

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
APPLICATION FOR APPOINTMENT OF
ARBITRATOR NO. 3 OF 2018

Lenin Anthony Viegas. Applicant.

Versus

K.C. Construction Co. & Anr. Respondents.

Mr. A. D. Bhobe, with Ms. A. Fernandes, Advocate for the Applicant.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat Ghanekar, Advocate for the Respondents.

Coram : M.S. Sonak, J.

Date : 1 February 2019.

P.C.:

1. Heard Mr. Bhobe, learned Counsel for the Applicant and Mr. Sudin Usgaonkar, learned Senior Advocate for the Respondents.

2. This is an application, requesting appointment of an arbitrator to adjudicate the disputes between the parties in terms of Clause 31 of the MOU dated 30 November 2009 (the arbitration clause).

3. Initially, this Court had appointed Shri G.U. Bhobe, as an arbitrator to adjudicate upon the disputes. On 2 September 2013,

the sole Arbitrator made his award. The Respondents, however, took out proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, which application was partly allowed by the District Court vide its Judgment and Order dated 29 June 2015. The award was set aside and the matter was remanded to the sole Arbitrator for fresh adjudication.

4. In pursuance of the remand, the proceedings commenced before the sole Arbitrator, but the sole Arbitrator ultimately withdrew himself as an arbitrator and the mandate of the proceedings stood terminated.

5. Mr. Bhobe, the learned Counsel for the Applicant submits that in view of the aforesaid, it is only appropriate that a new Arbitrator is now appointed to adjudicate into the disputes which have arisen between the parties.

6. The record indicates that in the meanwhile, the Respondents instituted a comprehensive Civil Suit No.3/2016 in the Court of Civil Judge, Senior Division, at Panaji, impelading therein not only the present Applicant, but also some other parties as defendants. In the said Special Civil Suit, the defendants, including the Applicant herein, took out an application under Section 8 of the said Act, seeking reference of the matter to arbitration, relying again

upon Clause 31 of the MOU dated 30 November 2009. This application was, however, dismissed by the learned Civil Judge, Senior Division by a detailed order dated 17 February 2017, on the ground that the disputes between the parties involved adjudication into serious issues of fraud and, therefore, such disputes could not be effectively adjudicated in the arbitration.

7. The Applicant chose not to question the order dated 17 February 2017 made by the learned Civil Judge, Senior Division, but other two defendants instituted Arbitration Appeals No.9/2017 and 15/2017 to question the order dated 17 February 2017. Both the Appeals came to be dismissed by this Court vide separate orders dated 7 July 2017 and 1 February 2018. This Court accepted the view taken by the learned Civil Judge, Sr. Division that the disputes involved adjudication into the issues of fraud which could not have been conveniently adjudicated in the arbitration.

8. Mr. Bhobe for the Applicant, however, pointed out that this Court, in its order dated 1 February 2018, whilst disposing of the Appeal under Arbitration Act No.15/2017, was apprised of the position that the present Applicant had already filed the present application seeking appointment of an arbitrator under Section 11 of the said Act and this Court made it very clear that its order dated 1

February 2018 shall not come in the way of the Applicant moving under Section 11 of the said Act, if so advised. Mr. Bhobe submits that in view of this clarification/liberty, the orders made by this Court in Appeals under Arbitration Act No.9/2017 and 15/2017 ought not to come in the way of the Applicant.

9. Having carefully considered Mr Bhobe's submission, it is not possible to accept the same. As the position presently stands, the order dated 17 February 2017 made by the learned Civil Judge, Sr. Division dismissing, *inter alia*, the Applicant's application under Section 8 of the said Act, seeking reference to arbitration, has attained finality. In fact, the Applicant chose not to even challenge the said order. The challenge by the other two defendants was unsuccessful before this Court. Therefore, based upon the liberty in the order dated 1 February 2018, the Applicant cannot wish away the effect of the order dated 17 February 2017 made by the learned Civil Judge, Sr. Division.

10. Besides, on perusal of the order dated 1 February 2018 in the Appeal under Arbitration Act 15/2017, it is quite clear that this Court has not held that the Applicant's Application under Section 11 of the said Act was maintainable or that it was required to be granted for any reason. All that this Court has observed is that the order dated 1 February 2018 will not come in the way of the

Applicant moving under Section 11 of the said Act, if so advised.

11. In any case, there are two orders made by this Court that the disputes which have arisen between the parties involve serious issues of fraud and, therefore, such issues are not arbitrable. This is the same view taken by the learned Civil Judge, Sr. Division in her order dated 17 February 2017, which has attained finality, at least *qua* the applicant herein.

12. A comprehensive suit is pending adjudication between the parties. The suit involves not merely the Applicant and the Respondents, but also some other parties. At this stage, it will not be appropriate to split the causes of action or permit some of the parties to the suit to proceed with arbitration and others to continue with the suit, which is reported to be a comprehensive in nature.

13. For all the aforesaid reasons, the request made in this Application cannot be considered. The Application is, therefore, dismissed.

14. In the facts of this case, however, there shall be no order as to costs.

M.S. Sonak, J.