

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
COMM.ARBITRATION APPLICATION NO.78 OF 2016

M/s Welways Engineers (India) .. Applicant  
VS  
ICICI Bank Limited .. Respondent

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Mr.Rohan Cama with Mr.Mihir Mody and  
Ms.Namrata Shah I/b M/s K.Ashar & Co for Applicant  
Mr.Chetan Kapadia with Mr.Abhishek Bhadan  
and Ms.Sanaya Dadachanji, Mr.Rohit Lalwani  
I/b M/s Manilal Kher Ambalal & Co for Respondent

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Coram : G.S.KULKARNI, J

Date : 17 DECEMBER 2018

ORDER

1. This arbitration application under section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') prays for appointment of an Arbitrator to adjudicate the disputes and differences that have arisen between the parties under an agreement dated 16.9.2010 which was for the work of “Civil, Structural, Plumbing & Landscaping works” to be undertaken at the ICICI Disaster Recovery Data Centre, at Jaipur.

2. The arbitration clause in the agreement is contained in the General Conditions of Contract being clause no.50.3, which reads thus:

“50.3. Subject to the aforesaid in the event of any dispute or difference between the parties hereto as to the construction or operation of this, contract or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the owner of any certificate to which the contractor may claim to be and entitled to or if the owner fails to make a decision within the aforesaid time, then and in any such case but, except in any of the exempted matters referred to in the above clause the contractor after 90 days of its presenting final claim on the disputed matters may demand in writing that the dispute or difference be referred to and settled by a sole arbitrator mutually acceptable to the owner and the contractor. In the event the parties fail to appoint a mutually acceptable arbitrator the parties shall approach the appropriate court for appointment of the sole arbitrator. The award of the arbitrator shall be final and binding on both the parties. The provision as per the arbitration and Conciliation Act, 1996 shall apply to such arbitration. The arbitration venue shall be at Mumbai. The procedure for the arbitration shall be determined by the arbitrator. Costs of such arbitration shall be equally shared between the owner and the contractor.”

3. The case of the applicant is that the applicant completed the entire work assigned to it under the contract to the satisfaction of the respondent. However, the respondents refused to release the payment which was due to the applicant. The applicant is a small contractor and was desperately requiring funds and thus withholding of the payment by the respondent was seriously affecting the financial position of the applicant.

4. The applicant states that the correspondence between the parties would reveal that by an e-mail dated 23.8.2012 the Project Manager of the respondent called upon the applicant to forward the corrections to the final bill and requested the applicant to submit a 'No

claim certificate. There is an e-mail dated 21.10.2012 of the applicant to the Project Manager *inter-alia* recording that a final bill was submitted along with completion drawings and all required submissions on 19.8.2012 incorporating all feasible corrections as suggested by the Project Manager. It was also recorded that two months had passed and there was hardly any progress for the release of the payments. The applicant stated that the claim for payments was for works actually executed by the applicant on site as per the contract. It was recorded that the applicant was facing '*extremely critical financial condition*' due to pressure by creditors and bankers' as huge amount was tied up in the final bill and other securities lying with ICICI Bank. It was thus, requested that the final bill be released and mitigate the financial hardship faced by the applicant.

5. There is again an e-mail dated 22.10.2012 of the applicant addressed to the Project Manager re-iterating the contents of the earlier e-mail dated 21.10.2012. Again on 27.10.2012 by its e-mail the petitioner informed the Project Manager recording that there was no progress for release of the final bill. It was recorded that market pressure was increasing every day and that steps be taken to the long standing final

payment. Thereafter, there was a similar e mail addressed by the respondent to the Project Manager on 7.11.2012.

6. The applicant thereafter by its e-mail dated 15.11.2012 addressed to the Project Manager/respondent recorded that despite lapse of three months and three reminders, there is no progress as to whether the final bill is stuck up. It was stated that the final bill for the sub-contract was submitted on 19.8.2012 after incorporating the necessary corrections. It was again recorded that the applicant is facing financial crunch due to the extraordinary delay for release of the final payment. It was also recorded that the applicants are suffering mental agony as well as loss of reputation in the market. It was recorded that final payment to be released expeditiously to mitigate the financial hardship being caused.

