

IN THE HIGH COURT OF BOMBAY AT GOA

APPLN. FOR APPOINTMENT OF ARBITRATOR NO. 25 OF 2015

IGNATIUS TONY PEREIRA. ... Applicant

Versus

MR.PIFRAN SANJIVAN FERNANDES. ... Respondent

Mr. J. J. Mulgaonkar, Advocate for the Applicant.

Mr. Parag Rao, Advocate for the Respondent.

Coram :- **F. M. REIS, J**

Date : **5th August, 2016**

ORAL ORDER

Heard Shri J. J. Mulgaonkar, learned Counsel appearing for the Applicant and Mr. Parag Rao, learned Counsel appearing for the Respondent.

2. This is an application under Section 11(6) of The Arbitration and Conciliation Act, 1996, (for short, 'the said Act'), for appointment of the Arbitrator.

3. Briefly, the facts of the case relating to decide the above Application are that based on an Arbitration Clause in the Deed of Partnership executed between the parties on 20.03.1996, an application was filed before this Court for appointment of Arbitrator under Section 11(6) of the said Act.

4. By an Order dated 30.08.2011, Justice G. D. Kamat, retired Chief

Justice of Gujarat High Court, was appointed as the Sole Arbitrator to adjudicate the dispute between the parties. Thereafter, the said Arbitrator expired and, consequently, the above application was filed by the Applicant to appoint a new/substitute Arbitrator to proceed with the Arbitration.

5. The Respondent after being served, objected to the said application. It is the contention of the Respondent that once the Arbitrator has expired, his mandate gets terminated in terms of Section 14 of the said Act and that a new Arbitrator would have to be appointed after following the procedure to appoint an Arbitrator in terms of the Agreement between the parties. It is further the contention of the Applicant that as such the power to appoint an Arbitrator under Section 11(6) of the said Act, only arises when there is a refusal on the part of the Respondent to appoint an Arbitrator in terms of the Agreement. It is further pointed out that as the claim itself is not maintainable and, as such, the above application deserves to be rejected.

6. Mr. Mulgaonkar, learned Counsel appearing for the Applicant pointed out that once the Arbitrator has expired as the appointment was made by this Court under Section 11(6) of the said Act, this Court can appoint a substitute Arbitrator.

7. On the other hand, Shri Parag Rao, learned Counsel appearing for the Respondents, has vehemently opposed the said application. Learned Counsel further pointed out that once the term of the Arbitrator stands terminated in view of

his death, the parties would have to resort afresh to appoint an Arbitrator by following the procedure laid down in the Agreement executed between the parties. Learned Counsel has taken me through the provisions of Sections 14 and 15 of the said Act to point out that once the mandate of the Appellant stands terminated, a fresh Arbitrator has to be appointed in terms of the Rules governing the relationship between the parties. Learned Counsel further pointed out that this Court as such cannot appoint a fresh Arbitrator in terms of Section 11(6) of the said Act unless the Applicant has started the process afresh in terms of the Agreement to appoint an Arbitrator.

In support of his submissions, learned Counsel has relied upon the Judgments of the Apex Court reported in **(2006) 6 SCC 204** in the case of ***Yashwith Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd. & anr.*** and **(2016) 1 SCC 721** in the case of ***Huawei Technologies Company Limited vs. Sterlite Technologies Limited.***

8. I have considered the submissions of the learned Counsel and have also gone through the records. Both the Judgments relied upon by Mr. Parag Rao, learned Counsel appearing for the Respondent, are in the context of an appointment of an Arbitrator by the parties in terms of the Arbitration Agreement subsisting between the parties. It is not a case wherein an Arbitrator was appointed under Section 11(6) of the said Act by the Hon'ble Chief Justice or his designate. Dealing with a similar issue, the Calcutta high Court in a Judgment reported in **2009 SCC Online Cal 321** in the case of ***Ramjee Power Construction Ltd. vs. Damodar Valley Corporation***, taking note of the Judgment of the Apex Court in

the case of ***Yashwith Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd. & anr.*** (supra), has held that the situation which arises in the cases where an Arbitrator has expired after his appointment by the Chief Justice or his designate, is different from cases where an Arbitrator is appointment in terms of the Agreement between the parties. The High Court has also relied upon the Judgments of the Apex Court wherein it has been held that once an Arbitrator is not appointed by a party after a notice is issued in terms of the Agreement, the right to appoint an Arbitrator thereby stands forfeited and it is only for the Chief Justice or his designate to appoint an Arbitrator. It has further been held that in case an Arbitrator is appointed in terms of the said Agreement, and the whole procedure is resorted to afresh, it would mean that such right of forfeiture gets revived. The High Court has observed thus :

