

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
APPLICATION FOR APPOINTMENT OF ARBITRATOR
NO. 23 of 2017

Synergy Ispat Limited,
having registered office at
55 B Rama Road Industrial Area,
New Delhi-110015
through its authorised representative
Arvind Kumar Tiwari,
aged about 45 years,
Resident of A-1, 407, Summer Palms,
Sector 86, Faridabad, Haryana.

..... Applicant.

Versus.

1. Mrs. Barbara Elizabeth Simoes,
major of age, Resident of House
No.89/J, Cupem, Nuvem,
Salcete, Goa 403 604.

2. Ms. Virginia Maria Simoes,
major of age, Resident of House
No.89/J, Cupem, Nuvem,
Salcete, Goa 403 604.

..... Respondents.

Mr. S.D. Padiyar, with Mr. Devender Kaushik and Mr. P. Shirodkar,
Advocates for the Applicant.

Mr. E. Kotwal with Mr. Ryan Menezes and Ms. G. Almeida,
Advocates for the Respondents.

Coram : N.M. Jamdar, J.

Date : 12 October 2018

Order:

The Applicant has moved this application under Section 11 read with Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 and the Appointment of Arbitrators by the Chief Justice of Bombay High Court Scheme, 1996. The Applicant has sought appointment of a retired Judge as a member of the Arbitral Tribunal as per Agreement dated 22 December 2004 between the parties.

2. The Applicant is a limited company engaged in the business of mining. The Respondents are holders of a mining lease. An agreement was entered into between the Applicant and the Respondents on 22 December 2004 for sale of iron ore/manganese from the mines. Terms and conditions were stipulated. According to the Applicant, as per the agreement, the entire excavated mineral was to be sold by the Applicant. According to the Respondents, the Applicant made no efforts to commence the mining operations. The Respondent terminated the Agreement dated 22 December 2004 vide letter dated 30 March 2007. The Applicant filed a Petition under Section 9 of the Act of 1996 in the Court of Principal District Judge,

South Goa, Margao. Applicant sought a declaration that the letter dated 30 March 2007 terminating the Agreement as illegal and non-est. The Principal District Judge passed an ad interim order on 30 June 2007 directing the parties to maintain *status quo*. Subsequently, by order dated 29 May 2008, the application under Section 9 filed by the Applicant was disposed of confirming the ad interim order.

3. The Applicant filed an Application under Section 11 of the Act in this Court on 24 July 2007 for designation of the Arbitral Tribunal as per the arbitration clause contained in the Agreement. The Application was disposed of on 12 October 2007 appointing an Arbitral Tribunal. Arbitral Tribunal consisted of Mr. Justice K.T. Thomas, a former judge of the Supreme Court, Justice Dr. B.P. Saraf, a retired chief justice of the high court, and Mr. Justice Eurico Da Silva, a retired judge of the high court. Arbitration commenced in January 2008. The first meeting was fixed on 19 January 2008. The Applicant filed an interim application under Section 17 of the Act of 1996. The Arbitral Tribunal stayed the operation of the termination letter dated 30 March 2007. The parties completed their pleadings. Evidence of witnesses of the parties commenced. There were certain adjournments for the purpose of examination of the witnesses. Dr. Justice B.P. Saraf passed away on 15 May 2012. The Respondents applied to the Principal District Judge, South Goa, Margao on 30

July 2016 and sought a declaration of extinction of the Arbitral Tribunal.

4. The Applicant appointed Mr. Justice Uma Nath Singh in place of Justice Saraf. By letter dated 7 June 2017, Justice Thomas informed the members of the Arbitral Tribunal and the parties that he was withdrawing from the arbitration on the ground of his ill-health. At the request of the applicant and by consent of the Arbitrators, Justice H.S. Bedi, a retired Judge of the Supreme Court was requested. He consented to act as an arbitrator by letter dated 23 July 2017. On 31 July 2017 Justice Da Silva withdrew on the ground of his ill-health. On 4 August 2017, the Applicant wrote to the Respondents for the appointment of a member of the Arbitral Tribunal in place of Justice Da Silva, as the discretion to appoint was with the Respondents. On 16 August 2017, Justice H.S. Bedi wrote to the Respondents for the appointment of an Arbitrator in place of Justice Da Silva. The Respondents by the letter dated 19 September 2017, refused to appoint an Arbitrator. In this factual backdrop, the Applicant has moved the present application for substitution and appointment of an Arbitrator.

