

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO. 207 OF 2017

Siddhi Developers and others

... Applicants

Versus

Asmita India Limited

... Respondent

Mr. Raghavan Sarathy alongwith Mr. Akhil Sarathy and Mr. Tejas Luniya instructed by Thodur Law Associates for the Applicants.
Mr. Sahil Mahajan for the Respondent.

CORAM : S.J. KATHAWALLA, J.
DATED : 24th JANUARY, 2018

P.C.:

1. The above Arbitration Application is filed by the Applicants (Original Respondents) - Siddhi Developers, a registered partnership firm and its partners under Section 11 read with Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (Act No.3 of 2016) (***the Act***) for the following reliefs:-

"(a) This Hon'ble Court be pleased to allow the Application and direct the termination of the mandate of the Ld. Arbitrator Mr. Shyam Kapadia.

(b) That this Hon'ble Court be pleased to substitute another Arbitrator in place of Ld. Arbitrator Mr. Shyam Kapadia."

2. Originally, Arbitration Application No.210 of 2016 was filed before this Court under Section 11(6) of the Act by Asmita India Limited (Applicant therein and

Respondent herein) against Siddhi Developers and others (Respondents therein and Applicants herein) seeking appointment of a Sole Arbitrator. On 14th October, 2016, when the said Arbitration Application No. 210 of 2016 was taken up for hearing, none appeared for Siddhi Developers. The Advocate appearing for Asmita India Limited informed the Court that Siddhi Developers and its partners were refusing service. In view thereof, by an order dated 14th October, 2016, this Court directed the Partners of Siddhi Developers to remain present on 17th October, 2016. Again, on 17th October, 2016, the Partners of Siddhi Developers failed to remain present before this Court, and in view thereof, the following order was passed:

"1. Earlier the Advocate for the Applicant had tried to serve the proceedings on the Respondents, who are the developers. However, they refused to accept service. In view thereof, on 14-10-2016 this Court passed the following order:

"The Respondents are directed to remain present before this Court on 17th October, 2016 at 11.00 a.m., failing which this Court shall pass necessary orders to ensure their presence before this Court. The Senior Inspector of local police station shall render all assistance to the representative of the Applicant/Advocate for the Applicant in serving a copy of this order on the Respondents. Stand over to 17th October, 2016.

2. The son of Respondent No.2 Mr. Gauravsinh Vithal Sawant Bhosale made an endorsement on the Notice sought to be served on the Respondents which reads as under :

"I am not authorized to receive any of the correspondence on behalf of entities mentioned here. And all names mentioned here are absent.

Thanks.

Sd/-

Not Received, 15/10/2016”.

3. Since the Respondents are trying to avoid the directions passed by this Court, Office to issue bailable warrant of arrest against the Respondent Nos.2, 3 and 4 in the sum of Rs.15,000/- each, made returnable on 19th October, 2016 at 3.00 p.m. The Prothonotary and Senior Master shall forward the said Bailable Warrants to the Commissioner of Police, Greater Mumbai by hand delivery with a direction to execute the same through the concerned Police Station and submit a report of such execution to this Court before the returnable date."

3. It is only after the said warrants were issued, the partners of Siddhi Developers appeared before the Court on 19th October, 2016 and tendered an apology for their absence and refusal of service, which was accepted. On that day, both the parties agreed to appoint Mr. Shyam Kapadia, Advocate as the Sole Arbitrator to decide the disputes between the parties arising out of the Joint Venture Agreement dated 11th February, 2008. It was also recorded in the order, by consent of the parties, that the Learned Arbitrator shall endeavour to pass his final Award within a period of four months from the date of this order.

4. The parties and their Advocates had a meeting with the Learned Arbitrator on 27th October, 2016 when it was agreed between the parties that timelines would be strictly adhered to and in the event of any non-compliance, minimum costs of Rs.15,000/- shall be imposed.

