

IN THE HIGH COURT OF BOMBAY AT GOA**APPLICATION FOR APPOINTMENT OF
ARBITRATOR NO.2 OF 2015**

Omkar Constructions,
F-2, Sangam Residency,
Subhashchandra Nagar,
Angol Belgaum-590006
represented through its
Proprietor Ulhas P. Desai,
major of age.

..... Petitioner.

V/s.

Philomena Periera,
major of age, wife of Elias Periera,
r/o. H.No.9, D'Monte Street,
Opposite Jain Sangh Hall,
Bandra West, Mumbai 400 050.

..... Respondent.

Ms. Gina Maria Almeida, Advocate for the petitioner.

Mr. Pramod K. Howal, Advocate for the respondent.

CORAM :- F.M. REIS, J.

Date : - 14th August, 2015.

ORAL ORDER :

Heard Ms. G.M. Almeida, learned Counsel appearing for
the petitioner and Mr. Pramod Howal, learned Counsel appearing for
the respondent.

2. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996.

3. The facts of the case are that there is an agreement executed between the petitioner and the respondent dated 29/9/2012. The agreement also has an arbitration clause. The dispute which is raised by the petitioner is covered by the arbitration clause and, consequently, the petitioner has filed this application for appointment of an arbitrator.

4. It is pointed out by the learned Counsel appearing for the petitioner that despite of a notice issued by the petitioner, the respondent did not appoint an Arbitrator and, as such, the petitioner was forced to file the above application. The learned Counsel appearing for the respondent has opposed the said application on the ground that the respondent has already filed a complaint before the State Consumer Dispute Redressal Commission, Goa, and, as such, according to him, the question of appointing an Arbitrator on the basis of the application filed by the petitioner would not arise. The learned Counsel further pointed out that the petitioner has also filed an application under Section 8 of the said Act of 1996 to refer the dispute

raised by the respondents before the Consumer Court to the Arbitrator, which application came to be allowed by the Consumer Court by order dated 10th September, 2014. The learned Counsel further points out that the respondents have preferred an appeal against the said order of the Consumer Court which is pending before the National Consumer Disputes Redressal Commission, New Delhi. The learned Counsel further points out that as the National Commission is seized of the dispute, it would not be proper for this Court to appoint an Arbitrator in terms of Section 11(6) of the Act of 1996. The learned Counsel further points out that the issues would overlap and, as such, there is no justification to allow the application under Section 11(6) of the Act of 1996. The learned Counsel further submits that in case an Arbitrator is appointed, there would be multiplicity of the proceedings and, as such, there is no justification to appoint an Arbitrator. The learned Counsel, in support of his submissions, has relied upon a Judgment of the Apex Court reported in (2008) 3 SCC 355 in the case of ***United India Insurance Co. Ltd.. vs. Ram Prakash Raturi.*** The learned Counsel, as such, points out that the application be rejected.

5. Learned Counsel appearing for the petitioner points out that the dispute which is raised by the petitioner is not covered by the

claim put forward by the respondent before the Consumer Court. The learned Counsel further points out that the claim of the petitioner is independent of the claim put forward by the respondent before the Consumer Court. The learned Counsel further submits that all the contentions which have been raised by the respondent can be raised before the Arbitrator who could decide such aspects. The learned Counsel further submits that at the stage of appointing an Arbitrator in terms of Section 11(6) of the Act of 1996, the Court has to only examine whether there is an arbitration clause and whether the dispute raised is referable to arbitration in terms of the agreement. The learned Counsel, in support of her submissions, has relied upon a Judgment of the Apex Court reported in 2008 (15) Scale 497 in the case of *VISA International Ltd. V/s. Continental Resources (USA) Ltd..*

6. I have considered the submissions of the learned Counsel appearing for the parties and I have also gone through the records. Taking note of the contentions of the learned Counsel appearing for the petitioner that the dispute which is raised by the petitioner is independent of the claim of the respondent before the Consumer Court, I find that the agreement entered into between the parties has an

arbitration clause and as the dispute raised by the petitioner, prima facie, appears to be covered by such arbitration clause, there is no reason to refuse the appointment of an Arbitrator. The contention of the learned Counsel appearing for the respondent to the effect that the arbitrator would not be competent to proceed with the arbitration as a consumer dispute has been raised by the respondent before the Consumer Court and such matter is pending before the National Commission, is a matter which the respondent can also raise before the Arbitrator. In terms of Section 16 of the Act of 1996, the Arbitrator can also decide whether the Arbitrator is competent to decide the matter in controversy. Keeping all such contentions of the respondents open, I find that there is no ground to refuse the application for appointment of an Arbitrator.

7. The Judgment of the Apex Court in the case of ***United India Insurance Co. Ltd.. vs. Ram Prakash Ratur (supra)***, relied upon by the learned Counsel for the respondent is not applicable to the facts of the case. There is nothing on record to suggest that the petitioner sought to put forward their claim before the Consumer Court. Apart from that, merely because an appeal is pending before the Appellate Forum against an order allowing the application under

Section 8 of the Act of 1996, would not preclude the petitioner herein to file an application for appointment of an Arbitrator to get their claims which are not subject matter of the proceedings before the Consumer Court being adjudicated in terms of law. In the present case, the petitioners are seeking to get their claims against the respondent being adjudicated by an Arbitrator and not the alleged dispute put up by the respondent before the Consumer Court. In any event, this aspect cannot be examined by this Court whilst deciding an application under Section 11(6) of the Act of 1996. The Apex Court in the Judgment reported in (2014) 5 SCC 68 in the case of ***Today Homes and Infrastructure Private Limited vs. Ludhiana Improvement Trust and another*** has observed at para 16 thus :

“ **16.** It may be profitable to remind ourselves of the observations made by the seven-Judge Bench in *SBP & Co. ((2005) 8 SCC 618)*, regarding what the Chief Justice is really required to decide on an application being made to him under Section 11(6) of the 1996 Act. In para 39 of the judgment, it has been stated that obviously the Chief Justice has to first decide his own jurisdiction and whether the party concerned has approached the right High Court. He also has to decide whether there is an arbitration agreement and as to whether the person who has made the request before him, is a party to such agreement.

Their Lordships further indicated that it was necessary to mention that the learned arbitrator could also decide the question as to whether the claim was a dead one or a long-barred claim, that was sought to be resurrected. Summing up its views, in para 47 of the judgment ((2005) 8 SCC 618) the seven-Judge Bench, while holding that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the 1996 Act is not an administrative power but a judicial one, also held that the Chief Justice or the Designated Judge would have the right to decide the preliminary aspects, as indicated hereinbefore.”

Taking note of the said observations, I find that as there is an arbitration clause in the Agreement and there is no dispute that the alleged claim of the petitioner is covered by the arbitration clause, the petitioners are entitled for appointment of an Arbitrator.

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

ORDER

(I). The application is allowed.

(II) Shri M.S. Keni, retired City Civil Judge, Mumbai having office at Margao, Goa is appointed as the sole Arbitrator to decide the dispute between the parties in the light of the observations made herein

above.

(III) All contentions of both the parties are left open.

F.M. REIS, J.

ssm.