

IN THE HIGH COURT OF BOMBAY AT GOA

APPLN. FOR APPOINTMENT OF ARBITRATOR NO. 6 OF 2016

SHRI RAMAN BATHLA.

... Applicant

Versus

MCPL INDIA PVT. LTD., THR. ITS DIRECTORS. ... Respondent

Mr. Bhavya Sethi and Mr. Pavithran A.V, Advocates for the applicant.

Mr. S. M. Singbal, Advocate for the respondent.

Coram:- F. M. REIS, J.

Date:- 18th June, 2016

P.C.

Heard Mr. B. Sethi, learned counsel appearing for the applicant and Mr. S. M. Singbal, learned counsel appearing for the respondent.

2. This is an application to appoint an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. It is pointed out by the learned counsel appearing for the applicant that in terms of Clause 42 of the agreement entered into between the parties

dated 28.04.2008 in cases in which there is a dispute which arises from such contract, the parties are at liberty to seek for appointment of an officer of the respondent to adjudicate such claim and in case the decision is not accepted by the agent/applicant herein, the respondent would have to give the names of three persons to enable the applicant to choose an arbitrator. It is further pointed out that in terms of the said clause, the applicant served a notice on the respondent dated 01.09.2015 calling upon the respondent to appoint an officer of the company to adjudicate such claim and on failure to do so to proceed to suggest the names of the arbitrator to enable the applicant to choose his arbitrator in terms of the said clause. It is further submitted that despite of the receipt of the said notice, the respondent chose to send a reply inter-alia claiming that the applicant had not accepted the termination and further calling upon the applicant to furnish the statement of accounts to enable the respondent to reconcile the accounts in terms of the said agreement. It is further submitted that as the respondent had defaulted either in appointing an officer or suggesting the names of the arbitrator, the applicant is entitled for appointment of an arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996.

3. Mr. Singbal, learned counsel appearing for the respondent points out that it is the contention of the respondent in the reply that the application itself is prematured as according to him prior to the appointment of the arbitrator, there was no request to appoint an officer in terms of the arbitration clause found in the said agreement. It is further pointed out that the respondent had sent a reply to the applicant to the statutory notice inter-alia calling upon the applicant to furnish the statement of accounts in order that the matter could be referred to the officer. The learned counsel further submits that it is well settled that the procedure as agreed upon in the arbitration clause has to be followed prior to the appointment of the arbitrator and in support thereof, the learned counsel has relied upon the judgment reported in **(2015) 3 SCC 800** in the case of **Walter Bau AG Legal Successor V/s Municipal Corporation of Greater Mumbai and another**. The learned counsel as such submits that the application be accordingly rejected.

4. I have considered the rival contentions. The Clause 42 of the said agreement reads thus :

“42. If any question or dispute shall at any time arise between the parties hereto with

respect to the meaning, interpretation or effect of any clause in this Agreement or the rights and liabilities of the parties hereto or with regard to any matter hereunder, then such question or dispute shall be referred to an officer at MCPL'S Registered Office at Goa and if the Agent is not satisfied with the decision of such officer of MCPL, it shall be referred to arbitration of an Arbitrator to be appointed from amongst 3 (three) persons whose names shall be suggested by MCPL. If the Agent fails to intimate its choice of Arbitrator within seven days of receipt of the names from MCPL, then MCPL shall be entitled to act as Arbitrator. The Arbitration shall be conducted in Goa in accordance with the provisions of the Arbitration Act, 1940 and the decision of such Arbitrator shall be conclusive and binding upon the parties.”

5. On perusal of the notice dated 01.09.2015 the applicant has called upon the respondent invoking the arbitration clause by observing thus :

“In view the above, I am instructed to call upon you to refer and decide my clients claims of Rs.21,86,793/-, on account of consideration

under the agreement dated 28.4.2008 along with refund of interest on security through your competent official and inform my clients about the decision of the official within a period not later than 15 days of the receipt of this notice. Your failure to respond shall be deemed as refusal and in that eventuality you are called upon to suggest the names of arbitrator in terms of clause 42 of the said Agreement. The claims raised hereinbefore are with respect to dues/consideration till July 2015, my client reserve right to stake claim to such other dues/entitlement/damages including refund of security and dues till the termination of agreement dated 28.4.2008 w.r.t. which another communication dated 1.9.2015 is already addressed.”

6. On plain reading of the said notice, it clearly reveals that the predicates as agreed by the parties in the arbitration Clause no.42 were duly followed by the applicant while serving such notice. The stand of the respondent that the statement of accounts have to be furnished prior to the appointment of an officer is not at all found on going through the arbitration clause referred to herein above. This exercise, if any, would have to be done by an officer if at all the

respondent had so appointed such officer in terms of the arbitration clause as called upon by the applicant in the said notice. Having failed to do so, the respondent are not now entitled to contend that the application is prematured as the officer of the respondent was not appointed in terms of the arbitration clause to adjudicate such dispute. Whether there is a valid termination which is accepted or not is a dispute which arise from such agreement and is an aspect to be considered by the arbitrator on its own merits. In such circumstances, the judgment of the Apex Court relied upon in the case of **Walter Bau AG Legal Successor** (supra) by the learned counsel appearing for the respondent is not at all applicable to the facts of the present case.

7. As already pointed out herein above, the applicant has invoked the arbitration clause in terms thereof and the respondent have chosen not to proceed in terms thereof. As such, the applicant is entitled to file an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator.

8. In view of the above, I pass the following order :

ORDER

- (i) Justice N. A. Britto (Retired Judge of this Court) is appointed as a sole arbitrator to decide the dispute between the parties.
- (ii) All contentions of both the parties are left open.
- (iii) The application stands disposed of accordingly.

F. M. REIS, J.

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