5. According to the timelines agreed between the parties, Asmita India Limited

was directed to file the Statement of Claim on or before 18th November, 2016 and Siddhi Developers were directed to file their Statement of Defence/Counter Claim by 7th December, 2016. Asmita India Ltd. filed its Statement of Claim as directed i.e. on 18th November, 2016. However, M/s. Siddhi Developers failed to file their Statement of Defence / Counter Claim by 7th December, 2016 and sought extension of one week for filing the same. The reason given was that the partner of Thodur Law Associates, the firm of advocates who were handling the matter, had been indisposed due to a delay in the healing of a wound in the foot. It was also submitted that he was admitted to S.L. Raheja Hospital at Mahim, Mumbai between 7th November, 2016 and 12th November, 2016.

6. The partner of Thodur Law Associates was discharged almost a week prior to Asmita India Ltd. filing its Statement of Claim. Siddhi Developers had time to draft its Statement of Defence from 18th November 2016 up to 7th December, 2016. There was nothing pleaded or on record to suggest that the partner of Thodur Law Associates was in difficulty after 18th November, 2016 when they would have been served the Statement of Claim and would have to begin preparing the Statement of Defence. This was noted by the Learned Arbitrator who condoned the delay in filing the Statement of Defence, but imposed costs of Rs.10,000/- on Siddhi Developers and by his order dated 22nd December, 2016 gave further directions pertaining to filing of Statement of Defence and Counter Claim; for discovery and inspection; exchange of draft issues; exchange of admissions and denials of documents; and adjourned the

matter to 16th January, 2017.

7. Siddhi Developers waited till the next date of hearing and only on 16th January, 2017 through their Advocates moved the Learned Arbitrator for recall of his direction to pay costs of Rs.10,000/-.

8. The Learned Arbitrator by his detailed order dated 25th January, 2017 rejected the application for recall of his order directing payment of costs of Rs.10,000/- inter-alia on the grounds that: the statement of claim was duly filed on 18th November, 2016 by Asmita India Ltd; the personal difficulty of the partner of Thodur Law Associates representing Siddhi Developers was admittedly for the period from 7th November 2016 to 12th November, 2016; even assuming that he required some recuperation thereafter, it was difficult to see why a foot injury consequent to which he had been discharged on 12th November, 2016 would entail him being indisposed to work on a Statement of Defence between 18th November, 2016 and 7th December, 2016; that in any event there was nothing pleaded or otherwise on record to suggest that the partner of Thodur Law Associates was in any difficulty after 18th November, 2016 (when the Statement of Claim was filed) and before 7th December, 2016 (when the Statement of Defence and Counter Claim was to be filed). The Learned Arbitrator also noted that the Application dated 16th January, 2017 was for recall of directions already given and the same submissions were made on the earlier occasion. He was of the view that it is beneficial for the speedy disposal of the arbitration if parties refrain from filing applications raising the same submissions which have already been adjudicated. The

Learned Arbitrator also noted in his order that parties had agreed that timelines would be strictly adhered to and that they had also agreed that minimum cost of Rs.15,000/- would be imposed in the event of any non-compliance. The Learned Arbitrator therefore rejected the application and gave further dates of hearing, and the matter proceeded in February and March 2017.

9. On 29th March, 2017, certain directions were passed for the evidence stage of the trial *inter alia* fixing a hearing on 1st July, 2017 for cross-examination of Asmita India Limited's witnesses by the advocates for Siddhi Developers, i.e. Thodur Law Associates. This, and various other dates, were fixed with the consent of both parties.

10. Thereafter, on 11th April, 2017, a notification was issued, whereby it was declared that Saturday, 1st July, 2017, would be a working day for High Court of Judicature at Bombay and its Bench at Nagpur in lieu of holiday already declared on 21st February, 2017. Siddhi Developers and their Advocates were therefore aware since April 2017 that 1st July, 2017 would be a working Saturday in Court. The Learned Arbitrator had in March, 2017 already fixed the cross-examination of both the witnesses of Asmita India Ltd. on 1st and 2nd July, 2017. Thodur Law Associates, Advocates for Siddhi Developers started correspondence with the Arbitrator only from 27th June, 2017 stating that they are in difficulty on 1st July, 2017 and the cross-examination be fixed only on 2nd July, 2017. The Learned Arbitrator who, by consent of the parties was directed by an order passed by this Court, to make an endeavour to dispose of the arbitration proceedings and pass his Award on or before 18th February,