5. According to the Applicant, the arbitration clause requires the Respondents to appoint their Arbitrator. A member of

the Arbitral Tribunal has withdrawn from the Tribunal. An Appointment by the Respondents is necessary to complete the quorum of the Tribunal. The Respondents have refused to appoint an arbitrator. The Applicant prays that by allowing this Application, an Arbitrator be appointed to fill up the vacancy.

6. A notice was issued in this application. The Respondents filed their reply and placed compilation of documents on record and also filed their written submissions. I have heard Mr. S.D. Padiyar, learned Counsel for the Applicant and Mr. E. Kotwal, learned Advocate for the Respondents.

7. The learned Counsel have argued the case extensively. They have filed voluminous record and written submissions. Both the learned Counsel have referred to almost every judgment governing Section 11 of the Act. These decisions are: *Ador Samia Pvt. Ltd. vs. Peekay Holdings Ltd. & ors.* (1999) 8 SCC 572; *Wellington Associates Ltd. vs. Kirit Mehta* AIR 2000 SC 1379; *Dilnawaz Koohinoory & ors. vs. Boman Kohinoor & ors.* (2002) 2 Bom LR 134; *Konkan Railway Corporation Ltd. & ors. vs. Mehul Construction Co.* (2000) 7 SCC 20; *SBP & Co. vs. Patel Engineering* (2005) 8 SCC 618; *Shree Ram Mills Ltd. vs. Utility Premises (P) Ltd.* (2007) 4 SCC 599; *DHV BV vs. Tahal Consulting*

Engineers Ltd. (2007) 8 SCC 321; National Insurance Co. Ltd. vs. Boghara Polyfab Private Ltd. (2009) 1 SCC 267; Speech & Software Technologies (India) Private Ltd. vs. Neos Interactive Ltd. (2009) 1 SCC 475; Union of India vs. Master Construction Co. (2011) 12 SCC 349; Yashwant Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd. & Anr. (2006) 6 SCC 204; National Highways Authority of India vs. Bumihiway DDB Ltd. (JV) & ors. (2006) 10 SCC 763; Shailesh Dhairyawan vs. Mohan Balkrishna Lulla (2016) 3 SCC 619; Supdt. of Taxes vs. Onkarmal Nathamal Trust (1976) 1 SCC 766; Emm Enn Associates vs. Commander Works Engineer & ors. (2016) 13 SCC 61; Velugubanti Hari Babu vs. Parvathini Narasimha Rao (2016) 14 SCC 126; Ballabhdas Mathurdas Lakhani vs. Municipal Committee Malkapur (1970) 2 SCC 267; Indian Oil Corporation Ltd. vs. Municipal Corporation (1995) 4 SCC 96; Kesho Ram & Co. vs. Union of India (1989) 3 SCC 151; Aravali Power Company Pvt. Ltd. v. Era Infra Engineering Ltd. (2017) 15 SCC 32; M/s. Mangalore Petrochemicals Ltd. vs. M/s. ANS Constructions Ltd. & Anr. 2018 SCC OnLine SC 99; Global Aviation Services Pvt. Ltd. v Airport Authority of India Ltd. 2018 SCC OnLine Bom 233; Sanjay Singh vs. U.P. Public Service Commission (2007) 3 SCC 720; State of Orissa vs. Balaram Sahu (2003) 1 SCC 250; Roger Shashoua vs. Mukesh Sharma & ors.

