

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

MISCELLANEOUS CIVIL APPLICATION NO.1385/2017

M/s. Concept Resources, Nagpur

..Vs..

Om Associates, Nagpur

AND MISCELLANEOUS CIVIL APPLICATION NO.1386/2017

M/s. Concept Resources, Nagpur

..Vs..

M/s. Lakeside Grill, Nagpur

AND MISCELLANEOUS CIVIL APPLICATION NO.1387/2017

M/s. Concept Resources, Nagpur

..Vs..

Mr. Shailendra Sharma

AND MISCELLANEOUS CIVIL APPLICATION NO.1388/2017

M/s. Concept Resources, Nagpur

..Vs..

M/s. Diva Fast Food Ltd., Nagpur

AND MISCELLANEOUS CIVIL APPLICATION NO.1389/2017

M/s. Concept Resources, Nagpur

..Vs..

M/s. Gayatri Food Court, Nagpur

AND MISCELLANEOUS CIVIL APPLICATION NO.1390/2017

M/s. Concept Resources, Nagpur

..Vs..

Rahul S/o Sudhakar Nagulwar

AND MISCELLANEOUS CIVIL APPLICATION NO.1391/2017

M/s. Concept Resources, Nagpur

..Vs..

Shri Mohammad Shakeel

AND MISCELLANEOUS CIVIL APPLICATION NO.1392/2017

M/s. Concept Resources, Nagpur

..Vs..

M/s. Lake Side Grill, Nagpur

AND MISCELLANEOUS CIVIL APPLICATION NO.1393/2017

M/s. Concept Resources, Nagpur

..Vs..

Smt. Shahenaz Jhan

AND MISCELLANEOUS CIVIL APPLICATION NO.1394/2017

M/s. Concept Resources, Nagpur

..Vs..

Sikandar Pal Singh

AND MISCELLANEOUS CIVIL APPLICATION NO.1395/2017

M/s. Concept Resources, Nagpur

..Vs..

Om Associates, Nagpur

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri C.S. Dharmadhikari, Advocate with Shri Abhilash Shriwas, Advocate
for the applicant.

Shri Ritesh D. Kalara, Advocate with Shri Vipin Lute, Advocate for the
non-applicant.

Shri Kunal Nalamwar, Advocate for the applicant in M.C.A.
Nos.1392/2017, 1390/2017, 1388/2017, 1387/2017, 1386/2017.

CORAM : Z.A. HAQ, J.**DATE : 5.4.2018.****Common order.**

Heard.

2. By this application under Section 11(6) read with Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (for short "Act of 1996"), the applicant prays that substitute Arbitrator be appointed to resolve the dispute between the parties. Earlier, applications seeking appointment of Arbitrator were filed before this Court which came to be disposed by separate orders dated 8th August, 2014. This Court allowed the application and appointed Shri S.T. Kharche, former Judge of this Court, as the Arbitrator to resolve the dispute between the parties.

3. At the time of hearing of the earlier applications, an objection was raised on behalf of the non-applicant that Arbitrator cannot be appointed as there was no arbitrable dispute and if at all there was any arbitrable dispute, the allegations were of fraud, which were required to be adjudicated by the Civil Court. While disposing the applications by orders dated 8th August, 2014 this Court recorded that the submissions/objections raised by the non-applicant were kept open for consideration by the learned Arbitrator. The learned Arbitrator entered the office, conducted arbitration proceedings and then at the stage of recording of evidence, informed the Registrar (J.) of this Court by communication dated 18th October, 2017 and 23rd October, 2017 that he is withdrawing from arbitration proceedings. In view of withdrawal by the learned Arbitrator, applicants have again approached this Court for appointment of substitute Arbitrator.

4. Shri Ritesh D. Kalra and Shri Kunal Nalamwar, Advocates appearing for the non-applicant in these applications have opposed the applications on various grounds, the principle ground being that the dispute raised by the applicant is required to be adjudicated by Small Causes Court as per Section 26 of the Provincial Small Cause Courts Act, 1887 (for short "Act of 1887") and as the dispute falls within the exclusive jurisdiction of Small Causes Court, it cannot be resolved by arbitration. To support the submission

reliance is placed on the judgment given by the Full Bench of this Court in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint Automotive Pvt. Ltd., Mumbai* reported in **2010 (1) Mh.L.J. 658**.