7. The applicant addressed further letters/e-mails dated 21.11.2012 and a detailed e-mail dated 28.11.2012 to the respondent. On 29.11.2012 the respondent by its e-mail addressed to the applicant *inter alia* informed that the entire payments were on hold due to the applicant not submitting corrected final bills along with 'No claim certificate' and on account of bank guarantee of 10 % of the final bill

being not submitted by the applicants.

8. The applicant replied to the above e-mail dated 29.11.2012 of the respondent. The applicants emphasised that the completion certificate was signed by the predecessor of the respondent's officer Mr.Sushil Singh, after confirming that the snag list was attended and cleared by the applicant. As regards the respondent's demand for a corrected final bill alongwith '*no claim certificate*' it was stated that the same were submitted on 19.8.2012 and were received by the Project Manager on 22.8.2012. It was further stated that the bank guarantee for 10% of the bill amount would soon be submitted. It was thus requested that payments be released at the earliest.

9. Thereafter, the Project Manager vide its e-mail dated 3.12.2012 addressed to the applicant inter alia demanded a '*no claim certificate*' after removing four Bollards. It was recorded that the respondents cannot accept the additional four number of Bollards as it was supplied in sets and not by numbers. The applicant was called upon to submit the final bill along with no claim certificate so as to process the payments. The applicants thereafter submitted a bank guarantee for

release of the payment.

10. The correspondence ensued between the parties from November 2012 reveals that there were disputes between the parties in regard to the bollard issue. Further correspondence between January to September, 2013 would indicate that an issue was also raised by the respondent in regard to the '*no claim certificate*' as per the Project Management Consultant Certification and in regard to the bollards as installed for which the applicant was demanding payments.

11. The case of the applicant is that by e-mail dated 20.5.2013 the respondent conveyed its decision to the applicant that the claim of the applicant cannot be considered. By another e-mail of the respondent dated 28.5.2013 addressed to the applicant, it was informed that no further claim would be entertained since the claims proposed were not in-line with the procedure and process laid down in the contract.

12. The applicant therefore, by its letter dated 3.8.2017 invoked clause 50.1 of the contract and called upon the respondent to inform its decision on the issues in writing within a period of 10 days from

the date of receipt of the said letter. There was no response from the respondent to the said letter of the applicant. Hence, the applicant by its letter dated 25.9.2013 addressed to the respondent invoked the arbitration agreement between the parties and called upon the respondent to agree for appointment of an arbitrator, so that the disputes could be mutually referred for arbitration. The claim as made by the applicant was appended to the said letter. This letter of the applicant was received by the respondent, however, the respondent did not nominate an arbitrator. The applicant therefore addressed another letter dated 26.12.2013 to the respondent suggesting four names of Engineering Officers and called the respondent to nominate a sole arbitrator from the said options.

13. Confronted by the above situation, that the respondent was not responding, the applicant by its letter dated 18.5.2014 addressed to the respondent, informed that since the respondent had failed to appoint a mutually acceptable arbitrator, the applicant was appointing a sole arbitrator, Col.A.V.Mudholkar who is an Engineering Officer and who would proceed with the arbitration. The respondent was once again called upon to convey its acceptance.

14. The applicant states that accordingly the arbitrator Col.A.V.Mudholkar as nominated by applicant accepted the arbitration and entered a reference. This was also conveyed to the parties by the learned sole arbitrator. The parties were directed to file their respective pleadings and the learned arbitrator also fixed a schedule of the arbitration proceedings. In para 5.7 of the arbitration application, the applicant has referred to the voluminous correspondence between the arbitrator and the parties from 9.8.2014 up to 28.11.2015 to *inter alia* contend that despite repeated reminders, the respondent refused to appear before the learned sole arbitrator. The learned sole arbitrator proceeded exparte and concluded the arbitration proceedings, by making an award dated 30.12.2015 read with correction sheet dated 19.1.2015 and awarded a claim of Rs.5,75,51,921.54 in favour of the applicant.

15. The applicant has averred that however, before the learned sole arbitrator could pronounce his award on 30.12.2015 the respondent had approached this Court by filing an application (Arbitration Application No.322 of 2015) under section 11 (6) of the Act praying for appointment of an arbitrator on the ground that disputes and differences existed between the parties which were required to be adjudicated by an

arbitrator. It is stated that however in view of the award dated 30.12.2015 the respondents withdrew the arbitration application No.322 of 2015 and filed Arbitration Petition No.325 of 2016 under section 34 of the Act challenging the award passed by the learned sole arbitrator Col.A.V.Mudholkar.