(2017) 14 SCC 722; *Union of India vs. Major Bahadur Singh*
(2006) 1 SCC 368; *Municipal Corporation of Delhi vs. Gurnam Kaur* (1989) 1 SCC 101; *Union of India vs. Godfrey Philips* (1985) 4 SCC 369; *MTNL vs. Applied Electronics Ltd.* (2017) 2 SCC 37; *Thyssen Stahlunion Gmbh vs. Steel Authority of India Ltd.* (1999) 9 SCC 334; *Ratna Infrastructure Projects Pvt. Ltd. vs. Meja Urja Nigam Pvt. Ltd.* MANU/DE/0944/2017; *Trf Ltd vs Energo Engineering Project Ltd.* 2017 (8) SCC 377; *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd. and etc.* 2018 LawSuit (SC) 225; *Raffles Design International India Pvt Ltd. and Anr. vs. Educomp Professional Education Ltd. and ors.* 2016 LawSuit(Del) 5705; *Padmini Chandran Menon vs. Vijay Candran Menon and ors.* (2018) 1 BCR 743; *Duro Felguera S.A. vs. Gangavaram Port Limited* 2017 (9) SCC 729; *Ibi Consultancy India Pvt. Ltd. vs. DSC Limited* 2018 (5) Scale 694; *Vipin Bhimlal Shah vs. Slum Rehabilitation Authority* 2017 LawSuit (Bom) 2200; *Jindal Stainless Limited vs. Damco India Pvt. Ltd.* 2016 LawSuit (Del) 6488; *M/s. Amisha Buildcon Pvt. Ltd. vs. Jidnyasa Co-operative Housing Society* Arb. Pet.82 of 2014 Bombay High Court; *M/s. Ancl & Co. (India) Pvt. Ltd. vs. M/s. RSWM Ltd.* Arb. Appln No.12/2016 decided by Rajasthan High Court; *Arasmeta Captive Power Company Pvt. Ltd. and anr. vs. Lafarge India Pvt. Ltd.* 2013

(15) SCC 414; and *Chloro Controls (I) P. Ltd. vs. Severn Trent Water Purification Inc & Ors.* 2013 (1) SCC 641.

8. Undoubtedly the learned Counsel have taken pains to prepare and argue the case. It is, however, necessary to keep in mind the scope and ambit of the jurisdiction. The Respondents have argued various aspects on the merits of the dispute to emphasis the genuineness of their case. I am neither trying the arbitration proceedings on merits nor exercising any equity jurisdiction. Going by the legislative changes, report of the Law Commission and the decisions of the Courts, the exercise under Section 11 should be simplified and reduced to examining the minimum possible circumstances. Such long drawn contests holding up the appointment of the arbitrators, is the very reason why changes have been brought in to unclog the procedure. The focus of the discussion in the present application thus is to be kept on the essentials.

9. The Agreement dated 22 December 2007, in clause 16 thereof has provided for resolution of the disputes by way of arbitration. Clause 16 of the Agreement reads thus :

“16. ARBITRATION:

16.1. In the event of any dispute or difference, or controversy or claim arising out of, or in connection

with or regarding the breach, termination, invalidity or interpretation of this Agreement, the same shall be resolved in the following manner :

16.2. Any party shall give a notice to the other notifying the dispute or differences, or controversy or claim. The authorised representatives of parties shall use their best endeavours to resolve the matter amicably within Ninety (90) days of such notification of the existence of dispute, breach or controversy or claim.

16.3. If the dispute is not resolved in terms of clause 15.2, the same shall be referred to and finally settled by the Arbitration.

16.3.1. The Arbitral Tribunal shall be comprised of a panel of three arbitrators, one to be appointed by the claimant(s) and one to be appointed by the respondent(s) and the two arbitrators so appointed shall appoint the third arbitrator who shall act as the presiding arbitrator.

16.3.2. The panel of arbitrators shall consist of retired High Court Judges and the presiding arbitrator shall be either a retired Chief Justice of High Court or a retired Judge of Supreme Court of India.

16.3.3. The arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act 1996 and the Rules made thereunder as amended upto date.

16.3.4. The arbitration proceedings shall be held in Goa and shall be conducted in English language. The arbitration award shall be final and binding on the

parties.

16.3.5. Any fee and all other related expenditure of Arbitration shall be share by both the parties equally.”

Therefore, the Arbitral Tribunal is to have two arbitrators to be appointed by the parties. One will be appointed as a presiding arbitrator. Who the arbitrators and the presiding arbitrator should be, is specified in the agreement.

