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

ARBITRATION PETITION NO.104 OF 2017

Mr.Rajesh K. Shah,)
of Mumbai, India Inhabitant in his capacity)
as Karta and Manager of R.K. Shah (HUF))
carrying on business at 63/7, Vasant Bldg.)
Road No.4, Sion (East), Mumbai – 22.) ...Petitioner

....Versus....

Mr.Kamlesh K. Sahani,)
carrying on business in the firm name)
and style of Kamal Enterprises as its)
Sole Proprietor, having address at C/o.)
Poonam Hotel, 629/3, Jungli Maharaj Road)
Deccan Gymkhana, Pune – 411 004.) ...Respondent

WITH
ARBITRATION PETITION NO.105 OF 2017

Mr.Ramesh K. Shah,)
of Mumbai, Karta and Manager of)
K.V. Shah (HUF))
Having address at 3, Bethel, Chheda)
Nagar, Chembur, Mumbai – 400 089)
through its Constituted Attorney)
Mr.Jatin R. Shah) ...Petitioner

....Versus....

Mr.Kamlesh K. Sahani,)
carrying on business in the firm name)
and style of Kamal Enterprises as its)
Sole Proprietor, having address at C/o.)
Poonam Hotel, 629/3, Jungli Maharaj Road)

Deccan Gymkhana, Pune – 411 004.) ...Respondent

WITH
ARBITRATION PETITION NO.107 OF 2017

Smt.Bharti Haren Chheda,)
of Mumbai, India Inhabitant, residing at)
B-24, Prem Kutir, Sion (E), Mumbai – 22.)
through its Constituted Attorney)
Mr.Rajesh K. Shah) ...Petitioner

....Versus....

Mr.Kamlesh K. Sahani,)
carrying on business in the firm name)
and style of Kamal Enterprises as its)
Sole Proprietor, having address at C/o.)
Poonam Hotel, 629/3, Jungli Maharaj Road)
Deccan Gymkhana, Pune – 411 004.) ...Respondent

WITH
ARBITRATION PETITION NO.108 OF 2017

Smt.Bharti Haren Chheda,)
of Mumbai, India Inhabitant, residing at)
Jai Anand Complex, 4th Floor, Gul)
Mohar Road, Sion, Chunnabhatti (E),)
Mumbai – 400 022.) ...Petitioner

....Versus....

M/s.Shant Snacks & Beer Bar)
Through its partner Mr.Kamlesh)
K. Sahani ,a registered Partnership firm)
carrying on business at Hotel Poonam)
657/3, Jungli Maharaj Road)
Deccan Gymkhana, Pune – 411 004.) ...Respondent

WITH

ARBITRATION PETITION NO.110 OF 2017

Smt.Bhanuben R. Shah)
through its C.A. Mr.Rakesh K. Shah)
of Mumbai, India Inhabitant, residing at)
3, Bethel, Chheda Nagar,)
Chembur Mumbai – 400 089.) ...Petitioner

....Versus....

Mr.Kamlesh K. Sahani,)
carrying on business in the firm name)
and style of Kamal Enterprises as its)
Sole Proprietor, having address at C/o.)
Poonam Hotel, 629/3, Jungli Maharaj Road)
Deccan Gymkhana, Pune – 411 004.) ...Respondent

WITH
ARBITRATION PETITION NO.111 OF 2017

Ramesh K. Shah)
of Mumbai, India Inhabitant, residing at)
3, Bethel, Chheda Nagar,)
Chembur Mumbai – 400 089.)
through its Constituted Attorney)
Mr.Rajesh K. Shah) ...Petitioner

....Versus....

Mr.Kamlesh K. Sahani,)
carrying on business in the firm name)
and style of Kamal Enterprises as its)
Sole Proprietor, having address at C/o.)
Poonam Hotel, 629/3, Jungli Maharaj Road)
Deccan Gymkhana, Pune – 411 004.) ...Respondent

WITH
ARBITRATION PETITION NO.112 OF 2017

Mr.Jatin Ramesh Shah)

of Mumbai, India Inhabitant, residing at)
6, Dayal Bhuvan, 104, Keshavji Naik Road,)
Mumbai – 400 089.) ...Petitioner

....Versus....

Mr.Kamlesh K. Sahani,)
carrying on business in the firm name)
and style of Kamal Enterprises as its)
Sole Proprietor, having address at C/o.)
Poonam Hotel, 629/3, Jungli Maharaj Road)
Deccan Gymkhana, Pune – 411 004.) ...Respondent

Ms.Mamta Sadh i/b Mr.Kalpesh J. Nansi and Ms.Khan Farhana for
the Petitioner.

Mr.Suyash Gadre with Mr.Chetan Mhatre i/b Utangale & Co. for the
Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 3RD NOVEMBER, 2017.

