

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO. 252 OF 2014

Mohan Balkrishna Lulla)
Adult, Aged – years, Indian Inhabitant,)
residing at Flat No.302, No.302,)
Building No.3A Manekchand Malaabar)
Hill, Lullanagar, Part (Kondhwa),)
Pune – 411 040) **..... Petitioner**

VERSUS

Shailesh Dhairyavan,)
Proprietor of Dhairyawan Developers)
Having his address at “Dhairya House”)
242 7th Road, Khar (West),)
Mumbai – 400 052) **..... Respondent**

Mr.Atul Damle, Senior Advocate, a/w. Ms.Bina Jariwala, i/b. Aurama Law for the Applicant.

Mr.Rahul Narichania, Senior Advocate, a/w. Mr.Shardul Singh, i/b.B.Amin & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 12th JUNE, 2015

JUDGMENT

By this application filed under section 11 of the Arbitration and Conciliation Act, 1996, the applicant seeks appointment of the arbitrator to adjudicate the dispute and differences between the parties and to dispose of the arbitration expeditiously.

2. It is not in dispute that initially there was no arbitration agreement recorded between the parties. The applicant had filed a suit (1927 of 2007) against the respondent herein in this court. The parties filed consent terms in the said suit on

3rd October, 2008. Under clause 8 of the consent terms the petitioner and the respondent no.1 agreed to refer disputes to the arbitration of Mrs.Justice Sujata Manohar, a former Judge of the Supreme Court. Clause 8 of the said consent terms reads as under :-

8) The Plaintiff and Defendant No.1 agree to and hereby do refer to Arbitration of Mrs.Justice Sujata Manohar (Retd.) the dispute as to (i) the difference in carpet area of the five flats agreed to be allotted as per the Development Agreement dated 27/12/2004 being Exhibit "B" to the Plaint by Defendant No.1 to the Plaintiff and his family members (i.e. 800 sq.ft. (carpet area) as provided in the said Development Agreement dated 27/12/2004) and the actual carpet area of the said Five Flats hereby allotted and handed over and (ii) the valuation of the deficient area, if any, and the damages for the same. The learned Arbitrator to make an Award with regard to compensation and the damages to be paid by Defendant No.1 to the Plaintiff for the deficient area, if any. Defendant No.1 shall not raise any dispute as to the jurisdiction of the Arbitrator. The Arbitrator shall decide the same as expeditiously as possible in accordance with law and under the provisions of Arbitration & Conciliation Act, 1996.

3. This court accordingly disposed of the said suit by taking the consent terms on record by an order dated 8th October, 2008. In paragraph (3) of the said order, it is provided that in respect of the dispute regarding compensation, the matter by consent is referred to Mrs.Justice Sujata Manohar (Retired) for arbitration.

4. Pursuant to the said order passed by this court, the parties appeared before the learned arbitrator. The pleadings were filed by both the parties. The matter was however adjourned on some occasions for giving an opportunity to the applicant to file an affidavit of evidence. It is the case of the applicant that due to unavoidable circumstances, the applicant could not file affidavit of evidence

before the learned arbitrator. On 22nd January, 2011 the learned arbitrator tendered the resignation and requested the parties to take away papers filed by them.

5. The applicant by his advocate's notice dated 31st May, 2012 called upon the respondent to fix a meeting for the purpose of appointing a common arbitrator to settle the dispute and differences in view of the erstwhile arbitrator having reclused herself to act as an arbitrator. The respondent vide their advocates' letter dated 5th June, 2012 refused to appoint an arbitrator on the ground that there was no provision for appointing another arbitrator and also alleging that the applicant had abandoned his right of arbitration. The applicant thus filed this application for filling up the vacancy arisen in view of the resclusal of the learned arbitrator to act as an arbitrator.

6. Mr.Narichania, learned senior counsel appearing for the respondent opposes this application on the ground that initially there was no arbitration agreement entered into between the parties. The parties had agreed to refer the disputes to the named arbitrator recorded in clause 8 of the consent terms with an intention to see that the disputes were resolved expeditiously. He submits that the said clause does not provide for filling up of the vacancy in case of the named arbitrator reclusing to act as an arbitrator. He submits that the intention of the parties is clear that the vacancy should not be filled in even if the learned arbitrator has reclused to act as an arbitrator.