10. Section 14 of the Act of 1996 lays down that the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator if he is unable to perform his functions and he withdraws from his office or parties agree to the termination of his mandate. Under Section 15 of the Act, in addition to the circumstances referred to in Sections 13 and 14, the mandate of the arbitrator will terminate if he withdraws from the office for any reason. When the mandate of the arbitrator is so terminated, substitute arbitrator has to be appointed according to the rules that applied to the appointment of the arbitrator being replaced. After Justice Da Silva withdrew as an Arbitrator, the Applicant had called upon the Respondents to appoint an arbitrator as per the procedure agreed under the Arbitration Agreement. Upon failure of the Respondents to appoint an arbitrator, the present application is filed.

Therefore, the present application is not only under Section 11 *simplicitor* but is to be read with Section 15 of the Act.

11. Briefly, the principal objections of the Respondents to the Application are that by the subsequent change in the law the Agreement dated 22 December 2004 has become void. Secondly, the arbitration is deemed to have been abandoned. The third, that one of the parties to the tripartite agreement, namely Metsil Exports Private Ltd., has not been joined and, therefore, the arbitration in respect of only two of the parties cannot commence. The fourth ground is of excessive costs of arbitration, which according to the Respondents they cannot bear.

12. According to the Applicant, the grounds raised by the Respondents need not be considered at the time of the appointment of the Arbitrator under Section 11 read with Section 15, and all these arguments can be urged before the Arbitrator. According to the Applicant, the contract is not void, and even otherwise, the arbitration agreement survives, and various other claims remain to be adjudicated. The Applicant contends that, because Metsil Exports Pvt. Ltd. has not applied to this Court as yet, does not mean that the present Application is to be dismissed. Lastly, the Applicants are ready to bear the costs, subject to the outcome of the arbitration.

13. Taking up the last point first, that is of costs of arbitration. The Respondents submit that substantial costs have already been incurred in the arbitration and with the limited financial resources available to the Respondents; it is not possible for them to conduct the arbitration any further. The Applicants have categorically submitted that they are ready to bear further costs of the arbitration subject to the outcome of the arbitration. Therefore, the financial burden as a ground to oppose the appointment of the Arbitrator, does not survive.

14. According to the Applicant, when Justice Da Silva withdrew from the Arbitral Tribunal and the Respondents did not appoint an arbitrator in spite of the letter dated 4 August 2017, that was the time the cause of action arose. According to the Applicant, the Respondents rejected the request by letter dated 19 September 2017, that is after the amendment to Section 11(6) on 23 October 2015 by virtue of Arbitration and Conciliation (Amendment) Act, 2015.

15. Amendment Act of 2015 has brought in different parameters in respect of the appointment of an arbitrator. Section 11(6A) which is introduced, reads thus :

“11. Appointment of arbitrators -

..

...

...

6(A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement”

The deliberate use of the phrase *confined to* makes the legislative intent clear. It is to minimise the scrutiny at the time of the appointment of Arbitrator.

16. The Agreement dated 22 December 2004 contains clause 16.3.3 which states that the arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act 1996 and the Rules made thereunder, as amended upto date. It reads thus :

“16.3.3. The arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act 1996 and the Rules made thereunder as amended upto date.”

It is clear by the phrases used in this clause that the parties have agreed that not only the Act of 1996 as it stood on 12 December 2004 will apply, but the further amendments and modifications as

well. This agreement is not a statute. It is entered into by the commercial entities. The phrase *upto date* is a colloquial. This phrase means 'latest' and 'current'. The phrase used *as amended upto date* would take within its ambit the amendments that would come about till the proceedings are complete. The argument of the Respondents that the expression *upto date* should be read as up to 22 December 2004, cannot be accepted. The Clause does not mean that the amendments should only "up to a particular date".

17. In the case of *Padmini Chandran Menon vs. Vijay Chandran Menon and ors.*¹, the learned Single Judge of this Court held that the parties would be governed by the Amendment Act of 2015, including Section 11(6A) of the Act of 2015 if the parties have agreed that not only the Act of 1996 will apply, but any further modifications. The learned Judge has observed that in view of section 26 of the Arbitration & Conciliation (Amendment) Act, 2015 and in view of the agreement between the parties that the disputes will be settled not only in accordance with the provisions of the Arbitration & Conciliation Act, 1996 prevailing on the date of the execution of the said agreement, but also any statutory modifications thereof. It was held that the parties in that case would be governed by the provisions of the Arbitration & Conciliation