"..... A judgment is a precedent for what it decides and is to be understood in the context of the circumstances in which the judgment is rendered. A phrase from a judgment cannot be read out of context ignoring the rest of the sentence. If the sentence is read as a whole, it would be absolutely clear that the Supreme Court did not construe Section 15(2) as a mandate for appointment of the substitute arbitrator in accordance with the agreement between the parties. The Supreme Court therefore did not end the sentence with the phrase "according to the original agreement", but went on to use the words " or provision applicable to the appointment of the arbitrator at the initial stage" meaning thereby a provision other than that contained in the original agreement. The words "or

provision applicable " were carefully chosen and not meant to be a redundant superfluity. The expression provision applicable could mean a provision of law or a provision of an agreement. The judgment was rendered in an appeal arising out of an order of the Andhra Pradesh High Court which is clearly distinguishable in facts. In that case the initial appointment of arbitrator was made by the Managing Director and not by the Chief Justice or his designate. On termination of mandate, the substitute arbitrator had also promptly been appointed.

In Union of India Versus Bharat Battery Manufacturing Co. (P) Ltd. reported in (2007) 7, SCC 684 cited by Mr. Sen, the Supreme Court relying on its earlier judgments in Punj Lloyd Ltd. Versus Petronet MHB Ltd. reported in (2006) 2 SCC 638 and Datar Switchgears Ltd.(supra) held that once a party filed an application under Section 11 (6) of the Act., the other party extinguished its right to appoint an arbitrator in terms of the clause of the agreement thereafter.

Mr. Sen also cited a judgment of this Court in Shankar Traders Vs. Union of India (UOI) and Ors. reported in AIR 2006 Calcutta 335 where this Court discussed various Supreme Court judgments and held that once an application had been moved for appointment of an arbitrator by the Chief Justice, the other party which had remained indolent would lose its right to make an appointment in terms of the agreement.

Mr. Sen also referred to an unreported judgment of this bench dated 25th July, 2005 in AP No.93 of 2005

(Bhattacharjee Construction Co. Vs. Union of India & Ors.) whereby this Bench allowed an application under Section 11(6) of the 1996 Act for appointment of a substitute arbitrator. The judgment is distinguishable on facts, and has no application to the issues involved in this case. In Bhattacharjee Construction Co.(supra) the mandate of the arbitrator appointed in accordance with the agreement between the parties had been terminated. This Court found, on facts, that there had been failure on the part of the Chief Engineer to appoint a substitute arbitrator. This Court thus held that even assuming that a substitute arbitrator was to be appointed according to the rules that were applicable to the appointment of arbitrator whose mandate had been terminated, there had been failure on the part of the Chief Engineer to promptly appoint a substitute arbitrator and as such the application 10under Section 11 (6) was liable to be allowed. The proposition that emerges from various judgments referred to above is that an arbitrator must be appointed in accordance with the procedure agreed between the parties. If however the party required, in terms of the agreement, to appoint or to agree to an arbitrator fails to do so within the time stipulated in the agreement and/or in Section 11 of the 1996 Act, the other party might request the Chief Justice or his designate to appoint an arbitrator under Section

11. Once an application under Section 11 is made, the right of the other party to appoint an arbitrator, in accordance with the agreement, gets extinguished. The right under the agreement, of a party, to appoint

an arbitrator, which stands extinguished once an application under Section 11 (6) is made, does not revive, if the arbitrator appointed by the Chief Justice resigns and/or his mandate is terminated.

As observed above, the expression "rules that were applicable to the appointment of the arbitrator being replaced" in Section 15, have carefully been chosen. If the arbitrator being 11 replaced was appointed by the Chief Justice and/ or his designate in accordance with Section 11 of the 1996 Act read with the applicable rules, the substitute arbitrator would also have to be appointed by the Chief Justice and/or his designate in the same manner. It is immaterial that the respondent has appointed an arbitrator in the meanwhile. The appointment of the arbitrator by the respondent, after filing of this application, is of no consequence."

9. Taking note of the said observations, I find that the contention of Mr. Parag Rao, learned Counsel appearing for the Respondent, that the application filed by the Applicant is not maintainable before this Court cannot be accepted. Hence, as the Arbitrator appointed by this Court under Section 11(6) of the said Act, has expired, the Applicants are entitled to appoint a substitute Arbitrator accordingly.

10. In view of the above, I pass the following :

ORDER

(i) Justice A. P. Lavande, retired Judge of this Court is appointed as the Sole Arbitrator to adjudicate the dispute between the parties.

(ii) Needless to say, the learned Arbitrator will examine the stage at which the proceedings should continue in accordance with law.

11. At this stage, learned Counsel appearing for the Applicant, seeks stay of the operation of the Order passed today. In the peculiar facts and circumstances of the case, the operation of the Order is stayed for a period of five weeks.

F .M. REIS, J.

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