

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 21 OF 2015

M/s. Technogem Consultants Pvt. Ltd

.....Petitioner

: V/S :

Pune Municipal Corporation

.....Respondent

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Mr. N.N. Bhadrashete, Advocate for the petitioner.

Mr. Abhijeet P. Kulkarni, Advocate for the respondent.

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Coram :- Smt. R.P. SondurBaldota, J.

4th September, 2015.

P.C. :-

1). This petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator. The clause for arbitration contained in the agreement between the parties is as follows :-

“Any dispute between the parties as to matters arising pursuant to this contract which cannot be settled amicably within thirty (30) days after receipt of request by either

parties, for such amicable settlement, then either of the parties shall be entitled to terminate the agreement. Moreover, either of the parties may refer such dispute to the Municipal Commissioner, Pune Municipal Corporation, being the sole arbitrator and his decision shall be final and shall be binding upon all the Parties.”

2). The petitioner complains that when the dispute arose over non-payment of the work done by the petitioner, it had by its letter dated 19th December, 2013 requested the Municipal Commissioner the named arbitrator in the agreement to adjudicate upon the dispute in accordance with the arbitration clause. But, no response was received to the letter. Thereupon, the petitioner filed the present petition under Section 11 for appointment of an independent person as an arbitrator, preferably a retired Judge to adjudicate the disputes between the parties. The respondent has, filed its affidavit-in-reply in which it states that the Municipal Commissioner of the respondent is ready to act as an Arbitrator as per the provisions of the agreement.

3). Mr. Badrashete, the learned Advocate appearing for the petitioner, submits that lack of response on the part of the Municipal Commissioner to the letter dated 18th December, 2013 of the petitioner, would amount to forfeiture of the clause of arbitration in the agreement. He seeks to rely upon the two decisions of the Apex Court i.e. (1) **Union of India Versus. Singh Builders Syndicate, reported in (2009) 4 Supreme Court 523**, and (2) **Punj Lloyd Ltd Versus. Petronet MHB**

Ltd, reported in (2006) 2 SCC page 638 which according to him support his contention. Mr. Kulkarni, the learned Advocate appearing for the respondent, submits in reply that the present view of the Apex Court in such situation has been expressed in **ACE Pipeline Contracts (P) Ltd Versus. Bharat Petroleum Corporation, reported in (2007) 5 SCC page 304** wherein the decisions cited by Mr. Badrashette have been specifically discussed. After considering the argument as regards the forfeiture of the arbitration clause to appoint a specific arbitrator, the Apex Court at para-20 and 21 observes as under :-

“20. It may also not be out of place to mention that we are aware of the departmental lethargy in making appointment of arbitrators in terms of the arbitration clause. Therefore, mandamus can be issued by the courts in exercise of powers under Section 11(6) of the Act but the demand should be in the event of failure by the authorities to appoint arbitrators within the reasonable time. Courts are not powerless to issue mandamus to the authorities to appoint arbitrators as far as possible as per the arbitration clause. But in large number of cases, if it is found that it would not be conducive in the interest of parties or for any other reasons to be recorded in writing, choice can go beyond the designated persons or institutions in appropriate cases. But it should normally be adhered to the terms of arbitration clause and appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties agree for common name.

21. In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes

wide open it cannot wriggle out of the situation that if any person of the respondent BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under Section 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.”

4). From the above decision, it is clear that, ordinarily there should be adherence to the terms of the arbitration clause and the arbitrator named therein be appointed. The exception carved out by the Apex Court to the ordinary course of action is for exceptional circumstances that must be justified by recording reasons. In the case on hand, no exceptional circumstance has been pointed out by the petitioner for not referring the matter to the arbitrator named in the arbitration agreement between the parties. The only allegation is of, delay in the action. The Apex Court in the decision cited, has already given concession to the departmental lethargy in making appointment of arbitrators in terms of the arbitration clause. That lethargy in the case on hand, need not cause prejudice to the petitioner because in the affidavit-in-reply to the present petition, the respondents have expressed their agreement for arbitration by the named arbitrator. Hence, the petition is disposed off by appointing the Municipal Commissioner of Pune Municipal Commissioner as the Arbitrator to arbitrate the disputes between the parties. Considering the fact that it is an old dispute

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between the parties having arisen in the year 2007, the Arbitrator is requested to dispose the same off expeditiously. The petitioner to appear in the office of the Municipal Commissioner on 21st September, 2015 so that the preliminaries of issuance of notice to the petitioner by the Arbitrator can be dispensed with and the Arbitrator with the assistance of the parties can plan the schedule of arbitration proceedings.

(SMT. R.P. SONDURBALDOTA, J)

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CERTIFICATE

. Certified to be true and correct copy of the original signed order.