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

ARBITRATION APPLICATION NO.32 OF 2015

Vanita Om Agrawal
Indian Habitant, Occupation
Housewife, residing at Juhu Grotto
Apartment, 41, 4th Floor, Juhu Road,
Santacruz (West), Mumbai – 400 049.

...Applicant

...Versus...

Charisma builders Limited.
A company incorporated under the
Companies Act, 1956, having its
registered office at 1st Floor,
Kamal Kung, Central Avenue Road,
Chembur, Mumbai – 400 071.

...Respondent

Mr.G.S. Hegde with Ms.Pinky Bhansali for the Applicant.

Mr.S.A. Oak i/b Mahesh Menon & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 3RD JULY, 2015.

ORAL JUDGMENT :-

1. By this application filed under section 11(6) of the Arbitration & Conciliation Act, 1996 (for short “the said Arbitration Act”), the applicant seeks appointment of an arbitrator.

2. Learned counsel appearing for the applicant invited my attention to clause 9 of the agreement entered into between the parties i.e. Memorandum of Understanding dated 25th January, 2011

which recorded the arbitration agreement. According to the said clause, the arbitrator was to be appointed by the assignee i.e. the respondent herein in accordance with the provisions of the Arbitration Act. The dispute arose between the parties. The applicant issued a notice for appointment of an arbitrator on 10th February, 2014 and called upon the respondent to appoint an arbitrator. The respondent vide its advocate's letter dated 21st February, 2014 alleged that there were no arbitral dispute between the parties and there was no necessity to appoint an arbitrator. It is stated in the said letter that without prejudice to the rights and contentions, the respondent appointed Mr.Vishrant Tendulkar to decide the disputes, if any.

3. The applicant thereafter addressed a letter suggesting three other names on 11th March, 2014. The said letter was replied by the respondent vide its advocate's letter dated 14th March, 2014 contending that the respondent had confirmed the appointment of Mr.Vishrant Tendulkar, advocate as an arbitrator. Based on the said letter, the applicant addressed a letter through its advocate on 7th July, 2014, to the learned arbitrator to fix a date for preliminary hearing. Since no action was taken by the learned arbitrator, the applicant filed this application under section 11(6) of the Arbitration Act.

4. Mr.Hegde, learned counsel for the applicant filed an additional affidavit on 29th June,2015. My attention is invited to the letter dated 26th March, 2015 which is addressed by the learned advocate representing the respondent to Mr.Vishrant Tendulkar. In the said letter, the respondent has referred to its alleged letters dated 21st February, 2014 and 11th March, 2014 and has alleged that by the said two letters, the respondent had requested the learned arbitrator

to give written consent to act as the sole arbitrator. By the said letter dated 26th March, 2014, the respondent through its advocate, once again requested for the written consent of Mr.Vishrant Tendulkar to act as the sole arbitrator and to fix the convenient date.

5. On 27th March, 2014, the said Mr.Vishrant Tendulkar addressed a letter to the learned advocate representing both the parties and fixed the meeting on 7th April, 2015. In the said letter, the learned arbitrator stated that he was in receipt of the letter dated 26th March, 2015 addressed by the respondent appointing him as the sole arbitrator.

6. It is not in dispute that the applicant has lodged this application under section 11(6) of the Arbitration Act on 29th October, 2014 itself.

7. Mr.Hegde, learned counsel for the applicant states that since the respondent has not appointed the arbitrator in accordance with the provisions of clause within 30 days from the date of receipt of notice invoking arbitration agreement by the applicant and in any event did not appoint the arbitrator even till the date of the applicant filing application under section 11(6) by the applicant, the respondent has lost its right to appoint the arbitrator in accordance with the arbitration agreement. He submits that the learned designate of the Hon'ble Chief Justice thus shall appoint an independent and impartial arbitrator under section 11(6) of the Arbitration Act.

8. Mr.Oak, learned counsel for the respondent on the other hand submits that the respondent had already appointed the arbitrator much prior to the date of filing of this application. In support of this

submission, learned counsel for the respondent seeks to rely upon the letters dated 21st February, 2014 and 11th March, 2014 which are referred in the letter dated 26th March, 2015 addressed by the learned advocate representing the respondent to Mr.Vishrant Tendulkar. He submits that the learned arbitrator has already held a meeting.

9. A perusal of the correspondence annexed to the arbitration application and the letters annexed to the additional affidavit dated 29th June, 2015 clearly indicate that till 26th March, 2015, the respondent had not appointed Mr.Vishrant Tendulkar as the arbitrator in accordance with the arbitration clause. A perusal of the said letter clearly indicates that even by the said letter of 26th March, 2015, the respondent had asked for written consent of Mr.Vishrant Tendulkar, to act as the sole arbitrator. It is thus clear that the respondent had not appointed any arbitrator within 30 days from the date of receipt of the letter invoking arbitration agreement by the applicant and in any event before the date of filing this application under section 11(6) of the Arbitration Act on 29th October, 2014. In my view, since the arbitrator has not been appointed by the respondent in accordance with the arbitration clause within the time prescribed and in any event before the date of filing of the arbitration application, the respondent has lost its right to appoint any arbitrator. Under section 11(6), the Chief Justice or his designate can appoint an independent and impartial arbitrator.

10. Insofar the submission of learned counsel for the respondent that the applicant herself has proceeded on the premise that the arbitrator was already appointed and is in place is concerned, in my view there is no merit in this contention of learned counsel for the respondent in view of the letter dated 26th March, 2015, addressed

by the respondent through its advocate asking for the written consent of Mr.Vishrant Tendulkar. Since the respondent has asked for the consent of Mr.Vishrant Tendulkar to act as the arbitrator on 26th March, 2015, the question of respondent appointing him as the arbitrator much prior to the date of the applicant filing application under section 11(6) of the Arbitration Act does not arise. In my view, the applicant was clearly misled by the respondent that the respondent had already appointed the arbitrator and on that premise the applicant had written a letter to the said Mr.Vishrant Tendulkar. In my view the present application thus filed by the applicant is maintainable. There is no dispute that the arbitration agreement exists.

11. Insofar as the submission of the respondent that the learned arbitrator has already held a meeting pursuant to his appointment made by the respondent is concerned, in my view since the appointment of Mr.Vishrant Tendulkar by the respondent is after filing of this arbitration application, the said appointment subsequently made is of no significance.

12. At this stage learned counsel for the parties have suggested various names for the purpose of appointing one of them as the sole arbitrator. In the said list, the name of Mr.U.J. Makhija, advocate is suggested by one of the party. Mr.U.J. Makhija, advocate is accordingly appointed as the sole arbitrator.

13. The arbitration application is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)