7. It is submitted by the learned senior counsel that in any event the applicant had committed gross delay in conducting the arbitral proceeding. In support of this submission, learned senior counsel invited my attention to some of the minutes of the meeting of the arbitral proceedings and submits that though several

opportunities were granted by the learned arbitrator to file affidavit of evidence, the applicant did not file any affidavit and thus the applicant has abandoned the arbitration proceedings. He submits that thus Hon'ble Chief Justice or his designate shall not appoint any arbitrator in place of the erstwhile arbitrator who has secluded herself to act as an arbitrator.

8. Mr.Damle, learned senior counsel appearing on behalf of the applicant submits that the learned arbitrator was appointed by this court in view of the agreement recorded in the consent terms. Once the learned arbitrator appointed by this court has secluded to act as an arbitrator, such vacancy can be filled in by applying the provisions of section 15 read with section 11 of the Arbitration and Conciliation Act. Since the respondent has refused to appoint an arbitrator, this application filed under section 11 read with section 15 is maintainable. He submits that the parties have entered into an arbitration agreement, the parties will be governed by the provisions of the Arbitration and Conciliation Act for all the purposes.

9. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Yashwith Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd. and another, (2006) 6 SCC 204*** and in particular paragraphs 4 and 5 which read thus :-

4. In our view, the learned Chief Justice and the Division Bench have rightly understood the scope of Section [15](#) of the Act. When the arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorized originally by the arbitration agreement, promptly appointed a substitute arbitrator. It is true that in the arbitration agreement there is no specific provision authorizing the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the

originally appointed arbitrator withdraws from the arbitration. But, this so called omission in the arbitration agreement is made up by the specific provision contained in Section [15\(2\)](#) of the Act. The withdrawal of an arbitrator from the office for any reason is within the purview of Section [15\(1\)\(a\)](#) of the Act. Obviously, therefore Section [15\(2\)](#) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section [15\(2\)](#) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term "rules" in Section [15\(2\)](#) obviously referred to the provision for appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section [11](#) of the Act so as to attract the jurisdiction of the Chief Justice under Section [11\(6\)](#) of the Act for appointing a substitute arbitrator. Obviously, Section [11\(6\)](#) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section [15\(2\)](#) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.

5. Since here, the power of the Managing Director of the respondent is saved by Section [15\(2\)](#) of the Act and he has exercised that power on the terms of the arbitration agreement, we see no infirmity either in the decision of the learned Chief Justice or in that of the Division Bench. We do not think it necessary in this case to go into the question whether the Writ Petition before the High Court was maintainable on the basis that it challenged an order of the Chief Justice rendered on

4.3.2005, prior to the date of the decision in **SBP & Co. v. Patel Engineering Ltd. and Anr.** (supra) rendered on 26.10.2005.

10. Learned senior counsel also placed reliance on the judgment of Supreme Court in case of ***ACC Limited (Formerly known as the Associated Cement Company Limited) vs. Global Cements Limited, (2012) 7 SCC 71*** and in particular paragraphs 20, 21, 29 and 30 and submits that since there is no prohibition in the said arbitration clause recorded by the parties in the consent terms from filling up the vacancy having arisen in view of the learned arbitrator having reclused herself to act as an arbitrator the learned Chief Justice or his designate has power to fill up such vacancy under section 15 read with section 11. Paragraphs 20, 21, 29 and 30 read thus :-

20. Section [11\(6\)](#) would not apply only if it is established that parties had intended not to supply the vacancy occurred due to the inability of the arbitrator to resolve the dispute or due to whatever reasons but that intention should be clearly spelt out from the terms of the arbitration clause in the Agreement.

21. The legislative policy embodied in Sections [14](#) and [15](#) of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hands off and there is no question of persuading or pressurising the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the court's duty is to give effect to the policy of law that is to promote efficacy of arbitration.

29. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes; in such a situation also, it is possible for the parties to appoint a

substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.

