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

ARBITRATION APPLICATION NO.352 OF 2014

M/s.Bhagheeratha Engineering Ltd.,
Bhagheeratha Residency,
Banerjee Road,
Kochi – 682 018.

...Applicant

...Versus...

M/s.Sesa Sterlite Limited,
(Formerly known as –
M/s.Vedanta Alumina Ltd.,
Vedanta House, 75, Nehru Road,
Vile Parle (E), Mumbai – 400 057,

Second Address :

Sesa Sterlite Limited,
(Erstwhile Vedanta Aluminium Ltd.)
Vedanta Aluminium & Power
Alumina Refinery Unit,
Via Viswanathpur, P.O. Lanjigarh
Distt. Kalahandi, Odisha – 766 027.

...Respondent

Mr.Vikram Shinde i/b Mr.Parul Sharma for the Applicant.

Mr.Arif Bookwala, Senior Counsel with Ms.Jyoti Ghorpade for the Respondent.

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

ORAL JUDGMENT :-

1. By this application filed under section 11(6) read with 15(2) and 15(1) and (a) of the Arbitration & Conciliation Act, 1996 (for short

“the Arbitration Act”), the applicant seeks an appointment of the arbitrator on behalf of the respondent to act along with the arbitrator nominated by the applicant and to select the presiding arbitrator.

2. It is not in dispute that the arbitration agreement is recorded between the parties in the letter of intent dated 19th February, 2004. The disputes arose between the parties. The applicant nominated an arbitrator. Since the respondent did not nominate any arbitrator, the applicant filed an application under section 11(6) of the Arbitration Act (Arbitration Application No.78 of 2012) before the Chief Justice of this Court. None appeared for the respondent.

3. The said Arbitration Application No.78 of 2012 appeared before the learned designate of the Chief Justice on 9th May, 2012. By an order dated 9th May, 2012, the learned designate of the Chief Justice observed that the arbitration agreement was contained in the letter of intend dated 19th February, 2003 which provided for a reference of disputes to arbitration. In the said order, it was also recorded that the respondent had terminated the contract by a letter dated 5th January, 2008 following which the applicant invoked arbitration on 10th April, 2008 followed by a letter dated 4th April, 2011. There was no response to the letter of invocation. The learned designate of Chief Justice appointed a former Judge of this Court as nominee arbitrator on behalf of the respondent and directed the learned arbitrator nominated by the applicant and the learned arbitrator nominated by the said order to constitute the arbitral tribunal in accordance with law.

4. Pursuant to the said order, the learned two arbitrators

appointed the presiding arbitrator and proceeded with arbitration. The arbitral tribunal issued the directions to the parties to file pleadings. The applicant herein has already filed the statement of claim along with the documents. The respondent has filed the written statement along with documents. The respondent also filed an application under section 16 of the Arbitration Act raising various preliminary issues before the arbitral tribunal. The arbitral tribunal has passed an order on the said application under section 16 of the Arbitration Act on 17th January, 2013.

5. The respondent thereafter filed a Notice of Motion (Lodging) No.1055 of 2013 in the said Arbitration Application No.78 of 2012 *inter-alia* praying for recall of the order passed by the learned designate of the Chief Justice dated 9th May, 2012. By an order dated 28th November, 2013, the learned designate of the Chief Justice disposed of the said notice of motion holding that the said application for recall of the order passed under section 11 of the Arbitration Act was not maintainable.

6. In the meeting held on 30th June, 2014, the arbitral tribunal resigned for the reasons recorded therein. The applicant thereafter vide its letter dated 6th August, 2014, nominated Dr.Kirty Dave as its nominee arbitrator and called upon the respondent to nominate its arbitrator in accordance with the arbitration clause in view of the arbitral tribunal having resigned. Vide its letter dated 8th August, 2014, addressed by the respondent to the applicant, the respondent refused to appoint an arbitrator. The applicant once again called upon the respondent to appoint the arbitrator by a letter dated 10th September, 2014.