5. The learned Advocate for the applicant has countered the above submissions made on behalf of the non-applicant urging that, at this stage, it is not open to the non-applicant to object for appointment of substitute Arbitrator. It is submitted that the objection for referring the dispute for arbitration was raised earlier also and still this Court referred the dispute for arbitration keeping open the objections to be considered by the Arbitrator. It is further submitted that all the claims made by the applicant do not fall within the jurisdiction of Small Causes Court and, therefore, the submission made on behalf of the non-applicant relying on the provisions of Section 26 of the Act of 1887 and the judgment given in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint Automotive Pvt. Ltd., Mumbai* (supra) cannot be accepted. It is further submitted that after the amendment to the Arbitration and Conciliation Act, 1996 by Act No.3 of 2016 and insertion of Sub-section (6-A) in Section 11 of the Act of 1996, this Court has to only examine whether there is any clause which requires reference of dispute to arbitration and nothing more is required to be seen by this Court while considering the application under Section 11 of the Act of 1996. To support the submission, reliance is placed on the

judgment given by the Hon'ble Supreme Court in the case of *Duro Felguera, S.A. V/s. Gangavaram Port Limited* reported in **(2017) 9 SCC 729**.

6. When the earlier applications filed by the applicant under Section 11 of the Act of 1996 were considered by this Court, the judgment delivered by the Full Bench in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint Automotive Pvt. Ltd., Mumbai* (supra) was not pointed out to this Court. Paragraph Nos.1, 7 and 40 of this judgment are relevant and is as follows:

“1. The question as referred by the Learned Single Judge of this Court for consideration of the larger Bench, is as follows:-

“Whether in view of the provision of Section 5 of the arbitration and Conciliation Act, 1996, if any Agreement between licensor and Licensee contains a clause for arbitration, the jurisdiction of the Small Causes Court under the Presidency Small Cause Courts Act, 1882 would be ousted?”

7. The principal question which we have to answer is : whether section 5 of the Act of 1996 would oust the jurisdiction of the Small Causes Court which is bestowed on it by virtue of section 41 of the Act of 1882 to try all suits and proceedings between a Licensor and Licensee, or a landlord and tenant, relating to recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or

charges or rent. We would, therefore, straightway refer to section 5 of the Act of 1996. The same reads thus:

“5. Extent of Judicial intervention - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.” (Emphasis supplied)”

40. In summation, we would hold that Section 41(1) of the Act of 1882 is a special law which in turn has constituted special Courts for adjudication of disputes specified therein between the licensor and licensee or a landlord and tenant. The effect of Section 41(2) of the Act of 1882 is only the suits or proceedings for recovery of possession of immovable property or of licence fee thereof, to which, the provisions of specified Acts or any other law for the time being in force apply, have been excepted from the application of non-obstante clause contained in Section 41(1) of the Act. The expression “or any other law for the time being in force” appearing in Section 41(2) will have to be construed to mean that such law should provide for resolution of disputes between licensor and licensee or a landlord and tenant in relation to immovable property or licence fee thereof, to which immovable property, the provisions of that Act are applicable. The Act of 1996 is not covered within the ambit of Section 41(2) in particular the expression “or any other law for the time being in force” contained therein. The question whether the exclusive jurisdiction of the Small Causes Court vested in terms of Section 41 of the Act of 1882 is ousted, if an agreement between the licensor and licensee contains a clause for arbitration, the same will have to be answered in the negative. For, Section 5 of the

Act of 1996 in that sense is not an absolute non-obstante clause. Section 5 of the Act of 1996 cannot affect the laws for the time being in force by virtue of which certain disputes may not be submitted to arbitration, as stipulated in Section 2(3) of the Act of 1996. We hold that Section 41 of the Act of 1882 falls within the ambit of Section 2(3) of the Act of 1996. As a result of which, even if the Licence Agreement contains Arbitration Agreement, the exclusive jurisdiction of the Courts of Small Causes under Section 41 of the Act of 1882 is not affected in any manner. Whereas, Arbitration Agreement in such cases would be invalid and inoperative on the principle that it would be against public policy to allow the parties to contract out of the exclusive jurisdiction of the Small Causes Courts by virtue of Section 41 of the Act of 1882. ”

