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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4442 OF 1999

M/s.Hotel Pride Executive Pvt.Ltd .. Petitioner

Vs.

M/s.Kelkar & Kelkar .. Respondent

Mr.R.D.Soni i/b Mr.Pankaj Shah, Advocate for the Petitioner.
Mr.Nitin P.Deshpande, Advocate for the Respondent.

CORAM : R. G. KETKAR, J.
RESERVED ON : 06th JULY, 2015
PRONOUNCED ON : 06th AUGUST, 2015

P.C. :

. Heard Mr.R.D.Soni, learned Counsel for the petitioner and Mr.Nitin P.Deshpande, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant has challenged the judgment and order dated 15/06/1999 passed by the Civil Judge, Senior Division, Pune below Exhibit 10 in Regular Civil Suit No. 1022 of 1996. By that order, the learned trial Judge allowed the application made by the respondent, hereinafter referred to as plaintiff, for passing decree in terms of the award made by the arbitrator on 07/06/1996. The parties shall hereafter be referred to as per their status before the trial Court. The relevant and material facts that are necessary for disposal of the present Petition, briefly stated, are as under.

3. The defendant herein proposed to construct 4th & 5th floors and car park at their hotel 'Pride'. The defendant, therefore, invited quotations from various construction contractors including the plaintiff. The terms and conditions of the work were recorded in the letter dated 14/05/1990. Articles of Agreement were signed and entered into by and between the plaintiff and the defendant on 04/06/1990 recording terms and conditions which also includes the arbitration clause.

4. It is the case of the plaintiff that in terms of clause 56 of Articles of Agreement dated 04/06/1990, it had sent a letter on 24/02/1994 to the defendant, copy thereof was marked to M/s.Vishwakumar Vishwanath Architects Pvt.Ltd., (for short 'Architects') calling upon the Architects to give decision/settlement on the various issues raised in the enclosure within 28 days of the letter as the matters were kept in abeyance too long. On 24/10/1994, the plaintiff issued reminder to the Architects for settling the issues at the earliest. On 09/11/1994, the Architects in turn, informed the plaintiff that it was not possible for them to participate in the subject matter under reference. In other words, in terms of clause 56 of Articles of Agreement, the Architects withheld its decision.

5. It is the case of the plaintiff that on 05/01/1995, it had caused to issue notice through advocate to the defendant setting out

the background and in paragraph 4 thereof it was stated that the plaintiff desires to refer the dispute to the sole arbitration of R.G.Pundlik, ARIBA, FILLA, FIV who has agreed and consented to act as an arbitrator. It was further set out therein that letter dated 24/02/1994 should be read as part and parcel of the notice. The defendant replied on 10/01/1995. The defendant did not accept appointment of Shri R.G.Pundlik as a sole arbitrator and further informed that they will not bound by the decision of the sole arbitrator.

6. On 24/06/1995, the plaintiff addressed a letter to Shri R.G.Pundlik, copy whereof was marked to the defendant. In that letter, request was made to Shri R.G.Pundlik to act as a sole arbitrator in the matter of dispute and differences in the contract Hotel Executive Ashok and sought permission to nominate him on the panel. The said letter was received by the defendant at 3.00 p.m. on 26/06/1995. It appears that on 29/06/1995, Shri R.G.Pundlik, Architect sent a letter bearing No. ARPN -695 dated 29/06/1995 to the plaintiff and defendant. On 03/07/1995, defendant addressed a letter to the plaintiff acknowledging receipt of the letter dated 24/06/1995 sent by them to the Architect, copy whereof was sent to the defendant. The defendant informed plaintiff that they are not accepting appointment of Shri R.G.Pundlik as a sole arbitrator.

7. On 29/07/1995, defendant addressed a letter to Shri R.G.Pundlik. In that letter, reference was made to letter No. ARBN-695 dated 29/06/1995 addressed by Shri R.G.Pundlik to the defendant. It was reiterated that his appointment as a sole arbitrator was not agreed and accepted by the defendant and they will not bound by the decisions taken by sole arbitrator. The right was reserved to appoint Arbitrator on behalf of the defendant as per clause 56 of the agreement. A request was made not to proceed with arbitration proceedings.

8. On behalf of the plaintiff, notice dated 11/08/1995 was served through advocate on the defendant. The reference was made to notice dated 05/01/1995 sent by the plaintiff and reply dated 10/01/1995 of the defendant. It was set out therein that defendant had reserved right to appoint an arbitrator. It was stated that till date defendant has not given any reply in detail. As the defendant did not choose to appoint any person as an arbitrator, it is clear that defendant does not intend to appoint any person as an arbitrator. It was informed that plaintiff will now direct Shri R.G.Pundlik to proceed with the arbitration according to law.

