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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**REVIEW PETITION (L.) NO.7 OF 2019
IN
COMMERCIAL ARBITRATION APPLICATION NO.249 OF 2018**

Stolt Tank Containers B.V. & Anr.	..Petitioners
Vs.	
Sai Prabha Marine Services Private Limited & Anr.	..Respondents

Mr.Cyrus Ardeshir, Mr.Abhishek Sawant with Mr.Ayaz Bilawala and
Ms.Anasamah Sayed i/b.M/s.Bilawala & Co. for Petitioners.
Mr.Vishal Kanade i/b.Mr.Akshay Petkar for Respondents.

CORAM : G.S. KULKARNI, J.

DATE : 26th MARCH, 2019

P.C.:

The petitioner/original respondent in the commercial arbitration application No.249 of 2018 is before the Court in this review petition seeking a review of the order dated 8 January 2019 passed by this Court whereby by consent of the parties, arbitral tribunal came to be appointed to adjudicate the disputes and differences between the parties under the memorandum dated 19 March 2010. The order under review is required to be noted which reads thus:-

- “ 1. Heard learned counsel for the parties.
2. There is obviously a mistake in the Order dated 17.12.2018 passed by this Court so also agreed by the learned counsel for the parties. Accordingly, the Order dated 17.12.2018 is re-called. This Application is taken up for hearing afresh.

3. The case of the Applicants is that disputes and differences between the parties have arisen under the memorandum dated 19.03.2010 as entered between the parties. In Article 14 of the said memorandum, the parties have agreed for “dispute resolution and arbitration”. Article 14 is required to be noted which reads thus :-

“ARTICLE 14

DISPUTE RESOLUTION AND ARBITRATION

14.1 In the event a dispute arises out of or in connection with the validity, interpretation or implementation of this MOU, the parties shall attempt in the first instance to resolve such dispute through consultations in good faith.

14.2 Any controversy or claim arising out of or relating to this MOU, if not resolved within thirty (30) days from the date of consultation, shall be settled by arbitration in India in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (or any statutory modification or re-enactment thereof for the time being in force).

14.3 The venue of arbitration shall be Mumbai.

14.4 The Board of Arbitrators shall be composed of three (3) arbitrators, one to be appointed by the party or parties pursuing the controversy, one to be appointed by the other party or parties, and the third by the two so chosen. For purposes of commencement or enforcement of arbitration proceedings, notice served by any party upon the others, in accordance with Article 10 hereof shall be deemed sufficient.

14.5 The decision of the majority of the Arbitrators shall be final and judgment upon any such award may be entered in any court having jurisdiction thereof.”

4. As is clear from a reading of Article 14.4 above, the Arbitral Tribunal would comprise of three arbitrators, one to be appointed by each of the party and the presiding arbitrator to be appointed by the two arbitrators so appointed by the parties.

5. After this Application was heard for some time, learned counsel for the parties on instructions of their clients have stated that their clients have nominated the appointment of the following arbitrators :-

(i) Mr. Justice S. S. Parkar (Retd.) as nominated on

behalf of the Applicants;

(ii) Mr. Justice S. J. Vazifdar (Retd.) as nominated on behalf of the Respondents.

6. In view of the above consensus, this Application would be required to be disposed of in terms of the following order:

ORDER

(i) An Arbitral Tribunal to adjudicate the disputes and differences of the parties under the Memorandum dated 19.03.2010 is constituted as under:-

(ii) Mr. Justice S. S. Parkar, Former Judge of this Court, is appointed as the prospective arbitrator as nominated by the Applicants;

(iii) Mr. Justice S. J. Vazifdar, Former Chief Justice, Punjab and Haryana High Court, is appointed as the prospective arbitrator as nominated by the Respondents;

(iv) The learned Arbitrators so nominated by the parties shall appoint the Presiding Officer;

(v) Parties are directed to initially appear before the nominated Arbitrators preferably within a period of 15 days from today;

(vi) Once the Arbitral Tribunal is constituted, the learned members of the Arbitral Tribunal, 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 the parties;

(vii) All contentions of the parties on merits of the matter are expressly kept open.