ORAL JUDGMENT :-

1. By consent of parties, facts being identical in all these matters, were heard together and are being disposed of by a common judgment.

2. I will summarize the facts in Arbitration Petition No.104 of 2017. By this petition filed under section 14 and 15 of the Arbitration & Conciliation Act, 1996, (for short “the said Act”) the petitioner seeks substitution and/or appointment and/or replacement of the erstwhile arbitrator. On 28th November, 2005, the parties filed a consent terms in Summons for Judgment No.186 of 2005 in Summary Suit No.2042 of 2003. The parties agreed to refer the disputes in the suit to the

sole arbitration of Shri Justice A.B. Palkar, a former Judge of this Court. The said suit was disposed of in terms of the consent terms filed by the parties. In view of the demise of Shri Justice A.B. Palkar, a former Judge of this Court, by an order dated 20th November, 2009, Shri Justice Anoop V. Mohta passed in Arbitration Petition No.685 of 2009 appointed Shri Justice S.S. Parkar, a former Judge of this Court as sole arbitrator in place of the erstwhile arbitrator Shri Justice A.B. Palkar, a former Judge of this Court. The said Shri Justice S.S. Parkar also refused to act as an arbitrator and vacated office. By an order dated 19th December, 2014, Shri Justice S.J. Kathawalla in Arbitration Application No.271 of 2014 along with connected matters appointed Mr.Ashish Kamat, a counsel of this Court by consent of parties.

3. The petitioner thereafter requested the learned arbitrator to fix a date for holding a preliminary meeting. The date was fixed by the learned arbitrator. The learned arbitrator however, could not remain present on the date fixed by him. The petitioner thereafter requested for fixing another date before the learned arbitrator vide letter dated 16th February, 2015. Learned arbitrator did not enter upon the reference. The petitioner thereafter filed separate arbitration petitions *inter-alia* praying for filling up of the vacancy arising out of the resignation of Mr.Ashish Kamat, the erstwhile arbitrator. By an order

dated 25th October, 2016 passed by this Court, those petitions were disposed of with liberty to issue notices to the respondent for appointment of an arbitrator and to file a fresh petition after expiry period of 30 days notice period.

4. The petitioner through his advocate issued a fresh notice on 29th November, 2016 to the respondent requesting the respondent to appoint an arbitrator within 30 days from the date of receipt of invoking sections 14 and 15 of the said Act.

5. The respondent vide their advocate's letter dated 27th December, 2016, responded to the said notices and raised an issue of limitation in respect of the claims and refused to appoint an arbitrator. The petitioners thus filed these seven petitions invoking sections 14 and 15 of the said Act seeking substitution and/or appointment and/or replacement of the erstwhile arbitrator.

6. Ms.Sadh, learned counsel appearing for the petitioner invited my attention to various orders passed by this Court in various petitions filed by the petitioner for substitution of the arbitrator appointed by this Court on 28th November, 2005 in Summons for Judgment No.186 of 2005. She submits that by an order dated 28th November, 2005, this Court appointed Shri Justice A.B. Palkar, a former Judge of this Court in the consent terms filed by the parties in the Summons for Judgment. In view of the sad demise of Shri Justice

A.B. Palkar, a former Judge of this Court, this Court by consent of parties on 20th November, 2009 appointed Shri Justice S.S. Palkar, a former Judge of this Court as the sole arbitrator. The said learned arbitrator also resigned. The petitioner thereafter filed the applications under sections 14 and 15 of the said Act which were disposed of by an order dated 19th December, 2014, appointing Mr.Ashish Kamat, a counsel of this Court as an arbitrator. She submits that since the learned arbitrator has resigned, the vacancy has arisen, which is required to be filled in by appointing a substitute arbitrator under section 15 of the Act. She submits that the request of the petitioner for appointment of substitute arbitrator is denied by the respondent only on the ground that the claims made by the petitioner are barred by law of limitation.

7. Learned counsel for the respondent on the other hand opposed this petition on the ground of maintainability filed under sections 14 and 15 of the said Act. It is submitted that Shri Justice A.B. Palkar, a former Judge of this Court was appointed in Summons for Judgment No.186 of 2005. She submits that the vacancy having arisen in view of the resignation of Mr.Ashish Kamat, a counsel of this Court, can be filled up only in an application under section 11 of the said Act and not in the petition filed under sections 14 and 15 of the said Act. In support of this submission, learned counsel placed

reliance on an unreported judgment of the Supreme Court delivered on 16th October, 2015 in case of **Shailesh Dhairyawan vs. Mohan Balkrishna Lulla** in Civil Appeal No.8731 of 2015 an in particular paragraph 22.