16. By an order dated 30.3.2016 this Court allowed the section 34 petition by setting aside the award of the learned sole arbitrator which was not on merits of the matter, but on the issue of non-adherence of the procedure under clause 50.3 of the General conditions of the contract for appointment of the arbitrator.

17. On the above backdrop the case of the applicant is that, the facts clearly reveal that there were disputes and differences between the parties, which was also apparent from the respondent itself approaching this Court by filing a section 11 (6) application. The case of the applicant is that the applicant had invoked the arbitration agreement (clause 50.3 of the agreement) by its notice dated 25.9.2013 addressed to the respondent.

18. Further the respondent by its advocate's letter dated

27.10.2016 refused to meet the applicant to discuss the appointment of a mutually agreed arbitrator. Thereafter, the applicant again by a notice dated 15.10.2016 called upon the respondent to have a joint meeting with the applicant and mutually appoint an arbitrator within 15 days from the date of the receipt of the said notice. This was responded by respondent's advocate's reply by its letter dated 27.10.2016 informing the applicant that no arbitral disputes have arisen between the parties, and that no further amounts were due and payable by the respondent to the applicant.

19. Thus, on the premise that disputes and differences have arisen between the parties, the applicant has filed the present application under section 11 (6) of the Act praying for appointment of an arbitrator as on the agreement between the parties.

20. The respondent has appeared and has opposed this application. An affidavit dated 8.3.2017 of Mr.Raghunath Nishankar Chief Manager of the respondent is filed to oppose this application. The plea as taken in the affidavit is that the contract between the parties stands discharged as there is an accord and satisfaction' and as such, there exists no arbitrable dispute between the applicant and the respondent. It

is next contended that the alleged claims of the applicant fall within the ambit of 'exempted matters' under clause 50.2 of the General Terms and Conditions of contract. The basis of this contention is that the applicant had issued '*no claim certificate*' dated 15.1.2013 to the respondent accepting that the contract stood discharged by 'accord and satisfaction' and waiving any further claims against the respondent towards the work done under the contract. It is contended that despite issuance of a '*no claim certificate*' in order to enrich unjustly and to extract money unlawfully from the respondent, the applicant has raised bogus inflated claims vide letter dated 25.9.2013 for the alleged outstanding dues.

21. In regard to the applicant's case that disputes have arisen between the parties and for that the respondent itself had invoked section 11 (6) of the Act, the reply affidavit in this regard in paragraph 12 states that the respondent was constrained to apply to this Court under section 11 (6) of the Act, in view of the illegal and unilateral continuation of the purported arbitral proceedings by the arbitrator appointed by the applicant (Col.A.V.Mudholkar) and that filing of the said application was without prejudice to the respondent's contention that there were no arbitral disputes between the applicant and the respondent.

22. The contention as urged on behalf of the respondent in the reply affidavit are denied by the applicant by a rejoinder-affidavit by which the applicant has placed on record correspondence between the parties, to show that there is an arbitral dispute.

23. There is an affidavit in-sur-rejoinder dated 1.9.2017 as filed on behalf of the respondent contesting the contents of the rejoinder-affidavit of the applicant.

24. The learned counsel for the applicant has made submissions in support of his application and has drawn my attention to the various documents on record and orders passed in the earlier round of litigation as noted above. Learned counsel for the applicant contends that the case of 'accord and satisfaction' as contended on behalf of the respondent ought not to weigh with the Court for two reasons. Firstly, there is voluminous correspondence placed on record that the applicant is a small contractor and the approach of the respondent of an absolute denial of the applicant claims has led the applicant in severe financial hardship bringing about a condition of economic duress. It is submitted that the applicant had issued a 'no claim certificate' but, the same was not fully unconditional as

can be seen from the correspondence. The second contention as urged by the learned counsel for the applicant is that the case of 'accord and satisfaction' of the respondent cannot be accepted, as the respondent after the alleged 'accord and satisfaction' itself had approached this Court after earlier arbitration proceedings had commenced by filing an application (Arbitration application No.322 of 2015) seeking appointment of a arbitrator under section 11 (6) of the Act. It is submitted that this is required to be construed as a conclusive act on the part of the respondent indicating that the dispute and differences between the parties are required to be referred for arbitration.

