

IN THE HIGH COURT OF BOMBAY AT GOA
APPLICATION FOR APPOINTMENT OF ARBITRATOR
NO. 9 OF 2017

M/S BHUMIKA CLEANTECH SERVICES
PVT.LTD.,

... Applicant

Versus

DIRECTOR OF TOURISM AND ANR.,

... Respondents

Shri Ashwin D. Bhobe, Advocate for the Applicant.

Shri Deep Shirodkar, Additional Government Advocate for the Respondents.

CORAM:- C.V. BHADANG, J.

DATE:- 23rd JUNE, 2017.

ORAL ORDER:

Heard Shri Bhobe, the learned Counsel for the applicant and Shri Shirodkar, the learned Additional Government Advocate for the respondents.

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

3. The petitioner and the respondents have entered into a beach cleaning contract, insofar as North Goa District, is

concerned. Clause No. 7 of the agreement reads thus :

“7. In the event of any question, dispute or difference of opinion arising under or out of or in any way relating to or concerning these presents or effects of these presents or in connection with the conditions herein contained or touching or concerning the meaning or effect thereof, or any other matter contained therein as to the rights, duties or liabilities of the parties hereto, howsoever, in connection with this Agreement, the same shall be referred to the sole arbitration of a person appointed by the Secretary (Tourism) to the Government of Goa. The Contractor shall not raise any objection to such appointment on the ground that the arbitrator so appointed is a Government servant and that he had dealt with the matter to which this Agreement relates or that in the course of his duties as such Government Servant, he had expressed his views on all or any of the matters in dispute or difference. In the event of such arbitrator being transferred or vacates his office or refuses or is unable to act as such for any reason whatsoever, it shall be open to the Secretary (Tourism) to the Government of Goa to appoint another person in his place. The arbitrator so appointed shall be entitled to proceed with reference from the stage at which it was pending. The arbitrator may, with the consent of both the parties to these presents, extend the time for making the award. The award of the arbitrator shall be final and binding on the parties to these presents. Save as aforesaid, the Arbitration and Conciliation Act,

1996 (Central Act 26 of 1996) and the rules made there under shall apply to the arbitration proceedings under this clause."

4. According to the applicant, disputes and differences have arisen between the parties, which include a dispute about non payment of certain amounts and the alleged termination of the contract, which led the applicant to issue a notice on 23.11.2016, thereby invoking Clause No. 7. A perusal of the notice also shows that the applicant had proposed the name of a practising Advocate of this Court, for being appointed as an Arbitrator. The respondents issued a reply to the said notice on 10th/14th March, 2017, stating that there is no specific dispute between the parties and as the matter is pending before the Hon'ble Lokayukta, the Government has decided not to appoint any Arbitrator. This led the applicant to file the present application.

5. The respondents have filed their reply raising three contentions. Firstly, it is contended that there is no dispute existing between the parties, which is set out by the applicant, which would require reference of the dispute to an Arbitrator. Secondly, it is contended that the arbitration clause provides that the Secretary (Tourism) shall appoint an Arbitrator, as such, the

applicant cannot seek appointment of any other person as an arbitrator. Thirdly, it is contended that the notice dated 23.11.2016, issued by the applicant is not in consonance with Clause No. 7 of the agreement and thus, the application for appointment of the Arbitrator, is not maintainable. For this, reliance is placed on the decision of this Court in the case of **Arohi Infrastructure Pvt. Ltd., & Others Vs. Tata Capital Financial Services Ltd., 2016(1) Bom. C.R. 660.**

6. I have heard the learned Counsel for the parties.

7. It is submitted by the learned Counsel for the applicant that the notice dated 23.11.2016, clearly sets out the existence of dispute between the parties as to some outstanding payments, as also the alleged illegal termination of the contract. It is submitted that by the said notice, the applicant has invoked Clause No. 7, however, the respondents have refused to appoint the Arbitrator and thus, have forfeited the right of appointment of the Arbitrator. For this, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Union of India Vs. Besco Limited, 2017 DGLS (SC) 341.**

8. It is next contended that in effect the applicant has

invoked Clause No. 7 of the agreement. It is submitted that merely because the applicant has suggested the name of the Arbitrator, would not derogate from the fact of the applicant having invoked the arbitration clause. It is submitted that the case of **Arohi Infrastructure Pvt. Ltd.** (supra) is distinguishable on facts. The learned Counsel also points out that in respect of a similar agreement, with another agency in respect of beach cleaning contract of South Goa District, this Court by an order dated 28.04.2017 in Application No. 6/2017, has appointed an Arbitrator. In other words, it is submitted that in the context of an identical contract and an identical arbitration clause, this Court has appointed an Arbitrator.