1 2018 (1) BCR 743

(Amendment) Act, 2015. It was observed that the process would be governed by the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 and more particularly section 11(6-A) of the Arbitration and Conciliation (Amendment) Act, 2015 and thus powers of court is confined to the examination of the existence of the arbitration agreement only. In the case of *Ratna Infrastructure Pvt. Ltd. Vs. Meja Urja Nigam Private Limited*² the Delhi High Court, in identical circumstances, held that if the parties had agreed for application of the amended Act when they entered into an agreement, then the Amending Act of 2015 would clearly be made applicable. The decisions in the cases of *Padmini Chandran and Ratna Infrastructure Pvt. Ltd* assist the Applicants in their interpretation

18. In the case of *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd. and etc.*³, the Supreme Court has held that the Amendment of 2015 is to ensure that the arbitration process becomes more user-friendly, cost-effective and lead to the expeditious disposal of cases. The legislative policy behind Section 11(6A) is to minimise intervention of the Courts at the stage of appointment of an arbitrator. It is clear that the Chief Justice or his designate is not empowered to enter into the merits of the dispute between the

² MANU/DE/0944/2017

³ 2018 AIR (SC) 1549

parties.

19. In the case of *Duro Felguera S.A. vs. Gangavaram Port Limited*⁴ the Supreme Court has considered the effect of the 2015 Amendment and has held that the power of the Court is restricted only to see whether there exists an arbitration agreement. Other issues to be left for the Arbitral Tribunal to decide.

20. In the case of *IBI Consultancy India Private Limited vs. DSC Limited*⁵, the Supreme Court has observed that the entire conspectus has changed after the enactment of the Section 11(6A). This Court in *Vipin Bhimlal Shah vs. Slum Rehabilitation Authority*⁶ has also stressed upon the limited ambit of Section 11(6A). It is not necessary to multiply the decisions on this point as the language of Section 11(6A) is very clear. As per Section 11(6A), all that the Court is required to examine, is the existence of the arbitration agreement.

21. Coming to the basic requirement of the existence of an arbitration agreement, the same is contained in the Agreement of 22 December 2004. The arbitration clause has already been reproduced. It is not the case that the parties are approaching the Court for the first time. The Applicant had approached the High Court under

4 2017 (9) SCC 729

5 2018 (5) Scale 694

6 2017 LawSuit (Bom) 2200

Section 11 and a valid arbitration agreement existed between the parties. The arbitration clause was invoked in the year 2007 and an Arbitral Tribunal was constituted. It is not the case of the Respondents that at that time there was no arbitration agreement. The case at hand is that the Arbitral Tribunal was validly constituted and the Court had exercised the jurisdiction under Section 11 of the Act. Therefore, when the Arbitral Tribunal commenced the arbitration, there was a valid agreement, and there existed valid claims. The Respondents contend that subsequently, the agreement has become illegal and inoperative. This contention will be considered in the subsequent paragraphs.

22. The Respondents contend that the position of law as it existed pre-2015 amendment will apply. Even assuming the argument of the Respondents that the position before 2015 amendment will apply is accepted, the un-amended Section 11(6) did not contemplate a free-ranging inquiry as sought for by the Respondents. Even before the Amendment of 2015, the Court could not go into the merits of the dispute to the extent the Respondents have called upon me to do.

23. In the case of *SBP & Co. Vs. Patel Engineering*⁷, the Apex Court had indicated the parameters of Section 11(6). The

Supreme Court has taken a review of the earlier cases on the subject in the case of *Arasmeta Captive Power Company Private Limited and anr. vs. Lafarge India Private Limited* ⁸. The Supreme Court has observed as under :

“18. On a careful reading of para 39 and Conclusion (iv), as set out in para 47 of SBP case, it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection.”

Therefore, even before the amendment of 2015, the inquiry by the Chief Justice or his designate was confined to decide the issues regarding territorial jurisdiction, the existence of an arbitration agreement, existence or otherwise of a live claim and existence of the conditions for the exercise of power or whether the claim stands satisfied.