7. Considering the proposition laid down in the judgment given in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint Automotive Pvt. Ltd., Mumbai* (supra) the request for referring the dispute for arbitration cannot be granted to resolve the disputes which fall within the exclusive jurisdiction of Small Causes Court even if the agreement between the parties contains an arbitration clause. However, this judgment was delivered prior to the Amendment of Act of 1996 by Act No.3 of 2016. Section 11(6-A) of the Act of 1996, inserted by the Act No.3 of 2016 lays down that while considering the application under Sub-section (4), Sub-section (5) or Sub-section (6) of Section 11 of Act of 1996 this Court should confine only to the examination of existence of an arbitration agreement. In the judgment given in the case of *Duro Felguera, S.A. V/s.*

Gangavaram Port Limited (supra) the Hon'ble Supreme Court has examined the intention of Legislature for insertion of Section 11(6-A) and has recorded its conclusions in paragraph No.59 of the judgment which reads as follows:

“59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. and Boghara Polyfab. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

8. In the judgment given by the Constitution Bench of Hon'ble Supreme Court in the case of *SBP & CO. V/s. Patel Engineering Ltd. and another* reported in **(2005) 8 SCC 618** it is held by majority decision that the power under Section 11(6) of the Act of 1996 is a judicial power and not an administrative power.

As the power under Section 11(6) of the Act of 1996 is held to be judicial power and as Full Bench of this Court has laid down that the disputes which would fall within the exclusive jurisdiction of Small Causes Court cannot be referred for arbitration even if the agreement between the parties provide for it, would it be appropriate for this Court to appoint an Arbitrator mechanically. For proper appreciation of the rival

submissions, I feel it is necessary to examine the basic facts of the case.

9. An agreement dated 17th February, 2010 was executed between Chairman, Nagpur Improvement Trust, Nagpur and M/s. Sell Ads, Nagpur for management and maintenance, improvement of infrastructure and Development around Futala Lake premises. Then a joint venture agreement dated 11th October, 2010 was executed between M/s. Sell Ads and M/s. Concept Resources for execution of work. Then a licence agreement dated 20th December, 2010 was executed between M/s. Concept Resources (applicant in Miscellaneous Civil Application No.1385/2017) and non-applicant. Similar agreements were executed between Concept Resources (applicant in all these applications and non-applicant in all these applications). These agreements stated that M/s. Sell Ads had completed first phase of development and now parking area, space for food plaza and mobile kiosk etc. was available around Futala lake for allotment to prospective catering contractors that the licensor i.e. M/s. Concept Resources had right to give licence of open space for running a food plaza, food kiosk etc. and as the licensees (non-applicants in all these applications) had approached the licensor with request to allow them to run food plaza / food kiosk at the designated place, the licensees had accepted the offer of licensor.

Clause (30) of this agreement reads as

follows:

“30. Arbitrations : - If at any time, any question, dispute or difference, whatsoever, shall arise between the Licensor and the Licensee with regards to or in connection with this contract, whether during the period of the contract or after its completion, will be subject to arbitration as per the Arbitration Act.”

10. According to the applicant, its claim is for licence fee, water charges, service taxes, interest on the above amount and penalty payable by the non-applicant for not handing over vacant possession even after termination of licence agreement, and except for recovery of licence fees the other claims do not fall within the jurisdiction of Small Causes Court and, therefore, as per Clause (30) of the agreement, the dispute between the parties is required to be resolved by arbitration.

As per the scheme of Section 11 of the Act of 1996, this Court can exercise powers under Section 11(6) of the Act of 1996 if a party. Unless one party makes a request for referring the dispute for arbitration and the other party fails to take steps within 30 days of receipt of request of the first party unless the party makes a request for referring the dispute for arbitration and the other party fails to take steps within 30 days, this Court cannot exercise powers conferred by Section 11(6) of the Act of 1996. In the present case the applicant made request by the notice dated 11th December, 2013 for referring the dispute for arbitration, informing the non-applicant the name of proposed