9. The plaintiff again issued notice dated 24/08/1995 through advocate raising grievance that even after so many months, defendant did not bother to appoint any arbitrator as represented by the defendant. Thus, defendant did not have any intention to

appoint anyone in that behalf. The plaintiff has therefore written to Shri R.G.Pundlik that he had been appointed as an arbitrator and to proceed with the arbitration proceedings.

10. It appears that the proceedings were conducted before Shri R.G.Pundlik on 30/10/1995, 06/11/1995, 11/11/1995, 16/11/1995, 25/11/1995, 16/03/1996, 18/03/1996, 09/04/1996, 29/04/1996, 03/05/1996, 04/05/1996, 04/06/1996. On 07/06/1996, the arbitrator made an award.

11. The plaintiff thereafter filed application at Exhibit 10 requesting the Court to pass judgment in view of an award made by the arbitrator. By the impugned order, the learned trial Judge allowed the application and decreed the Suit in terms of award made by the arbitrator on 07/06/1996. The learned trial Judge also directed to draw decree in terms of the award.

12. In support of this Petition, Mr.Soni submitted that the learned trial Judge has not at all considered clause 56 of the Articles of Agreement. He submitted that clause 56 provides that all the disputes and differences of any kind whatsoever arising out of or in connection with the contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the Architect who shall state his decision in writing. Such decision may

be in the form of a Final Certificate or otherwise. The decision of the Architect with respect to any of the expected matters shall be final and without appeal. But if either the owner or the contractor is dissatisfied with the decision of the Architects on any matter, question or dispute of any kind (except any of the expected matters) or as to withholding by the Architects of any certificate to which the contractor may claim to be entitled then and in any case either party (the owner or the contractor) may within 28 days after receiving notice of such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of a single arbitrator being a fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single arbitrator to the arbitration of two arbitrators both being fellows of the Indian Institute of Architects one to be appointed by each party, which arbitrator shall before taking upon themselves the burden of reference appoint an Umpire.

13. Mr.Soni submitted that clause 56 also lays down that the submission shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1940 or any modification

thereof for the time being in force. The plaintiff had issued notice through advocate on 05/01/1995 referring the dispute to the sole arbitration of Shri R.G.Pundlik. The defendant replied that letter on 10/01/1995 and did not accept appointment of Shri R.G.Pundlik as a sole arbitrator. Mr.Soni submitted that in terms of clause 56, plaintiff did not nominate any Architect who is a fellow of Indian Institute of Architects. In view thereof, defendant had no occasion to nominate their arbitrator and consequently, the arbitrators did not appoint an Umpire. He submitted that though these objections were raised in the reply filed by the defendant as also the submissions were advanced before the learned trial Judge, they were not dealt with in the impugned order.

14. On the other hand, Mr.Deshpande supported the impugned order. He submitted that after the reply sent by defendant on 10/01/1995, the plaintiff nominated Shri R.G.Pundlik as their arbitrator. The defendant, however, did not nominate their arbitrator. He also relied upon Section 9(b) of the Arbitration Act, 1940 and submitted that defendant failed to appoint an arbitrator within 15 clear days after the service of plaintiff's notice in writing and therefore, the arbitrator appointed by the plaintiff became the sole arbitrator in the reference and the award made by the same arbitrator is binding on both parties as if he had been appointed by consent. He, therefore, submitted that no case is made out for

invocation of powers under Article 227 of the Constitution of India.

15. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, on 05/01/1995, plaintiff had issued notice through advocate setting out therein that plaintiff desires to refer the dispute to the sole arbitrator. The defendant replied that letter on 10/01/1995 and did not accept the appointment of Shri R.G.Pundlik as a sole arbitrator. On one hand, defendant contends that thereafter plaintiff did not nominate arbitrator on their part and consequently, defendant could not appoint arbitrator on their part. The arbitrator so appointed, in turn, could not appoint an Umpire. On the other hand, plaintiff contends that after reply dated 10/01/1995, plaintiff had nominated Shri R.G.Pundlik as their arbitrator and the defendant failed to nominate their arbitrator.

16. It is, therefore, necessary to consider clause 56 of the Articles of Agreement. Clause 56 reads as under :

“56. All dispute and differences of any kind whatever arising out of or in connection with the Contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the Contract) shall be referred to and settled by the Architect who shall state his decision in writing. Such decision may be in the of a Final Certificate or otherwise. The decision of the Architect with respect of any of the expected matters shall be final and without appeal. But it either the Owner or the Contractor be dissatisfied with the decision of the Architect or any

matter, question or dispute of any kind (except any of the expected matters) or as to withholding by the Architect of any certificate to which the Contract may claim to be entitled then and in any case either party (the owner or the Contractor) may within 28 days after receiving notice of such decision give a written notice to the other party through the Architect requiring that such matters in dispute be Arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the Arbitration and final decision of a single Arbitrator being a Fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator to the arbitration of two Arbitrators both being fellows of the Indian Institute of Architects one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire.