7. Disposed of. No costs.

8. Office to forward a copy of this order to Mr. Justice S. S. Parkar (Retd.) and Mr. Justice S. J. Vazifdar (Retd.).

2. Learned Counsel for the petitioners would submit that the above order passed by this Court is required to be set aside in as much as the Court lacks inherent jurisdiction to entertain a Section 11 application to pass any order therein in as much as arbitration in question is an international commercial arbitration as defined under Section 2(f) of the ACA in as much as the petitioner No.1 is a foreign company

incorporated under the laws of Netherlands having its corporate office at Westelaan 5 Rotterdam, 3016 C.K. Netherlands. Learned Counsel for the petitioners has drawn my attention to the provisions of Section 11 Sub-section (9) of the Arbitration and Conciliation Act, 1996 which provides that in the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by the Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. It is therefore submitted that taking into consideration the provisions of Section 2(f) read with Section 11(9) of the ACA, the Section 11(6) petition as filed by the respondent before this Court was not maintainable and order under review could not have been passed. In support of this contention, learned Counsel for the petitioners has relied on the decision of learned Single Judge of this Court in case of **Roptonal Ltd. Film Company Ltd. & Anr. Vs. Anees Bazmee**¹. It is submitted that this case arose out of an identical situation where by consent of the parties, by an order dated 12 June 2014 Section 11 application (Arbitration Application No.97 of 2013) was disposed of by this Court. Learned Single Judge in the said case in disposing of the said application had passed the following order:-

“ There is no dispute that arbitration agreement exist. By consent of parties, Shri Justice F.I. Rebello, former Chief Justice of Allahabad High Court is

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appointed as a sole arbitrator. Except the issue that the arbitration agreement exist, all other issues raised in the affidavit in reply are kept open. Arbitration application is disposed of. No order as to costs.”

3. A review petition came to be filed against the above order contending that the Court lacked inherent jurisdiction to pass such consent orders, considering the legal position under Section 2(1)(f) of the ACA. Learned Single Judge of this Court held that even by consent of the parties as the provision stood then, the learned designate of the Chief Justice of this Court could not have appointed an arbitrator under section 11(6) of the ACA in view of the arbitration being “international commercial arbitration” within the meaning of section 2(1)(f) of the ACA and thus set aside the said order. The relevant observations of the Court are required to be noted which read thus:-

“43. In my view even by consent of parties, the learned designate of the Chief Justice of this court could not have appointed an arbitrator under section 11(6) of the Arbitration Act in view of the arbitration being “international commercial arbitration” within the meaning of section 2(1)(f) of the Arbitration Act. In my view, the said order dated 12th June, 2014 passed by the learned designate of the Chief Justice suffered from inherent lack of jurisdiction and thus can be recalled by the learned designate of the Chief Justice of this court by exercising powers to have procedural review permissible under Article 215 of the Constitution of India.”

4. The orders passed by this Court in **Roptonal Ltd.** (supra) by the learned Single Judge were assailed by the respondent therein before the Supreme Court in Civil Appeal No.10395 of 2018 (ANEES BAZEE

VERSUS ROPTONAL LTD.). The appeal was disposed of by the Supreme Court by an order dated 10 October 2018. The Supreme Court upheld the order passed by the learned Single Judge of this Court thereby confirming that this Court would not have jurisdiction under Section 11 of the ACA to appoint an arbitral tribunal when the arbitration in question was an international commercial arbitration. While upholding the order passed by the learned Single Judge of this Court, the Supreme Court made the following observations:-

“ In the peculiar facts of the present case, since the arbitration proceedings had gone ahead before the Arbitrator and since there is no objection either to the name of the Arbitrator or to the conduct of the proceedings, in exercise of our power, we declare that the same Arbitrator shall continue to be the Arbitrator in the proceedings. We must, however, observe that the arbitration so conducted shall be an “International Commercial Arbitration” and if any exigency arises, the Court in question shall be this Court and not the High Court. Rest of the aspects shall continue to be in terms of the arbitration agreement entered into between the parties.”

5. It is pertinent to note that in the case of **Roptonal Ltd.** (supra), the arbitral tribunal had proceeded with the arbitration and the arbitral has reached the stage where the evidence of the parties was being recorded.

6. Considering the above clear position in law, it would be appropriate that the order under Review dated 8th January, 2019, passed by this Court, appointing an arbitral tribunal, even when the same was

on consent of the parties, is required to be set aside. Hence, the following order :-

- i) The order dated 8th January, 2019 passed by this Court in Commercial Arbitration Petition No.249 of 2018 is set aside.
- ii) The petitioner is at liberty to adopt appropriate proceeding as permissible in law.

7. It is clarified that in paragraph No.5 of the order dated 8.1.2019, the Court had merely recorded the statement as made on behalf of the parties nominating their respective arbitrators.

8. No costs.

[G.S. KULKARNI, J.]