agreement reads thus :

"In the event of any question, dispute or difference arising under this agreement or in connection therewith the same shall be referred to the sole arbitration of the Chairman and Managing director of GSL or if his designation is changed or his office is abolished, then in such case, to the sole arbitration of the officer for the time being entrusted with the functions of Chairman & Managing Director of GSL, Vasco, by whatever

designation such officer may be called (hereinafter referred to as the said officer) and if the Chairman & Managing Director or the said officer is unable or unwilling to act a such to the sole arbitration, some other person appointed by the Chairman and Managing Director or the said officer. There will be no objection to any such appointment by the Chairman and Managing director or the said officer. There will be no objection to any such appointment that the arbitrator to any such appointment that the arbitrator is a Government servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant. The award of the arbitrator shall be final and binding on the parties. It is the terms of the agreement that in the event of such arbitrator to whom the matter is referred, being transferred or vacating his office or being unable to act for any reasons whatsoever, the said officer shall appoint another person to act as arbitrator in accordance with terms of the agreement and the person as appointed shall be entitled to proceed with reference from the stage of which it was left out by his predecessor. Upon any and every reference as foresaid the assessment of the cost of an incidental expense in the proceedings for the award shall be in discretion of the arbitrator. The venue of arbitration proceedings will be the office of the Chairman and Managing Director, Goa Shipyard, Ltd., Vasco da Gama, Goa or such other places the arbitrator may

decide."

11. The other clause which would be relevant to examine the contentions of the learned Counsel is the individuality clause in the contract which reads thus :

"XV : INDIVIDUALITY OF CONTRACT

this Order should be treated as an individual contract, shall not allow any general lien to you and shall not get prejudice in execution due to any situation arising out of some other contract that you may have with GSL."

12. On going through the Arbitration clause, it clearly provides that in the event of any questions, disputes or differences arising under the Agreement or in connection therewith, the same shall be referred to the sole Arbitrator. What is to be emphasised therein is that the disputes or differences should arise under the respective agreements. On reading the other clause referred to above it clearly provides that each of the Agreements/contracts executed between the Applicant and the Respondent are independent.

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 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.

14. In the present case, it is not disputed that though the

Applicant has called upon the Respondent to appoint an Arbitrator, the Respondent having failed to appoint such Arbitrator, it is not open to the Respondent in the present application to now contend that the Respondent now accepts the Arbitrator suggested by the Applicant in the original notice served in accordance with the Arbitration clause. In the present case, apart from the said terms in the Agreement of the Individuality of the contracts, the issues nor the points for determination settled by the Arbitrator have been produced to examine whether there is any overlapping or familiarity in the disputes raised in the present case. In such circumstances, taking note of the contention of the learned Counsel appearing for the Applicant, that the same learned Arbitrator if appointed, would delay the adjudication in the present case, I find that it would be appropriate to appoint some other person to act as a sole Arbitrator to decide and adjudicate the dispute in the present case. Merely because the Counter Claim filed by the Respondent allegedly also covers the claim of the Respondent in respect of the subject matter of the present agreement, would not by itself justify that the same Arbitrator be appointed in the present case. Apart from that, it is also pointed out by the learned Counsel appearing for that the Applicant that the dispute in the other three Agreements are distinct to the issues which

would arise in the present case. In such circumstances, the Judgment of the Apex Court cited by Shri S. G. Desai, learned Senior Counsel appearing for the Respondent, would not be applicable to the facts and circumstances of the peculiar case. The learned Arbitrator admittedly was not appointed to decide the differences or disputes arising in the subject agreements. In any event, in case based on the rival claims of the parties a legal jurisdictional or procedural impediment arise in proceeding before the Arbitrator being appointed with regards to the claims in the aforesaid Agreements, it is always open to the parties to raise such contention in terms of Section 16 of the said Act before the Arbitrator and to that extent, the rival contentions on this aspect are left open.

15. The Apex Court in a Judgment reported in **2014(5) Mh. L.J. 483** in the case of ***Today Homes and Infrastructure Pvt. Ltd., vs. Ludhiana Improvement Trust & anr.***, has observed at Para 13 thus :

"13. We have carefully considered the submissions made on behalf of the respective parties and we are of the view that the learned designated Judge exceeded the bounds of his jurisdiction, as envisaged in SBP and Co. (supra). In our view, the learned designated Judge was not required to undertake a detailed scrutiny of the merits and demerits of the

case, almost as if he was deciding a suit. The learned Judge was only required to decide such preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not, for the purpose of appointment of an arbitrator. By the impugned Order, much more than what is contemplated under Section 11(6) of the 1996 Act was sought to be decided, without any evidence being adduced by the parties. The issue regarding the continued existence of the arbitration agreement, notwithstanding the main agreement itself being declared void, was considered by the 7-Judge Bench in *SBP and Co. (supra)* and it was held that an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void."

Taking note of the said observations and as the issues framed in the proceedings by the learned Arbitrator with regard to the other three Agreements have not been produced and the counter statement of the Respondents to the claims put forward by the Applicant with regard to the subject Agreements are also not filed, a detailed inquiry with regard to the rival claims at this stage, would not at all be appropriate. Hence, it

would not be possible to examine the contention of Shri S. G. Desai, learned Senior Counsel appearing for the Respondent, that the issue involved would overlap.

16. With regard to the contention of the learned Counsel that specialized knowledge is required for the purpose of adjudicating the dispute in the present case, considering that an Arbitrator can appoint an expert under Section 26 of the said Act it required, I find that the question of appointing any Marine expert as an Arbitrator in the present case would not be justified. Proceedings for Arbitration have to be disposed of as expeditiously as possible and without any delay.

17. As there was no consensus between the parties in naming an Arbitrator, I find it appropriate to appoint Mr. Justice F. I. Rebello, (Retd. Chief Justice of Allahabad High Court, having residence at Dona Paula, Panaji, Goa, as the Sole Arbitrator to adjudicate on the disputes in respect of both the aforesaid Agreements which are the subject matter of the present proceedings, in accordance with law.

18. At this stage, Mr. Pavithran AV, learned Counsel appearing for the Respondent, seeks stay of the operation of the Order passed today

for a period of eight weeks as it is pointed out that the Hon'ble Supreme Court will be on Vacations from next week. Learned Counsel appearing for the Applicant, opposes such requests.

19. In the facts and circumstances of the case, the operation of the Order passed today is stayed for a period of eight weeks.

F. M. REIS, J.

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