25. Learned counsel for the applicant would also contend that in view of the amended provisions of section 11 by insertion of sub-section (6A), the endeavour of the Court would be to consider whether there exists an arbitration agreement between the parties and the issues as raised by and on behalf of the respondent would not be relevant in adjudication of the present application. In support, learned counsel for the applicant has placed reliance on the following decisions : (1) **National Insurance Company Limited vs Boghara Polyfab Private Limited** <sup>1</sup> (2)

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<sup>1</sup>(2009) 1 Supreme Court Cases 267)

**Duro Felguera S.A. vs Gangavaram Port Limited <sup>2</sup>**

26. On the other hand, learned counsel for the respondent has opposed this application placing reliance on the reply affidavit as filed on behalf of the respondent. At the outset, it is submitted that the amended provisions of sub-section (6A) of section 11 of the Act are not applicable in the facts of the case, inasmuch as invocation of arbitration by the applicant is by its letter dated 25.9.2013, which is prior to the coming into force of the amended provision which was brought into effect from 23 October 2015. It is next contended that this is clear case of 'accord and satisfaction' as the documents speak for themselves that the applicant had received payment in full and final settlement by submitting the '*no claim certificate*.' It is thus, submitted that considering the provisions of section 11 (6) of the Act, the present application ought not to be entertained. In support of his submissions, learned counsel for the respondent has placed reliance on the following decisions : (1) **New India Assurance Company Limited vs Genus Power Infrastructure Limited<sup>3</sup>** (2)

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<sup>2</sup>(2017) 9 Supreme Court Cases 729)

<sup>3</sup>(2015) 2 Supreme Court Cases 424)

**M/s Jumbo Bags Ltd vs The New India Assurance Co.Ltd<sup>4</sup>**

27. Having heard the learned counsel for the parties and having perused the record, it can be clearly seen that disputes have arisen between the parties under the contract in question. The parties have agreed under clause 50.3 of the contract for appointment of a mutually acceptable sole arbitrator for the adjudication of the disputes between the parties arising under the contract.

28. It is further clear that the fact that the disputes are required to be adjudicated in arbitration, was recognized by the respondent when the respondents disagreed with the appointment of Col.A.V.Mudholkar as an arbitrator as appointed by the applicant and approached this court by filing an application under section 11(6) of the Arbitration Act in Arbitration Application No.322 of 2015. However, as Col.A.V.Mudholkar delivered an award, the respondent withdrew the section 11 (6) application to challenge the said award.

29. These facts put the issues beyond a pale of doubt that on one

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<sup>4</sup>(2016-2.I.W.769)

hand the applicant desired appointment of an Arbitrator and unilaterally appointed as arbitrator, on the other hand, as the appointment was not as per clause 50.3 of the contract and as such appointment was not mutually made, the respondent approached this Court for appointment of an arbitrator by filing arbitration application No.322 of 2015. Thus, both parties desired that the dispute ought to be resolved in arbitration proceedings. If this is the clear position on record, then that there can be no two opinions, that the issue ought to be now referred for arbitration, by appointing an arbitrator to adjudicate the disputes between the parties, more so in view of the fact that this court had set aside the award, passed by the unilaterally arbitrator and the parties now stand in the same position as it stood before the dispute arose.

30. In so far as the contention as urged on behalf of the applicant that sub-section 6(A) of the Arbitration Act, would become applicable and thus the endeavour of the Court would be only to examine the existence of an arbitration agreement, in my opinion, this submission ;in the facts of the case cannot be accepted. This for the reason that in the present case, invocation of the arbitration by the applicant is initially made on 25.9.2013. The arbitral proceedings in terms of section 21 of the Act

would thus commence when the said notice was received by the respondent. The provisions of sub-section (6A) were introduced by the amendment Act 3 of 2016 w.e.f. 23.10.2015. Considering the provisions of section 26 of the Amendment Act (Act No.3 of 2016) in the facts of the present case, sub-section (6A) would not have any application. This is also the clear position in law as can be seen from the recent judgement of the Supreme Court in **SP Singla Constructions Pvt.Ltd vs State of Himachal Pradesh & anr**<sup>5</sup> Justice R.Banumathi, speaking for the Bench observed thus :

“15. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23.10.2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the Amended Act cannot be invoked.

