

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ARBITRATION APPLICATION NO. 11 OF 2017

M/S N.A. KHAN TRANSPORT CONTRACTORS
THROUGH IT'S PROPRIETOR NISAR AHMAD KHAN
HAJI ABDUL GAFFAR KHAN
VERSUS
THE STATE OF MAHARASHTRA. THR. IT'S
SECRETARY, LABOUR, INDUSTRY AND ENERGY
DEPT., MANTRALAYA AND OTHERS.

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Advocate for Applicant : Mr Ajinkya Kale h/f Talekar
and Associates

AGP for Respondent 1 : Mr. S P Tiwari

Advocate for Respondent 2 : Mr N B Suryawanshi

Advocate for Respondent 3 : Mr. P M Gaikwad

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CORAM : V.K. JADHAV, J.

Dated: April 25, 2018

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PER COURT :-

1. This pertains to the contract of handling of food grains from railway station Rake Point, Aurangabad to the Government godowns at Jadhavwadi, Aurangabad. The applicant had offered the lowest rates and, as such, his bid was accepted and work order was issued in his favour. In terms of the clause 20 of the tender document, all disputes and differences arising out of and in any way touching or concerning the agreement

whatsoever shall be referred to the Arbitration. The applicant has submitted an application to respondent no.2 seeking appointment of the arbitrator as per clause no.20 of the agreement, however, respondent no.2 rejected the said application on account of the delay for submitting the disputes before the Arbitrator. Respondent no.2 has rejected the said application on the ground that such disputes can be referred only within a time of one year from the termination or completion of the contract. Being aggrieved by the same, the applicant has approached this Court by filing writ petition no.3837 of 2016 and, this Court has disposed off the said petition with liberty to approach this Court to seek appointment of the Arbitrator under section 11(6) of the Arbitration and Conciliation Act, 1996. Hence, this arbitration application.

2. Learned counsel for the applicant has raised two grounds. Firstly, it is open to the respondents to raise all contentions against the claim of the applicant

including the contention of limitation, maintainability and res judicata before the arbitrator. Secondly, though, clause 20 of the agreement restricts the appointment of the sole arbitrator, either the Chairman and Managing Director or any person including any officer of the Corporation appointed by the Chairman and Managing Director of the Maharashtra State Warehousing Corporation, the Chairman or the Managing Director become ineligible by operation of law and further they cannot nominate any another as an Arbitrator.

3. Learned counsel for the applicant, in order to substantiate his contentions placed his reliance on following judgments :-

1. Arjandas Tekchand Kashyap and others Vs. Smt. Pooja Jaiprakash Pamnani and others reported in (2014) 3 Air Bom R 55.
2. TRF Limited Vs. Energo Engineering Projects Limited reported in AIR 2017 SC 3889.

4. Learned counsel for respondent no.2 submits that,

in terms of the clause no.20 of the agreement, claim can be referred to the sole arbitrator within one year of the date of termination or completion of the contract, otherwise, the contractor shall be deemed to have been waived and absolutely barred and the Corporation shall be discharged and released of all liabilities whatsoever under the contract. Learned counsel submits that, in terms of clause 20 of the Arbitration, all the disputes and differences arising out of or in any touching or concerning this agreement whatsoever shall be referred to the sole Arbitration of Chairman and Managing Director or any person including any officer of the Corporation appointed by the Chairman and Managing Director of the Maharashtra State Ware Housing Corporation and none else. Learned counsel, however, in the alternate submits that, the Hon'ble Shri Justice [F.I.REBELLO](#) (Retired) may be appointed as an Arbitrator.

5. I have also heard the learned counsel appearing

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for respondent no.3. He has adopted the submissions made on behalf of respondent no.2.