2017, rejected the request of Siddhi Developers not to hold any meeting on 1st July, 2017. On 29th June, 2017, the Arbitrator received a letter from Thodur Law Associates seeking cancellation of the hearings scheduled on 1st and 2nd July, 2017 and to adjourn the proceedings for eight weeks to enable them to pursue proceedings for change of the Tribunal. To enable Thodur Law Associates to move such Application before this Court, the Learned Arbitrator cancelled the hearing on both the dates (1st and 2nd July, 2017) but declined to cancel the hearing scheduled on 8th and 9th July, 2017.

11. Thodur Law Associates, in the meantime, wrote a letter to the Hon'ble Chief Justice of this Court on 27th June, 2017 (copy of which was marked to the Learned Arbitrator) recording their grievance against the Arbitrator. The letter concluded by stating that *"under the circumstance we have no alternative but to approach your Ladyship for necessary directions so as to facilitate due and proper dispensation of Justice, by appointing another Arbitrator in place of the abovenamed Arbitrator"*. M/s. Thodur Law Associates ought to be aware that an Arbitral Tribunal cannot be changed by writing a letter to the Hon'ble Chief Justice. The Advocate for the Respondents have thereafter filed the present application.

12. From the aforestated facts, I am of the view that no case is made out by M/s. Thodur Law Associates representing Siddhi Developers for termination of the mandate of the Learned Arbitrator and to substitute him by appointment of another Arbitrator. I am satisfied beyond doubt that the present Arbitration Application has

been filed since the Learned Arbitrator is a very conscientious person and was firm and strict in conducting the arbitral proceedings. It is evident that he was not willing to succumb to pressure and toe the line suggested by Siddhi Developers and their Advocates, which was bound to delay the proceedings. It is for this reason that M/s. Siddhi Developers and their Advocates are attempting to browbeat the Learned Arbitrator by sending a written complaint to the Hon'ble Chief Justice of this Court and by filing the above Application.

13. In another recent matter (*Hitech Plast Limited v. Ho Plast Pvt. Ltd - Arbitration Application No. 24 of 2017*), this Court had observed:

“With growing unease, this Court has been observing the increasing prevalence of what can only be said to be misconduct with arbitrators, many of whom are officers of this Court as in the present case. The intention behind such misconduct is often to engineer a withdrawal by the concerned arbitrator or, at the very least, to delay and frustrate the arbitral proceedings. Needless to say, such conduct makes it difficult for arbitrators to function let alone meet the stringent time-frames provided for under the Act (as amended). It is critical that this behavior is nipped in the bud and substantial costs imposed on such parties by the Courts so as to prove a disincentive to any persons contemplating such action.”

14. The present Arbitration Application also falls squarely within this category. Siddhi Developers and their Advocates have successfully managed to delay / derail the arbitration proceedings from 1st July 2017 until today. Despite observations of this Court, Advocates persist to misbehave and misconduct themselves before arbitrators

appointed by this Court. In the instant case, Siddhi Developers first tried avoiding service, when forced to appear before this Court, it agreed to arbitration in a time-bound manner, thereafter it has sought to merely delay and frustrate the arbitration proceedings before the Learned Arbitrator. One can perhaps understand parties conducting themselves in this fashion, however, we place a higher burden on Advocates. It is expected that Advocates lend their cooperation to the timely disposal of arbitration proceedings rather than placing hurdles by making frivolous allegations and attempting to browbeat arbitrators who stand firm. After the coming into force of the amendments to the Act, arbitrators are also under considerable pressure to complete the arbitration in a timely manner. This is indeed the legislative intent behind such amendments. We hope that we are not again faced with situations such as these where Advocates and parties attempt to delay and frustrate proceedings, thereby negating the legislative intent behind amendments to the Act and undermine the timely disposal of arbitration proceedings. This Court will not entertain such Applications and impose substantial costs on any party conducting itself in this manner.

15. In view thereof, the above application is dismissed with costs quantified at Rs.25,000/-.

(S.J.KATHAWALLA, J.)