7. The respondent once again refused to appoint an arbitrator by a letter dated 11th October, 2014. The applicant thus filed this application on 15th December, 2014 for appointment of the nominee arbitrator on behalf of the respondent.

8. Learned counsel for the applicant invited my attention to the arbitration agreement, order passed by the learned designate of the Chief Justice in the earlier arbitration application and the order passed by the learned designate of the Chief Justice disposing of the notice of motion filed by the respondent for recall of the earlier order. He submits that since the arbitral tribunal has resigned, the vacancy having arisen in view of the resignation of the entire tribunal, the applicant was entitled to appoint an arbitrator on its behalf. He submits that though the applicant has already nominated its arbitrator, the respondent has not nominated its arbitrator and thus this application for appointment of arbitrator on behalf of the respondent is maintainable under section 11(6) read with section 15 of the Arbitration Act.

9. Mr.Bookwala, learned senior counsel for the respondent on the other hand submits that the applicant had invoked arbitration agreement and submits that that the bank guarantee was invoked on 5th January, 2008. On 10th January, 2008, the respondent made the entire payment to the applicant. He submits that the applicant filed the arbitration application on 21st December, 2012, which was after a period of three years from the date of invocation of the arbitration agreement. He submits that since the application filed under section 11(6) of the Arbitration Act was itself barred by law of limitation, the learned designate of the Chief Justice could not have appointed the arbitrator by an order dated 9th May, 2012. He submits that since the

initial appointment itself was illegal, no appointment under section 11(6) read with section 15 of the Arbitration Act by way of substitute arbitrator can be appointed by the learned designate of the Chief Justice in the present application.

10. In re-joinder, learned counsel for the applicant invited my attention to the order passed by the arbitral tribunal under section 16 and would submit that various issues of jurisdiction raised by the respondent have been already decided. One of the issues is kept pending. He submits that this Court cannot go into the validity of the said order passed by the arbitral tribunal under section 16 in the present application.

11. Mr.Bookwala submits that the respondent would file an application under section 16 of the Arbitration Act before the arbitral tribunal.

12. Insofar as the submission of learned senior counsel that Arbitration Application No.78 of 2012 itself was barred by law of limitation and thus no arbitrator could have been appointed by the learned designate of the Chief Justice is concerned, in my view there is no merit in this submission. Since such application filed under section 11(6) of the Arbitration Act was not the application before the Court, the provisions of the Limitation Act, 1963 and more particularly Article 137 of the Limitation act would not apply to the arbitration application filed under section 11. Be that as it may, the learned designate of the Chief Justice has already appointed an arbitrator by the said order dated 9th May, 2012 on behalf of the respondent. The review application filed by the respondent has been already disposed of by the learned designate by refusing to recall the said order. In my

view in any event, the issue of limitation now raised in filing the earlier arbitration application, thus cannot be gone into in this application, at this stage.

13. Insofar as the issue of limitation whether the claims are barred by law or not, the same can be considered by the arbitral tribunal on its own merits.

14. Insofar as the submission of the learned senior counsel for the respondent that the respondent be permitted to file an application under section 16 before the arbitral tribunal is concerned, in my view, if any such application is filed before the arbitral tribunal, the arbitral tribunal can decide such application, including the issue of maintainability of such application.

15. In my view, since the existence of the arbitration agreement is not in dispute and the erstwhile arbitral tribunal having resigned, the present application filed under section 11(6) read with section 15 of the Arbitration Act for appointment of the substitute arbitrator on behalf of the respondent is maintainable. The applicant has already nominated its named arbitrator. Since the respondent has not appointed its arbitrator as nominee arbitrator, I appoint Shri Justice M.G. Gaikwad, a former Judge of this Court, as the nominee arbitrator on behalf of the respondent.

16. The nominee arbitrator of the applicant and the learned arbitrator appointed by this order is directed to appoint a presiding arbitrator in accordance with the provisions of the Arbitration & Conciliation Act, 1996.

17. The arbitration application is disposed of in the aforesaid terms. No order as to costs.

(R.D. DHANUKA, J.)