6. So far as the point of limitation as raised by learned counsel for respondent no.2 in terms of clause no.20 of the agreement is concerned, this court (Coram: R.D. Dhanuka, J.) in the matter of Arjandas Tekchand Kashyap and ors (supra) relied upon by the learned counsel for applicant, by relying upon the judgment of the Supreme Court in a case of National Insurance Company Ltd. Vs. Boghara Polyfab Private Limited, reported in (2009) 1 SCC 267 and in a case of Indian Oil Vs. SBP Engineering Limited reported in AIR 2011 SC 987, in paragraph no.26 of the Judgment has made following observations :-

26. In so far as the issue whether claim made by the applicants are barred by law of limitation or not, reference to the judgment of the Supreme Court in the case of National Insurance Company Limited (supra) would be relevant. In paragraph 22 of the said judgment, the Supreme Court has categorized three types of issues which may arise in an application under [section 11](#) of the Arbitration Act. It is held by the Supreme court that whether claim is dead (long barred) claim or alive claim, it is for the Chief Justice or his designate to choose whether to decide such issue or to leave them to the decision of the arbitral tribunal. Supreme Court in the case of Indian Oil Vs. SBP Engineering Ltd. AIR 2011 SC 987 has held that the designate

Judge shall avoid the risks and dangers involved in deciding an issue relating to the tenability of the claim without necessary pleadings and documents, in a proceedings relating to the limited issue of appointing an arbitrator. It is held in that matter that the designate Judge committed a jurisdictional error in dismissing the application filed by the appellant under [section 11](#) of the Act, on the ground that the claim for extra cost was barred by res judicata and by limitation. The Supreme Court has set aside the said judgment of the designate Judge and has held that it is open to the respondent to raise all contentions against the claim of the applicant including the contention of limitation, maintainability and res judicata, before the arbitrator. I am respectfully bound by the judgment of the Supreme Court in the case of National Insurance Company and in the case of Indian Oil Ltd. (supra).

Paragraph 19 of the Judgment of the Indian Oil Ltd. (supra) reads thus :-

"19. The Designate should have avoided the risks and dangers involved in deciding an issue relating to the tenability of the claim without necessary pleadings and documents, in a proceeding relating to the limited issue of appointing an Arbitrator. It is clear that the Designate committed a jurisdictional error in dismissing the application filed by the Appellant under [Section 11](#) of the Act, on the ground that the claim for extra cost was barred by res judicata and by limitation. Consideration of an application under [Section 11](#) of the Act, does not extend to consideration of the merits of the claim or the chances of success of the claim."

7. It is clear that it is open to the respondents to raise all contentions against the claim of the applicant including the contention of limitation, maintainability, etc. before the Arbitrator. The Supreme Court, in the aforesaid cases has observed that, the designate Judge shall avoid the risks and dangers involved in deciding an issue relating to the tenability of the claim without

necessary pleadings and documents in a proceedings relating to the limited issue of appointing an arbitrator. Further, issue of limitation is a mixed question of fact and law and merely on the basis of the limited averments made in the application under section 11 for the purpose of appointment of arbitrator, the said issue cannot be decided effectively.

8. So far as appointment of a Chairman or a Managing Director as a sole Arbitrator or a person of their choice as per clause 20 of the agreement is concerned, in a case TRF Limited Vs. Energo Engineering Projects Limited (supra), in paragraph no.54 of the judgment, has made following observations :-

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in [Section 12\(5\)](#) of the Act. It is inconceivable in law that person who

is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.

The Supreme Court has specifically observed that, we are neither concerned with the authority objectivity nor the individual respectability. The Chairman or the Managing Director may be otherwise eligible and respectable person, however, considering the authority or the power they hold and possess. It would not be appropriate to appoint them as an Arbitrator once they become ineligible by operation of law, they cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12 (5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person.

9. In view of the above, this application is allowed. No costs. Shri Justice [F.I.REBELLO](#) (Retired) is hereby

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appointed as an Arbitrator. Inform the learned Arbitrator accordingly and parties to act upon the same. Application accordingly disposed of.

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(V.K. JADHAV, J.)

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