30. We are of the view Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under Clause 21 of the agreement.

11. A perusal of the record indicates that initially there was no arbitration agreement entered into between the parties. The applicant had filed a suit in this court against the respondent. It is not in dispute that in the said suit, the parties had entered into consent terms. In clause 8 of the said consent terms, the applicant and the respondent had agreed to refer to the arbitration of Mrs. Justice Sujata Manohar, former judge of Supreme Court the dispute referred therein. The parties thereafter acted upon the arbitration agreement and filed pleadings before the learned arbitrator.

12. The learned arbitrator reclused herself and resigned. The vacancy thus has arisen. In my view the parties can enter into an arbitration agreement at any stage in any proceedings including the suit. Once the parties have entered into an arbitration agreement even in a pending suit, the rights and obligations of the parties would be governed by the provisions of the Arbitration and Conciliation Act, 1996 for all the purposes including for the purpose of filling up of the vacancy having arisen in view of the reclusal by the learned erstwhile arbitrator. I am thus not inclined to accept the submission made by the learned senior counsel for the respondent that the arbitration agreement recorded in clause 8 of the

consent terms has come an end or that the parties did not intend to fill up the vacancy in future in case the learned arbitrator recluses to act as an arbitrator or in a similar circumstances.

13. Supreme Court in case of ***Yashwith Constructions (P) Ltd. (supra)*** has held that if an arbitrator resigns or fails to act in accordance with the arbitration agreement, the substituted arbitrator can be appointed under section 15(2) of the Arbitration and Conciliation Act. The Supreme Court has clarified that the substitute arbitrator can be appointed in accordance with the rules that were applicable for the appointment of the arbitrator originally and it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It is clarified that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. In my view there is no merit in the submission of the learned senior counsel appearing for the respondent that since in this case there are no rules, section 15(2) would not be attracted. In my view the said submission is in teeth of the principles laid down by the Supreme Court in case of ***Yashwith Constructions (P) Ltd. (supra)*** and is rejected.

14. In my view since the parties had entered into an arbitration agreement, the vacancy having arisen will have to be filled in and the arbitrator will have to be substituted by appointing an arbitrator under section 15(2) read with section 11 of the Arbitration and Conciliation Act. I am respectfully bound by the judgment of Supreme Court in case of ***Yashwith Constructions (P) Ltd. (supra)***.

15. Supreme Court in case of ***ACC Limited (Formerly known as the Associated Cement Company Limited) (supra)*** has dealt with the similar situation and has

held that the vacancy under section 15 would not be filled in only if a prohibition or debarment in resolving the question or dispute or differences between the parties in case of death of the named arbitrator or their non-availability by a substitute arbitrator is recorded in the agreement.

16. Supreme Court has also held that in the absence of such debarment or prohibition of appointment of substituted arbitrator, it is duty of the court to give effect to the policy of law that is to promote efficacy of arbitration. I am respectfully bound by the judgment of the Supreme Court in case of **ACC Limited (supra)** which in my view squarely applies to the facts of this case. On perusal of the arbitration agreement, in my view neither there is any prohibition or debarment nor parties have intended not to appoint a substitute arbitrator.

17. Insofar as submission of the learned senior counsel that there is gross delay on the part of the applicant in conducting the arbitration proceedings and thus applicant has abandoned his right proceeded with the arbitration and therefore the learned designate of the Chief Justice shall not appoint an arbitrator is concerned, it is not in dispute that though there was some delay on the part of the applicant before the learned arbitrator, the respondent did not apply for termination of the mandate before the learned arbitrator by making an application. In my view, there is thus no merit in this submission of the learned senior counsel.

18. Mr.Damle, learned senior counsel for the applicant submits that the applicant would co-operate with the respondent and with the learned arbitrator and would not seek any unnecessary adjournments. Assurance of the learned senior counsel is accepted.

19. I, therefore, pass the following order :-

Mr.Justice Dr.S.Radhakrishnan, former judge of this court, having his address at 407, Gundecha Chamber, Nagindas Master Road, Fort, Mumbai – 400 001 is appointed as the sole arbitrator.

20. Oral application of the learned senior counsel for the respondent for seeking stay of this order is rejected. No order as to costs.

[R.D. DHANUKA, J.]