9. On the contrary, it is submitted by the learned Additional Government Advocate that the notice dated 23/11/2016 is not in terms of clause 7 of the contract and as such, the present application would not be maintainable. It is next submitted that the contract provides that the Secretary (Tourism) shall appoint an Arbitrator and thus, the applicant cannot seek deviation from the same.

10. I have carefully considered the circumstances and the submissions made. A bare perusal of the notice dated

23.11.2016, would clearly show that there is a dispute between the parties, including a dispute of the alleged illegal termination of the contract. Thus, it cannot be accepted that there are no disputes or differences between the parties in respect of the subject agreement.

11. The Hon'ble Apex Court in the case of **Indian Oil Corporation & Others Vs. Raja Transport Private Limited, (2009) 8 SCC 520** had an occasion to consider the scope of the powers of the Hon'ble the Chief Justice and his designate for appointment of an Arbitrator under Section 11(6) of the Act. After taking a survey of various decisions holding the field, the Hon'ble Apex Court has set out the relevant considerations in para 48 of the judgment, which read as under:

“48. In the light of the above discussion, the scope of [section 11](#) of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an Arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the

date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of [section 11](#) of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of [section 11](#), if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of [section 11](#), if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) & (5), such a time bound requirement is not found in sub-section (6) of [section 11](#). The failure to act as per the agreed procedure within the time limit prescribed by the arbitration agreement, or

in the absence of any prescribed time limit, within a reasonable time, will enable the aggrieved party to file a petition under [Section 11\(6\)](#) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators), failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of [section 11](#) shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure

prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

12. The present case, would be governed by clause (iii) of para 48 of the judgment in the case of **Raja Transport Private Limited** (supra) as in the present case, there was a procedure prescribed in the agreement itself. The question is whether, the respondents have forfeited the said right of appointment of the Arbitrator.

13. A perusal of the notice makes it clear that the applicant has invoked Clause No. 7 of the arbitration agreement and has also incidentally proposed a name of the Arbitrator, who is a practising Advocate in this Court. In this case, the respondents, by their reply, have refused to appoint an Arbitrator, for the reason that there is no dispute existing between the parties and the matter is pending before the Hon'ble Lokayukta. Thus, there is a clear denial even to abide by Clause No. 7 of the contract. In such circumstances, in my considered view, this would be a case where the respondents have forfeited the right of appointment of the Arbitrator and the application would be maintainable. It may be mentioned that in respect of a similar contract relating to South Goa District, this

Court has appointed an Arbitrator by an order dated 28.04.2017 in Application for Appointment of Arbitrator No. 6/2017.

14. In the case of **Arohi Infrastructure Pvt. Ltd.** (supra), the respondent had already appointed an Arbitrator within 30 days from the receipt of the notice, much prior to the filing of the application under Section 11 of the Act and the question was whether the respondent had lost the right to appoint the Arbitrator. It is true that this Court after taking note of the notice, had come to the conclusion that the notice was not in accordance with the arbitration clause and was defective. The question whether, the notice is in accordance with the arbitration clause or not, would depend upon facts and circumstances of each case. As noticed earlier, at more than one places, the respondents have invoked the arbitration Clause No. 7 in the notice. Thus, in my considered view, the judgment in the case of **Arohi Infrastructure Pvt. Ltd.** (supra), cannot come to the aid of the respondents.

15. In the circumstances, the following order is passed:

ORDER

(a) Justice N.A. Britto, Former Judge of this Court is appointed as a Sole Arbitrator to decide the dispute between the parties.

(b) Needless to say, all contentions of both the parties on the rival claims are left open.

(c) The application stands disposed of accordingly.

C.V. BHADANG, J.

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