⁸ 2013 (15) SCC 414

24. The Respondents have raised issues as to whether the High Court while considering an application of the arbitrator, acts in an administrative capacity or judicial capacity. Secondly, the High Court has the power to dismiss an application under Section 11(6) acting in the judicial capacity. The Amendment Act of 2015 has restricted the scope of inquiry to the existence of an arbitration agreement and nothing else. Even going by the position before the amendment of 2015, the scope of inquiry was extremely narrow. Furthermore, the Court, when called upon to interpret the statutory provision and exercise its powers, cannot be unmindful of the jurisprudential trend. Legislative intent is clear that the role of Courts at the time of the appointment of an arbitrator is to be minimal, restricted to only ascertain the existence of arbitration agreement. Rest of the issues are to be decided by the arbitrators. As the following discussion will show that even going by the pre-amended Section 11, the objections raised by the Respondents will have to be urged before the Arbitrators.

25. Three main arguments are raised by the Respondents. Firstly, the arbitration is expressly barred and illegal by operation of law. Secondly, the arbitration has been abandoned. Thirdly, that the Court should not permit bifurcation of arbitration proceedings.

26. The State Government, under Section 23-C of the Mines and Minerals Development (Regulation) Act, 1957 has framed Rules for preventing illegal mining, by name "Goa (Prevention of Illegal Mining, Storage and Transportation of Minerals) Rules 2013. The Rules were published on 17 October 2013. The Respondents have relied upon Rules 7 and 32, which read thus :

7. Bar on contracts for sharing of mineral or long term sale agreements.— All contracts/ agreements whether registered or otherwise by whatever name called, entered between lease holders and end-users or traders, raising contractors, transport contractors which authorize sharing of minerals under such contract for transport, raising, processing or trading of mineral shall be void from the date of publication of these Rules. Similarly, long term purchase contract at fixed price shall also come to an end from the date of publication of these Rules.

x x x ---

32. Penalties.— Whoever undertakes or causes to undertake illegal mining, transports or stores any mineral otherwise than under the provisions of section 4(1) and or 4(1A) of the Act or any of the provisions of these rules is punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees or with both and in case of continuance of such illegal activity with an additional fine which may extend to five hundred rupees for each day during which such illegal activity continues after conviction for the

first such contravention.

x x x ---

According to the Respondents, the Agreement is a long term contract in respect of minerals for fixed price which is void under Rule 7. The Respondents also contend that penal consequences are provided for the breach under Rule 32, making the legislative intent clear. According to the Respondents, since the Applicant is seeking specific performance of the Agreement dated 22 December 2004, which has now become illegal and void, there will be no purpose in proceeding with the arbitration. It is on this ground that the Respondents oppose appointment of an arbitrator contending that the Agreement itself is invalid.

27. The Respondents have relied upon the decision of the Supreme Court in the case of *Goa Foundation vs. Union of India & ors.*⁹. In this decision, the Apex Court has directed that Rules will have to be strictly followed by the State Government. The Respondents have also relied upon the decision of the learned Single Judge of this Court in the matter of *Kunda Madhukar Shetye and ors. vs. Shaila Subrao Shetye and ors.*¹⁰, which had commented on the Rule 7 and the agreements in breach thereof.

9 (2014) 6 SCC 590

10 2015 (6) MhLJ 843

28. The Applicant contends that this objection will have to be left to the Arbitrator to decide and cannot be a ground for rejection of the Application under Section 11 of the Act of 1996. The Applicant contends that the arbitration clause would survive and so also the claims.

29. As far as the decision in the case of *Kunda Shetye* heavily relied upon by the Respondents, the same cannot be *ipso facto* made applicable. In the said case, the High Court was considering an Appeal from Order from an interlocutory exercise of a discretionary relief, namely injunction. The parties had approached the High Court at an interlocutory stage in a pending suit and as a matter of equity and for balancing the right, that certain directions were issued taking note of the Rule 7. Therefore, this decision cannot be directly made applicable to the case at hand. The Supreme Court in *Goa Foundation* has directed that the Rules of 2013 be enforced.

30. The Applicant has approached this Court under Section 11 read with Section 15 of the Act for filling up a vacancy. The arbitration had rightfully commenced. The contention of the Respondents is akin to frustration of the contract. Whether the contract is frustrated or not will require a detailed inquiry. There is

difference in the contention that the agreement is *void ab initio* and that the agreement which is otherwise valid, during the pendency of the arbitration has become invalid, by way of subsequent changes in law.

