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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1029 OF 2016

M/s. Evergreen Roadways	...Petitioner
vs	
Mahindra Logistics Limited	...Respondent

.....
Mr. A.K. Saxena, for the Petitioner.

Mr. Akash Rebello, i/b. Triumph Legal, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: JUNE 7, 2017

P.C. :

. Heard learned Counsel for the parties.

2. The Arbitration Petition challenges an award passed by a sole Arbitrator on 9 November 2015. Two grounds of challenge are urged before the Court. Firstly, it is submitted that the pre-condition for invocation of the reference has not been satisfied in the present case. Secondly, it is submitted that the impugned award has been passed without considering the written statement of the Petitioner (who was original Respondent in the arbitration reference).

3. As regards the first ground of challenge, the arbitration clause in the present case is quoted below :-

“19. Dispute Resolution:

- A. In the event that any dispute arises between the Parties in connection with this MOU, the construction of any provision of this MOU or the rights, duties or liabilities of the Parties hereto either Party may give to the other Party written notice of the existence of a dispute and may call a meeting to resolve the same. Such meeting shall be held within fourteen (14) days of the date of such notice (unless otherwise agreed) and will be attended to by the senior management of both the Parties (who have the authority to agree on action(s) to be taken) to resolve the dispute amicably.
- B. If mutual resolution cannot be reached within 30 (thirty) days of such meeting, the Parties shall be at liberty to refer the dispute for arbitration to be conducted as per the Arbitration and Conciliation Act, 1996. The sole Arbitrator shall be appointed by MLL only. The venue of arbitration shall be exclusively MUMBAI. The arbitration proceedings shall be conducted in English. Any award made in such arbitration will be final and binding on both Parties.
- C. The parties agree that all negotiations connected with the dispute shall be conducted in confidence and shall not be divulged to any unconnected third party.”

4. It may be seen from this clause that the agreement anticipated a conciliation meeting between the parties before a reference is made of the disputes to the sole arbitrator. It is the case of the Respondent (original Claimant) that though no formal conciliation was held within the meaning of clause A of Article 19 of the Memorandum of Understanding, which deals with dispute resolution, several meetings were held between the parties and all modes of conciliation were tried, despite which, the dispute between the parties could not be settled. The learned Arbitrator, in the impugned award, has held that not following

the procedure of conciliation strictly had not prejudiced the Petitioner in any manner; that either of Counsel or parties were at liberty to make a submission to that end and have the matter referred to conciliation, in which case even the tribunal would have itself explored the possibility of mediation or conciliation. Though no proof of any conciliation meeting between the parties was tendered in the arbitral reference, the tribunal was of the view that such technical objection with regard to conciliation at the stage of final hearing of the arbitration reference was inconsequential. The parties were in fact free to conciliate at any time before the award was made. There was no request to that effect even on the part of the Petitioner. The impugned award, thus, cannot be faulted on the ground of non-compliance with the pre-condition of conciliation. A condition such as this is clearly directory in nature. In the absence of it being shown that a party, who was in fact ready to conciliate and whose management was willing to negotiate with the opponent, was in fact denied such opportunity, mere technical failure to resort to conciliation cannot be termed as non-fulfillment of a pre-condition. A party who never sought such conciliation cannot be heard to complain at the final hearing of the arbitration on the basis of such non-fulfillment.

5. Insofar as the written statement of the Petitioner is concerned, the learned Arbitrator has, in the impugned award, set out in detail the various orders passed by the arbitral tribunal from time to time giving time and opportunity to the Petitioner to deposit costs, subject to which the arbitral tribunal had allowed filing of the written statement of the Petitioner. Despite giving time on a number of occasions neither was cost paid nor was the Petitioner present on a number of adjourned

occasions. The arbitral tribunal had passed an order for admitting written statement, subject to payment of costs as a condition precedent. No fault can be found *per se* with an order such as this. If despite giving several opportunities to the Petitioner, no cost was paid, no grievance can be made regarding the arbitration having proceeded in the absence of written statement.

6. There is, thus, no merit in either of the two challenges. The Arbitration Petition is, accordingly, dismissed. No order as to costs.

(S.C. GUPTE, J.)