8. Ms.Sadh, learned counsel for the petitioner distinguished the said judgment relied upon by the leaned counsel for the respondent on the ground that in this case the arbitration agreement was recorded in the Summons for Judgment No.186 of 2005 when both the parties agreed to refer the disputes and differences between the parties to a former Judge of this Court, who was appointed as a sole arbitrator. She submits that thereafter two more appointments came to be made by this Court substituting Shri Justice A.B. Palkar, a former Judge of this Court, who expired, and Shri Justice S.S. Parkar, former Judge of this Court in the arbitration petitions also filed under section 15 of the Arbitration & Conciliation Act, 1996. She submits that the petitioner had filed similar application however, without issuing any notice to the respondent. The said applications however, were withdrawn with liberty to issue a notice to the respondent. She submits that this petitioner filed under section 15 of the said Act is thus maintainable.

9. A perusal of the record indicates that the parties have arrived at an arbitration agreement by filing consent terms dated 28th

November, 2005 in Summons for Judgment No.186 of 2005. The disputes and differences were referred to arbitration. The said Summary Suit No.2042 of 2003 was disposed of in terms of the consent terms.

10. In view of the demise of Shri Justice A.B. Parkar, a former Judge of this Court, this Court filled up the said vacancy by appointing Shri Justice S.S. Parkar, a former Judge of this Court as a sole arbitrator. Shri Justice S.S. Parkar, a former Judge of this Court also resigned. The vacancy arising out of that resignation was thereafter filled in by this Court by consent of parties by appointing Mr.Ashish Kamat, a counsel of this Court by an order dated 19th December, 2014. Mr.Ashish Kamat, a counsel of this Court also resigned and thus the vacancy arose.

11. Under section 15 of the said Act, a Court is empowered to substitute the arbitrator if the mandate of the arbitrator is terminated because of his withdrawal from the office for any reason or pursuant to the agreement of the parties. In this case Mr.Ashish Kamat, a counsel of this Court, who was appointed in substitution of Shri Justice S.S. Parkar, a former Judge of this Court, withdrew from his office. Section 15(2) of the Arbitration & Conciliation Act, 1996 would attract to the facts of this case.

12. Insofar as the issue raised by the learned counsel for the

respondent that this petition is not maintainable under sections 14 and 15 of the said Act and the petition could have been filed under section 11 of the said Act is concerned, this issue is dealt with by the Supreme Court in case of **Yashwith Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd (2006) 6 SCC 204.** The said judgment of the Supreme Court is adverted by the Supreme Court in the later judgment in case of **Shailesh Dhairyawan** (supra). The Supreme Court in the said judgment **Yashwith Constructions (P) Ltd.** has construed section 15(3) and also 11(6) of the said Act. It is held by the Supreme Court that there was no failure on the part of the party concerned as per the arbitration agreement, to fulfill his obligation in terms of section 11 of the said Act so as to attract the jurisdiction of the Chief Justice under section 11(6) of the said Act for appointing a substitute arbitrator. It is further held that section 11(6) of the said Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. Section 11(6) of the said Act can be attracted where under an appointment procedure agreed upon by the parties contemplated in section 11(2) read with 11(4) of the said Act, a party fails to act as required under that procedure or the parties or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure.

13. In the facts of this case, admittedly the parties had agreed to refer the disputes and differences to arbitration of Shri Justice A.B. Palkar, a former Judge of this Court in Summons for Judgment No.186 of 2005. In the said arbitration agreement, no other procedure was agreed upon by the parties for appointment of a substitute arbitrator. The judgment of the Supreme Court in case of **Yashwith. Constructions (P) Ltd.** (supra) thus would squarely apply to the facts of this Court and would assist the case of the petitioner and not the respondent. In my view, the argument of the learned counsel for the respondent is contrary to the principles of law laid down by the Supreme Court in the said judgment.

14. Be that as it may, the earlier applications filed by the petitioner for substitution of an arbitrator were also under section 15 of the said Act. These petitions are thus maintainable under section 14 read with 15 of the said Act.

15. The erstwhile arbitrator having withdrawn from the office, the substitute arbitrator in place of erstwhile arbitrator will have to be made by this Court in this application under section 15 of the said Act. There is thus no merit in the submission made by the learned counsel for the respondent.

16. I therefore, pass the following order :-

a). Shri A.J. Dholakia, a former Principal District Judge and a

former Charity Commissioner having his address at c/o Room No.56, High Court Law Library, 3rd Floor, High Court, Bombay is appointed in all the seven petitions as a sole arbitrator in place of erstwhile arbitrator Mr.Ashish Kamat, a counsel of this Court, who has withdrawn from the office. The arbitration petitions are disposed of in aforesaid terms.

b). No order as to costs.

(R.D. DHANUKA, J.)