31. It is the contention of the Respondents that since the Agreement of 2004 has become illegal and void, consequently there is no arbitration agreement. This submission is not correct. Section 16(1) indicates that existence of arbitration agreement has to be seen on a different footing than that of the main agreement. Section 16 of the Act of 2015 reads thus :

“16. Competence of arbitral tribunal to rule on its jurisdiction. -

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”

Section 16(1) clearly lays down that arbitration clause is independent of other terms of the contract.

32. As held by the Apex Court in *Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*¹¹, even under the provisions of the 1940 Act, the question whether the contract has become impossible of performance, will still have to be decided under the arbitration clause which operates. In the case of *Enercon (India) Ltd. & ors. Vs. Enercon GmbH & anr.*¹², the Apex Court has emphasized on the concept of separability of the arbitration clause. The Court has stated that Section 16 of the Arbitration Act accepts the concept, that the main contract and the arbitration agreement form different parts. In the case of *Today Homes and Infrastructures Pvt. Ltd. vs. Ludhiana Improvement Trust and anr.*¹³ the Supreme Court, after referring to the decision of *SBP & Co* held that even if the main agreement is declared void, arbitration agreement can continue.

33. The Respondents contended that the agreement of 2004 is a long term purchase contract for fixed price which would come to an end upon framing of Rules of 2013. The question whether it is a long term contract for purchase and whether fixed price has been stipulated, are essentially questions of fact. This is a matter for the Arbitrators to decide.

11 1968 AIR (SC) 522

12 2014 (5) SCC 1

13 (2014) 5 SCC 68,

34. Even, otherwise, two questions will still remain to be considered. Firstly, what was the position and rights of the parties prior to the Rules of 2013. Second is under Clause 14 of the Agreement of 2004 where the parties have provided for '*Force Majeure*' where they have agreed for resolution of the disputes by way of arbitration. The Applicant still has claims against the Respondents and those claims will have to be adjudicated. It is not the case of the Respondents that the claims stand satisfied, or that the final payment has been received without objection and the parties have recorded their satisfaction.

35. The agreement was not illegal when the parties entered into it. The Applicant has sought specific performance, as well as damages. The claim was referred to the Arbitral Tribunal. What are the implications of subsequent changes in law on the *inter se* rights of the parties, will have to be decided by the Arbitral Tribunal.

36. The second ground raised by the Respondents is that the parties have abandoned the arbitration. According to the Respondents, for eight years the Applicant took no steps. The Respondents contend that last effective hearing took place in March 2010. It was contended that on the last date, one Mr. S.K. Sharma, on behalf of Metsil was cross examined in November 2010, but he

did not remain present. Again the matter was adjourned for cross examination. According to the Respondents, after Justice Saraf expired on 15 May 2012, no efforts were made to replace him. It is contended that five years thereafter the Applicant appointed Justice Uma Nath Singh on 23 March 2017 and there was no effective hearing for eight years. The Respondents have relied upon decisions of Court of Appeal in *Andre & Cie SA vs. Marine Transocean Ltd.*¹⁴ and of the High Court in *State of Orissa vs. Modern Constructions*¹⁵ to propound the theory of abandonment.

37. No provision under the Act of 1996, nor any specific decision under the Act of 1996 to uphold the contention of the Respondents is shown. No specific provision is shown to reject the application under Section 11 read with Section 15 of the Act on this ground alone. On the other hand, Section 32(2)(c) of the Act of 1996 lays down thus:

“32. Termination of proceedings.-

1...

2...

2...

2 (a)...

2 (b)...

2 (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become

¹⁴ (1981) 2 All.E.R. 993

¹⁵ AIR 1972 Orissa 219

unnecessary or impossible.”

Section 32(2)(c) would indicate that the arguments regarding abandonment of arbitration would fall within the ambit of this provision and, therefore, it is for the Arbitral Tribunal to decide this question. As and by way of prima facie observation, it is not that only the Applicant alone is to be blamed for the hiatus of eight years. Which party was guilty of abandonment and whether there was in fact any abandonment or the situation was beyond control of the parties are all factual aspects, which the arbitrators will have to decide.

