

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

**COMMERCIAL ARBITRATION No. 316 OF 2017
WITH
NOTICE OF MOTION No. 308 OF 2017
IN
COMMERCIAL ARBITRATION No. 316 OF 2017**

M/s. Ultra Engineers **....Petitioners**
Vs.
Quartet Thermal Engineering Pvt. Ltd. **....Respondents**

Mr. Jaydeep Deo for Petitioners
Mr. Firoz Bharucha a/w. Mr.Makarand Bakare i/b JMB Partners for
Respondent

CORAM : M.S. SANKLECHA, J.

THURSDAY, 2ND NOVEMBER, 2017

P.C.

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) challenges the Award dated 6th January, 2017 passed by the Sole Arbitrator. By the impugned award dated 6th January, 2017, the Respondents has been awarded an amount of Rs. 3,75,07,942/- as damages.

2. The grievance of the Petitioners to the impugned award is that the

same is unsustainable in law for the following reasons :-

- (a) There is no arbitration agreement between the Petitioners and the Respondents which would entitle reference to an arbitration;
- (b) No notice appointing an arbitrator was ever received by the Petitioners from the Respondents; and
- (c) Without prejudice to the submissions (a) and (b), the appointment of the Arbitrator by the Respondents was unilateral as the Petitioners had at no point of time consented to the appointment of the Arbitrator. In fact, the Petitioners had on receipt of the notice of hearing dated 16th July, 2016 from the Arbitrator had by letter dated 31st August, 2016 specifically disputed his jurisdiction to enter upon an alleged arbitral reference. This on the ground that he was not appointed as an Arbitrator in terms of the Act.

3. The petition was admitted. In view of the fact that the controversy in the petition is within a very narrow compass with the consent of the learned counsel of the parties, the petition is immediately taken up for final disposal.

4. I shall first examine submission (c) above made by the Petitioners as the facts therein are undisputed and it would require only application of law

to the same. The undisputed facts with regard to submission (c) above are that the Petitioners on receipt of notice dated 6th July, 2016 from the Arbitrator had responded by its letter dated 31st August, 2016, pointing out that no consent had been given to his appointment as a Sole Arbitrator by the Petitioners. Therefore, even if one accepts the contention of the Respondents that conditions of sale containing the arbitration clause was served upon the Petitioners (the Petitioners dispute that the condition of sale were ever communicated to it) yet it clearly provides that the disputes and differences between the parties would be settled by arbitration under the arbitration law in force. Moreover the Arbitration clause therein does not provide for any procedure for appointment of an Arbitrator. Therefore, once the Petitioners have not appointed their Arbitrator and has disputed / not accepted the appointment of the sole arbitrator by the Respondents, the only remedy open to the Respondents was to have moved this Court under Section 11 (b) of the Act for an appointment of an Arbitrator.

5. The entire controversy which arises in this petition with regard to the jurisdiction of an unilateral appointment of the Arbitrator is no longer *res-integra*. It stands settled by the decision of this Court in ***Zenith Fire***

Services (India) Pvt. Ltd., Mumbai Vs. Charmi Sales, Ahmedabad [2013

(2) Mh.L.J. 623] wherein the Court has observed as under:

“14. Mere appointment of Arbitrator by one party and admittedly when it was not mutual appointment, that itself also is not sufficient to treat valid appointment of the Arbitrator, as per clause as well as under the provisions of the Arbitration Act. The mutual consent is a must, even otherwise, to appoint sole Arbitrator. I am inclined to observe that such appointment of the sole Arbitrator cannot be accepted as valid and legal appointment by invoking the Doctrine of Acquiescence and/or Estoppel and/or Waiver. Considering the whole scope and purpose of Arbitration Act and specifically in view of the provisions of section 11 and the judgment of Supreme Court and even otherwise such unilateral appointment of Arbitrator itself is void, unjust and contrary to law. The whole proceedings therefor so initiated and continued also faces the same consequences. The consequential proceedings in view of this illegal appointment of sole Arbitrator is also bad.”

6. In the above view, the impugned award dated 6th January, 2017 is quashed and set aside. It is however made clear that in view of the above finding on submission (c) above on the part of the Petitioners, I have not

examined submissions (a) and (b) above made on behalf of the Petitioners as the facts therein are disputed before me. Accordingly, arbitration petition is allowed in above terms. No orders as to costs.

6. In the above view, the notice of motion is also disposed of as infructuous.

[M. S. SANKLECHA, J.]