

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION (L) NO. 1414 OF 2015

Madhav Tarachand Ailani

..... Applicant

VERSUS

M/s.Gammon India Ltd.

..... Respondent

Mr.Nitin Lalwani, a/w. Mr.Pratik Thakkar, i/b. Pewani Associates for the Applicant.

Mr.Kirit Hakani for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 30th SEPTEMBER, 2015

P.C.

By this application filed under section 11(6) of the Arbitration and Conciliation Act, 1996, the applicant seeks appointment of an independent arbitrator to decide the dispute between the applicant and the respondent.

2. There is no dispute that the arbitration agreement as recorded in clause 30.1 of the agreement exists.

3. The dispute arose between the parties. Various correspondence were exchanged between the parties. On 28th March, 2015, the applicant through their advocates addressed a notice to the respondent referred to the arbitration clause which provides for settlement of dispute by way of arbitration but prior to invoking that clause 31 called upon the respondent to discuss the claim therein and to make an attempt to settle the disputes amicably within a period of 15 days making it clear that the failing the same, applicant would be constrained to take

appropriate legal remedies available to him under the law. There was no response to the said notice.

4. The applicant thereafter issued a notice on 15th May, 2015 through his advocate and called upon the respondent to appoint an arbitrator. In the said notice it was averred that since the respondent was not interested in settling the dispute amicably, the applicant had invoked clause 29 of the work order and called upon the respondent to appoint an arbitrator within a period of 30 days from the date of receipt of the said notice. The said notice was sent by Registered A.D. on 22nd May, 2015 and was duly received by the respondent. On 7th July, 2015 the applicant filed this application under section 11(6) of the Arbitration and Conciliation Act, 1996.

5. The arbitration application has been opposed by the respondent on the ground that the respondent had not received the second page of the notice dated 15th May, 2015. The respondent has also filed a sur-rejoinder affirmed on 28th September, 2015 contending that considering the actual weight of the notice received by the respondent from the applicant, it is clear that the applicant had posted only one page out of two pages of the notice dated 15th May, 2015.

6. Mr. Hakani, learned counsel appearing for the respondent submits that since the respondent had not received both the pages of the notice, the respondent has not lost right to appoint any arbitrator in accordance with the arbitration agreement. He submits that if the applicant does not accept the appointment of the arbitrator to be appointed by the respondent, there will be no arbitration agreement. He submits that in accordance with clause 30.1 of the arbitration agreement, even if an officer who has proposed to be appointed by the respondent

is an employee of the respondent and has dealt with the matters relating to this contract and during the course of his duties with the matters as such he had expressed views on all or any of the matters in dispute or differences, the applicant cannot oppose appointment of such an arbitrator by the respondent.

7. A perusal of the record indicates that the objection now raised by the respondent is that the respondent has received only one page out of the two pages. Though the said notice dated 15th May, 2015 was sent by Registered A.D. by the petitioner through his learned advocate on 27th May, 2015 to the respondent having their office at Mumbai which notice must have been received in the month of May itself, for two months no objection has been raised by the respondent of not receiving second page of the notice dated 15th May, 2015. I am thus not inclined to accept the submission of the learned counsel for the respondent that there was service of an incomplete copy of the said notice dated 15th May, 2015.

8. Insofar as submission of the learned counsel for the respondent that this court shall consider the actual weight of the notice received by the respondent to come to a conclusion that the respondent has been served only with one page of the notice and not two pages, I am not inclined to accept this submission of the learned counsel for the respondent in view of the fact that the respondent did not raise any objection immediately after notice dated 15th May, 2015.

9. Insofar as third submission of the learned counsel for the respondent that the respondent has not lost right to appoint an arbitrator in accordance with clause 30.1 of the arbitration agreement and are entitled to appoint their officer even if he had expressed his views in the matter of dispute or was even though connected with the contract in question, in my view there is no merit in this submission of the

learned counsel for the respondent. Since the respondent has failed to appoint any arbitrator in accordance with the arbitration clause within 30 days from the date of receipt of the notice, in my view the respondent has lost its right to appoint an arbitrator. The present application filed under section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of independent arbitrator is thus maintainable.

10. A perusal of the section 11(8)(b) of the Arbitration and Conciliation Act, 1996 clearly indicates that the Chief Justice or his designated has to keep in mind other considerations as are likely to secure the appointment of an independent and impartial arbitrator. In my view the person who has expressed his views in the same contract or has participated during the course of the execution of the contract cannot be an impartial arbitrator. The submission of the learned counsel for the respondent is thus contrary to section 11(8)(b) of the Arbitration and Conciliation Act, 1996 and is rejected.

11. Shri N.N. Shrikhande, Consulting Engineer residing at 42, Kalpak Artek Apartments, Madhusudan Kalekar Marg, Bandra (East), Mumbai – 400 051 is appointed as the sole arbitrator.

12. Arbitration application is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]

CERTIFICATE

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