Arbitrator and called upon the non-applicant to inform its agreement on one of the three name proposed by the applicant, to the Arbitrator. By this notice, the applicant claimed an amount of Rs.9,46,100/- towards licence fee, an amount of Rs.28,995/- towards service charges, an amount of Rs.3,000/- towards water charges, interest at the rate of 18% per annum and an amount of Rs.4,000/- per day from 4th September, 2013 towards penalty. The applicant requested for appointment of an Arbitrator to resolve the dispute between the parties in respect of all the above claims. The claim of the applicant for licence fee would fall within the exclusive jurisdiction of Small Causes Court as per Section 26 of the Act of 1887 in view of the judgment given by the Full Bench of this Court in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint Automotive Pvt. Ltd., Mumbai* (supra). There is a dispute as to whether claim in respect of service charges and water charges would also fall within exclusive jurisdiction of Small Causes Court. The learned Advocate for the applicant has submitted that these claims would not fall within the jurisdiction of Court of Small Causes and, therefore, as per Clause (30) of the licence agreement it will have to be resolved by arbitration. The learned Advocates for the non-applicants have submitted that the claim in respect of service charges and the claim in respect of water charges would also fall within the exclusive jurisdiction of Small Causes Court as per Section 26 of the Act of 1887. It is submitted that term “charges” used in Section

26(1) of the Act of 1887 is wide enough and covers the ancillary charges in addition to the licence fees/ charges. As far as the claim of the applicant in respect of penalty is concerned, there is dispute as to whether the claim would fall within exclusive jurisdiction of Small Causes Court.

11. In the above situation, when undisputedly, the claim for recovery of licence fee falls within exclusive jurisdiction of Small Causes Court and as per the proposition laid down in the judgment given by the Full Bench of this Court in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint Automotive Pvt. Ltd., Mumbai* (supra) in my view, the non-applicant was justified in not taking any steps as per Clause (30) of the licence agreement.

12. The learned Advocate for the applicant has made alternate submission that an Arbitrator be appointed to resolve the dispute between the parties in respect of the claims of the applicant excluding the claim for recovery of licence fees. This submission cannot be accepted as this Court will be entitled to exercise the power under Section 11(6) of the Act of 1996 only if one party makes a request for appointment of an Arbitrator to resolve an arbitrable dispute between the parties and the other party fails to take steps in the matter within 30 days. As I find that the request made by the applicant for appointment of an Arbitrator was in respect of several disputes which included disputes which fall

within the exclusive jurisdiction of Small Causes Court, it cannot be said that the non-applicant is at fault for not taking steps as per Clause (30) of the licence agreement. Consequently, it would not be appropriate for this Court to exercise the powers under Section 11(6) of the Act of 1996.

13. The learned Advocates for the non-applicants have further objected to the application filed by the applicant under Section 11(6) of the Act of 1996 on the ground that before filing the present applications the applicant has not made any request for appointment of substitute Arbitrator in consonance with the procedure under Clause (30) of the licence agreement. To support this submission, reliance is placed on the judgment given in the case of *Huawei Technologies Company Limited V/s. Sterlite Technologies Limited* reported in **(2016) 1 SCC 721**.

14. The learned Advocate for the applicant has distinguished the above judgment to urging that in the case of *Huawei Technologies Company Limited V/s. Sterlite Technologies Limited (supra)*, the procedure of appointment of Arbitrator was under the agreement between the parties prescribed, however, in the present case there is no such clause in the licence agreement prescribing any specific procedure for appointing Arbitrator or substituted Arbitrator.

15. The learned Advocate for the applicant has

submitted that the objection raised on behalf of the non-applicant relying on Section 26 of the Act of 1887 and the judgment given by the Full Bench of this Court in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint Automotive Pvt. Ltd., Mumbai* (supra) cannot be accepted as there is no relationship of licensor and licensee between the parties. It is submitted that for existence of relationship of licensor and licensee, the subject matter of licence has to be immovable property and in the present case as per the agreement, the license is for running a food kiosk only.

The submission made on behalf of the applicant cannot be accepted. In the notice issued on behalf of the applicant to the non-applicant on 11th November, 2013 in paragraph No.9 it was stated that the applicant claimed an amount of Rs.9,46,100/- from the non-applicant towards the licence fees. Apart from this, the licence agreement between the applicant and the non-applicant refers to the grant of licence of open space for running food plaza. The Clause (8), Clause (17) and Clause (25) of the licence agreement refer to the use of “designated space”, “land in question” and “space allotted”. Considering these facts, it cannot be said that there was / is no relationship of licensor and licensee between the applicant and non-applicant.

16. Considering the facts and the proposition laid down in the judgment given in the case of *Central Warehousing Corporation, Mumbai V/s. Fortpoint*

Automotive Pvt. Ltd., Mumbai (supra) the applications are **dismissed**. In the circumstances, the parties to bear their own costs.

JUDGE

Tambaskar.