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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO.96 OF 2014

M/s.Solapur Bio Energy Systems Pvt. Ltd.	...Applicant
V/s.	
M/s.Elixir Engineering Pvt. Ltd.	...Respondent

Mr.S. Shamim for the Applicant.

Mr.R.S. Tripathi i/b Mr.J.R. Vakil for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 7TH OCTOBER, 2015.

P.C. :-

1. By this application filed under section 11(6) of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act"), the applicant seeks appointment of qualified, independent, impartial and fit and proper person as a sole arbitrator. The agreement entered into between the parties. Clause 56 of the Condition of Contract records the arbitration agreement.

2. Dispute arose between the parties. The applicant issued a notice for appointment of the arbitrator. The respondent did not appoint any arbitrator.

3. The respondent filed an application under section 18 of the Arbitration Act before The Micro & Small Enterprises Facilitation

Council (for short the “said Council”). The said Council terminated the conciliation proceedings insofar as claims made by the respondent are concerned and directed that the arbitration proceedings be initiated under section 18(3) of the Arbitration Act and the Council shall act as an arbitral tribunal. The said order passed by the Council has been impugned by the applicant herein by filing a writ petition which is pending before the Division Bench.

4. The applicant also filed a counter claim before the Council. By an order dated 3rd July, 2015, the learned designate of the Chief Justice directed the Council to dispose of the counter claim filed by the applicant under section 18(1) and (2) of the Arbitration Act within two months from the date of the said order. It was made clear that if order is passed by the Council under section 18(1) and (2) of the Arbitration Act insofar as the counter claim made by the applicant is concerned, appropriate order for appointment of arbitral tribunal can be passed in this proceeding.

5. Learned counsel tenders a copy of a true copy of the Rozname of the Council dated 5th September, 2015 and would submit that the Council has terminated the conciliation proceedings. He submits that since the conciliation proceedings are failed and the counter claim is terminated on this ground, the learned designate of the Chief Justice shall appoint the arbitrator in accordance with the

arbitration clause recorded in the agreement entered into between the parties.

6. Mr.Tripathi, learned counsel for the respondent submits that even if the conciliation proceedings are failed before the Council, the Council can still entertain the counter claim and refer the matter to arbitration in accordance with the provisions of the said Act. He submits that in view of the provisions of the said Act, the learned designate of the Chief Justice cannot appoint any arbitrator in this application filed under section 11(6) of the Arbitration Act based on the agreement entered into between the parties.

7. A perusal of the said order dated 3rd July, 2015 clearly indicates that the said order was passed after hearing learned counsel for the parties at length. In the said order, the learned designate of the Chief Justice has considered the order and judgment of the Division Bench rendered on 27th August, 2010 in the case of **M/s.Steel Authority of India vs. The Micro, Small Enterprise Facilitation Council & Anr.** in Writ Petition No.2145 of 2010. The Division Bench held that there is no provision in the said Act which negates or renders an arbitration agreement entered into between the parties ineffective. The Division Bench has also held that it cannot be said that because section 18 which provides for a forum of arbitration, an independent arbitration agreement entered into

between the parties will not cease to have effect. It is held that there is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under section 18 and arbitration conducted under an individual clause since both are governed by the provisions of Arbitration & Conciliation Act, 1996.

8. In paragraph 14 of the said judgment, it is held that the Council is not entitled to proceed under the provisions of section 18(3) of the Act in view of an independent arbitration agreement arrived at between the parties. In view of the order and judgment delivered by the Division Bench, the learned designate of the Chief Justice in the said order dated 3rd July, 2015 made it clear that both the parties shall pursue the conciliation which shall be conducted by the Council under Micro & Small Enterprises Facilitation Council under section 18(1) and (2) of the said Act. The learned designate of the Chief Justice in the said order dated 3rd July, 2015 made it clear that the appropriate order for appointment of an arbitrator can be passed in this proceeding after the Council disposes of the counter claim under section 18(1) and (2) of the Arbitration Act. It is not in dispute that the Council has already closed the counter claim and has submitted a report of failure of conciliation.

9. The learned designate of the Chief Justice has passed the said order dated 3rd July, 2015 after adverting and interpreting the order and judgment delivered by the Division Bench of this Court in the case of **M/s.Steel Authority of India** (supra) and the said order was passed after hearing both the parties at length. The respondent has not impugned the said order dated 3rd July, 2015.

10. I am respectfully bound by the judgment of the Division Bench delivered by this Court in the case of **M/s.Steel Authority of India** (supra) which clearly applies to the fact of this case.

11. Since the respondent has failed to appoint an arbitrator, this application filed under section 11(6) of the Arbitration Act is maintainable. In my view the arbitration agreement entered into between the parties as recorded in clause 56 of the Condition of Contract exists.

12. I therefore pass the following order :-

a). Shri Dr.Justice S. Radhakrishnan, former Judge of this Court is appointed as the sole arbitrator.

b). The arbitration application is disposed of in aforesaid terms. No order as to costs.

(R.D. DHANUKA, J.)

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