16. In **Board of Control for Cricket in India v Kochi Cricket Private Limited and others**<sup>6</sup>, this Court has held that the provisions of

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<sup>5</sup>.Civil Appeal Nos.11824-11825 of 2018 (Arising out of SLP {C} Nos.1274-75 of 2015)

<sup>6</sup> (2018) 6 SCC 287

Amendment Act, 2015 (with effect from 23.10.2015) cannot have retrospective operation in the arbitral proceedings already commenced, unless the parties otherwise agree and held as under :

“37. What will be noticed, so far as the first part is concerned which states---

“**26. Act not to apply to pending arbitral proceedings---**  
Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree....”

is that (1) “the arbitral proceedings” and their commencement is mentioned in the context of Section 21 of the principal Act (2) the expression used is “to “ and not “in relation to” and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely the part which reads, “...but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act” makes it clear that the expression “in relation to” is used; and the expression “the” arbitral proceedings and” in accordance with the provisions of Section 21 of the principal Act” is conspicuous by its absence. “

In view of above clear position applicant's reliance on the decision of the Supreme Court in **Duro Felguera S.A. vs Gangavaram Port Limited** (supra) is not well-founded.

31. Thus, the only question which would require consideration is the contention of the respondent of accord and satisfaction. In my opinion, this argument ought not to detain the Court to proceed and allow this application for appointment of a sole arbitrator. This is for the reason that the case of accord and satisfaction is being urged by the respondent in view of the communication dated 15.1.2013 (Exhibit C of the paper book)

was very much available to the respondents' right from the inception of the dispute and more particularly when the respondent approached this Court by filing an application under section 11 (6) of the Act seeking appointment of an arbitrator. Once the respondent has taken such a position that there are disputes existing between the parties, then it necessarily follows that an arbitrator would be required to be appointed to adjudicate the dispute between the parties. The respondent cannot be permitted to blow hot and cold in the same breath.

32. In my opinion, merely because the respondent stands in a better position in view of the unilateral award being set aside, which was on a technical issue that appointment of an arbitrator, being not as per the arbitration agreement, it would not be proper for the respondent to exploit this position and oppose appointment of an arbitrator.

33. Moreso, as noted above the respondent in any case had moved this Court by filing an application under section 11 as far back as in 2015. Assuming that the said application was to succeed, and the Court was to appoint an arbitrator, then all these issues of accord and satisfaction, could have been, very well the subject matter on merits of the

rival pleas to be adjudicated by the learned arbitrator. I am therefore not satisfied with the plea as urged on behalf of the respondent that this Court in this application should consider that there is no arbitral dispute in view of the applicant submitting a full and final claim certificate dated 15.1.2013.

34. Needless to observe the substantial correspondence between the parties after 15.1.2013 clearly would indicate that the full and final claim certificate as issued by the applicant cannot be considered of such a nature that it should be considered to be sacrosanct and no orders need to be passed on this application. The law in this regard is well-settled. (See **National Insurance Company Ltd vs Boghara Polyfab Pvt.Ltd** (supra).

35. As regards the decision in the case of **New India Assurance Company Limited vs Genus Power Infrastructure Ltd** (supra) there can be no two opinions on the principles of law as laid down in the decisions of the Supreme Court, however, so far as the facts of the present case are concerned, in my opinion, the issue of 'accord and satisfaction' is surely not of a nature which in the present facts would extinguish the requirement of an arbitral adjudication of the dispute between the parties.

36. In view of the above discussion, I am of the considered opinion, that this application is required to be allowed. Accordingly, the following order :

**ORDER**

(i) The Court appoints Mrs.Justice Vasanti A.Naik (Retd) having her address as 322, Verma Chambers, 11, Homji Street, Horniman Circle, Fort, Mumbai as the prospective arbitrator to adjudicate the disputes and differences between the parties.

(ii) The learned arbitrator fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of section 11 (8) read with Section 12 (1) of the Arbitration and Conciliation Act, 1996 to the Prothonotary and Senior Master of this Court, to be placed on record of this application as also the same be furnished to both the parties.

(iii) All contention of the parties on merits of the matter are expressly kept open.

(iv) The Arbitration Application is disposed of, in above terms.  
No costs.

36. Office to forward a copy of this order to Mrs.Justice Vasanti Naik (Retd).

{G.S.Kulkarni, J}