The Arbitrator, the Arbitrators or the Umpire as the case may be shall have power to open up revise and revise any certificate, opinion, decision, requisition or notice save in regard to the expected matters referred to in clause 55 and to determine all matters in dispute which shall be submitted to him or them and of which notice shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every of any such reference the cost of and incidental to the reference and Award receptively shall be in the direction of the Arbitrator or Arbitrators or the Umpire the case may be who may determine the amount thereof or direct the same to be taxed in between Attorneys and Client or as between party and party and shall direct by whom and to whom and in that manner the same shall be borne and paid. This submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration Act 1940 or any modification thereof for the time being in force. The Award of the Arbitrator or Arbitrators or the Umpire as the case may be shall be final and binding on the parties. Such reference except as to the withholding by the Architect of any Certificates under clause 49 to which the Contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works or until after the practical cessation of the works

arising from any cause unless with the written consent of the Owner and the Contractor. Provided always that the Owner shall not withhold the payment of an Interim Certificate nor the Contractor except with the consent in writing of the Architect in any way delay the carrying out of the works by reason of any such matter, question or dispute being referred to Arbitration but shall proceed with the work with all due diligence and shall until the decision of the Arbitrator or the Arbitrators or the Umpire as the case may be, given abide by the decision of the Architect and no award of the Arbitrator or the Arbitrators or the Umpire as the case may be shall relieve the Contractor of his obligations to adhere strictly to the Architects, instructions, with regard to the actual carrying out of the works. The Owner and the Contractor hereby also agree that Arbitration under this clause shall be a condition precedent to any right of action under the Contract.”

17. In the present case, it is not in dispute that on 24/02/1994, plaintiff had sent a letter to the defendant, copy whereof was marked to the Architects, calling upon the Architects to give decision/settlement on the various issues raised therein. On 09/11/1994, the Architects in turn, informed the plaintiff that it was not possible for them to participate in the subject matter under reference. Thus, in terms of clause 56, it amounts to the Architects withholding the certificate which the plaintiff being Contractor had claimed.

18. Mr.Soni submitted that as the Architects withheld certificate, the parties have to follow procedure laid down in clause 56. The parties have to refer the dispute or difference to the arbitration and final decision of a single arbitrator being a fellow of

the Indian Institute of Architects to be agreed upon and appointed by both parties. In case of disagreement as to the appointment of a single arbitrator to the arbitration of two arbitrators both of being fellows of the Indian Institute of Architects one to be appointed by each party, which arbitrators shall before taking upon the burden of reference appoint an Umpire. Mr.Soni submitted that in the present case, defendant did not accept appointment of Shri R.G.Pundlik as a sole arbitrator. In the event of disagreement, the plaintiff had to nominate their arbitrator and the defendant thereafter had to nominate their arbitrator. In the present case, the plaintiff did not nominate their arbitrator. As against this, Mr.Deshpande submitted that the plaintiff nominated Shri R.G.Pundlik as their sole arbitrator and there was failure on the part of the defendant to nominate their arbitrator. In view of Section 9(b) of the Arbitration Act, 1940, as defendant failed to appoint an arbitrator within 15 days, the arbitrator appointed by plaintiff became the sole arbitrator.

19. Perusal of the impugned order shows that the learned trial Judge has not considered clause 56 extracted hereinabove. The learned trial Judge has not considered the case of the plaintiff that after the disagreement over the appointment of a sole arbitrator, plaintiff had nominated their arbitrator and there was failure on the part of the defendant in nominating their arbitrator. Likewise, the learned trial Judge failed to consider the case of the defendant that

after the disagreement, plaintiff did not nominate their arbitrator. That apart, the learned trial Judge also did not deal with the contention raised in the say filed by the defendant that the arbitrator who made an award was not appointed with the consent of the parties. The learned trial Judge has also not considered the correspondence exchanged between the parties and more particularly referred hereinabove. In view thereof, it is not possible to uphold the impugned order passed by the learned trial Judge. It is, therefore, necessary to set aside that order thereby restoring application for deciding it afresh. Hence, following order.

- i) The impugned order dated 15/06/1999 is quashed and set aside and application Exhibit 10 in Regular Civil Suit No. 1022 of 1996 is restored to the file of the trial Court.
- ii) The parties agree that they will appear before the learned trial Judge on 01/09/2015 and for that purpose, fresh notice need not be issued to them.
- iii) The learned trial Judge is requested to decide the application in accordance with law and on the basis of the material on record and also deal with the contentions recorded herein as also any other contention that may be advanced by the parties within 2 weeks from the date of the appearance of the parties.
- iv) The learned trial Judge will also pass appropriate order in relation to the amount of Rs.12,46,663/- deposited by the petitioner and withdrawn by the respondent subject to

furnishing security.

20. It is made clear that as I have remanded the matter for de novo consideration, the application shall be decided uninfluenced by the observations made herein. All the contentions of the parties on merits are expressly kept open. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)