38. The decision in *Andre & Cie* and *Modern Constructions* cited by the Respondents is not directly on the issue. In the said decision one party was clearly at fault and other party, by its conduct, had made the other party change the position substantially. In the present case, what were the rights and obligations of the Applicant, what were the rights and obligations of the Respondents and whether any of the parties altered its position by conduct of others, are all questions to be decided by the arbitrators on evidence. On the other hand, the Applicant has relied upon a decision of *Bremer Vulkan Schiffbau Und Maschinenfabrik vs. South India Shipping*

*Corporation*¹⁶ wherein the House of Lords had observed that it is not open to a respondent to sit back while the claimant did nothing and then demand for dismissal of the claim on the ground of claimant's delay. It is not necessary to conclude this issue finally, as this is a matter for the Arbitrators to adjudicate.

39. The third opposition of the Respondents is on the ground that there has been bifurcation of the arbitral proceedings midstream. According to the Respondents, there was an extraction agreement with Metsil Exports Pvt. Ltd. and sale agreement with the Applicant and these agreements had an arbitration clause. According to the Respondents Metsil and the Applicant moved the High Court and by two separate orders, Justice Dr. Saraf and Justice Da Silva were appointed as arbitrators. It is the contention of the Respondents that the present application is only in respect of the Applicant's arbitration agreement and Metsil has not filed any application which is an attempt to abandon the agreement. According to the Respondents, such bifurcation is not permissible as both these contracts are interlinked, as can be seen from Clause 4.1 of the Agreement dated 22 December 2004. The Applicant has countered this position contending that as far as appointment of arbitrator is concerned, the arbitration agreement between the Applicant and the Respondents is

¹⁶ [1981] 1 All ER 289

valid and there is no embargo that, unless Metsil files an application, the arbitrator cannot be appointed.

40. It may be that the Respondents had an agreement with Metsil Exports Pvt. Ltd. and the Applicant, but both are private limited companies and are independent entities. There are two different agreements and both the agreements have separate arbitration clause. Present application is for the appointment of an arbitrator under Section 11 read with Section 15 of the Act. Ingredients for exercise of jurisdiction under Section 11 are satisfied as far as the Applicant's agreement is concerned. Metsil has not approached this Court for the appointment of an arbitrator. As and when Metsil approaches with its own application, the matter could be considered. At that time the Respondents could contend that both arbitrations be conducted together by the same arbitrators to save costs. But on the ground that Metsil has not filed an application, the Application of the Applicant cannot be rejected.

41. The agreement dated 22 December 2004 contains an arbitration clause. The agreement was validly executed. The arbitration proceedings have commenced, however, due to certain unfortunate events, they could not conclude. Request of the Applicant to replace one member of the Arbitral Tribunal was refused

by the Respondents. The Applicant has moved this Application under Section 11 read with Section 15 of the Act for substitution of the arbitrator. Arguments of the Respondents regarding the frustration of the contract, subsequent changes in law, abandonment, etc. are for the Arbitral Tribunal to decide.

42. The Applicant has rightly contended that rejection of the application would mean that arbitration proceeding lawfully commenced will come to an end without the dispute being resolved and by such course of action the Respondents will succeed on merits and the Applicant will be rendered remediless.

43. Since the Respondents have refused to appoint an Arbitrators as per the Agreement, the vacancy in the arbitral tribunal will have to be filled up.

44. In the circumstances, the Application is allowed. Justice S.J. Vazifdar, retired Chief Justice of Punjab and Haryana High Court, Natwar Chambers (2nd Floor), 94, Nagindas Master Road, Fort, Mumbai 400 023 is appointed as an arbitrator to constitute the arbitral tribunal in respect of the disputes between the parties pending before the Arbitral Tribunal.

45 . The Applicant shall bear the fees, and expenses, of the arbitration and the same be subject to the order to be passed in the arbitral proceeding.

46. The learned Arbitrator will make disclosure in writing directly to the parties as required under Section 11(8) read with section 12(1) of the said Act within four weeks of receiving communication from either of the parties forwarding a copy of this order.

47. Application disposed of in above terms.

N.M. Jamdar, J.