

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

MISCELLANEOUS CIVIL APPLICATION NO.1343/2015

M/s ARSS ATLANTA (JV)
 Plot No.38, Sector A, Z1D,
 Mancheswar Industrial Estate,
 Bhubaneswar, through its Power of
 Attorney, Rajesh Agrawal S/o Shri
 M.L. Agrawal,
 Address - Plot No.38, Sector A, Z1D,
 Mancheswar Industrial Estate,
 Bhubaneswar, Odisha.

..Applicant.

..Versus..

1. RITES Limited through its
 Chairman and Managing Director,
 RITES Bhavan, No.1, Sector 29,
 Gurgaon 122 001.

2. Group General Manager (P),
 RITES Ltd. RITES Bhavan,
 Kadbi Chowk, Nagpur
 of behalf of and Power of Attorney
 of the National Thermal Power
 Corporation Limited Mouda,
 Distt. Nagpur.

..Non-applicants.

 Shri Rahul Tajne, Advocate for the applicant.

Shri N.P. Lambat, Advocate for the non-applicants.

CORAM : Z.A. HAQ, J.

DATE : 1.4.2016

ORAL JUDGMENT

1. Heard Shri Rahul Tajne, advocate for the applicant and Shri N.P. Lambat, advocate for the non-applicants.
2. **Rule.** Rule made returnable forthwith.
3. It is undisputed that as per Clause 56 of the General Terms and Conditions of the Contract, the dispute between the applicant and the non-applicants was referred for arbitration to Shri V. Thangapandiyar GGM (Mouda) NTPC Limited, however, Shri V. Thangapandiyar - sole Arbitrator has withdrawn from the office of Arbitrator by sending the communication dated 20th August, 2015. The applicant had sent communication dated 3rd September, 2015 requesting the non-applicants to appoint new Arbitrator, however, the non-applicants have neither replied nor have taken any action in the matter. In these circumstances, the applicant is constrained to approach this Court under Section 11 of the Arbitration and Conciliation Act, 1996 praying that the Arbitrator be appointed to resolve the dispute between the parties.

4. According to the non-applicants, after Shri V. Thangapandian has withdrawn from the office of Arbitrator, Shri T.K. Chatterjee Ex Executive Director N.T.P.C. Limited is appointed as sole Arbitrator to resolve the dispute between the applicant and the non-applicants. It is submitted that in view of appointment of Shri T.K. Chatterjee as the Arbitrator, the present application need not be entertained. It is further submitted that the prayer of the applicant cannot be considered in application under Section 11 of the Arbitration and Conciliation Act, 1996.

5. Shri Tajne, learned advocate for the applicant has pointed out that Shri T.K. Chatterjee is appointed as sole Arbitrator by the non-applicants by the communication dated 25th February, 2016 i.e. after the notice of present application is served on the non-applicants. It is submitted that the non-applicants have failed to appoint Arbitrator within 30 days of the receipt of the communication dated 3rd September, 2015 and, therefore, they have forfeited the right to appoint the Arbitrator.

The submission made on behalf of the applicant is in consonance with the provisions of Section 11(5) of the Arbitration and Conciliation Act, 1996 and,

therefore, has to be accepted.

6. As far as the objection raised on behalf of the non-applicants that the prayer made by the applicant cannot be considered in application under Section 11 of the Arbitration and Conciliation Act, 1996, it is only to be mentioned to be rejected. The learned advocate for the applicant has rightly relied on the judgment given in the case of *Yashwith Constructions (P) Ltd. V/s. Simplex Concrete Piles India Ltd. and another* reported in **(2006) 6 SCC 204** on the point that the applicant, in such situation like the present one, can approach this Court under Section 11 and jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 can be exercised.

7. The learned advocate for the non-applicants has submitted that as per Clause 56 of the General Terms and Conditions of the Contract, the arbitration can be only by the Arbitrator appointed as per the provisions of Clause 56 referred above and the arbitration cannot be undertaken by any other Arbitrator. The submission is misconceived and considering the conduct of the non-applicants, it has to be held that it is frivolous. The provisions of Clause 56 of the General Terms and Conditions of the Contract do not restrict the jurisdiction of this Court conferred by Section 11 of

the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator in case of failure on the part of the parties to take action according to law within the stipulated time.

8. It is undisputed that the dispute between the parties is required to be resolved by the Arbitrator. The claim of the applicant is live and cannot be said to be stale. The cause of action has arisen at Nagpur and, therefore, this Court has jurisdiction to entertain the application.

9. Hence, the following order:

(i) Shri A.P. Deshpande, former Judge of this Court (R/o Shiraj Bunglow, West Park Road, Dhantoli, Nagpur - 400 012, Tel. 0712 - 2426806, [M] 9420807633) is appointed as Arbitrator to resolve the dispute.

(ii) The applicant shall deposit Rs.1,00,000/- within four weeks with the Registry of this Court.

The non-applicants (jointly) shall deposit Rs.1,00,000/- within four weeks with the Registry of this Court.

This amount shall be kept with the Registry of this Court towards security of the fees of learned Arbitrator.

- (iii) The applicant and the non-applicants shall pay the fees of the learned Arbitrator separately.
- (iv) The applicant shall deposit Rs.10,000/- with the Registry of this Court within four weeks towards processing charges.
- (v) The application is **allowed** in the above terms.

CIVIL APPLICATION (C.A.O.) NO.514/2016

In view of disposal of main application, this application does not survive and is **disposed of** accordingly.

JUDGE

Tambaskar.