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

COMMERCIAL ARBITRATION APPLICATION (L) NO.115 OF 2019

H J Services ... Petitioner.

V/s.

Maharashtra State Tourism
Development Corporation

... Respondent

Mr. Zain Mookhi a/w Mr. Ajinkya Patil i/by Naik Patil Salvi
Associates, for the Petitioner.

Mr. S. P. Bharti, for respondent

CORAM : G. S. KULKARNI, J.

DATE : 20th MARCH, 2019.

P.C. :

1] Heard learned counsel for the applicant and learned counsel for respondent.

2] This application is filed under section 11 of the Arbitration and Conciliation Act, (for short, “ACA”); whereby the applicant prays for appointment Mr. Bharat Jain, Advocate of this Court, as sole arbitrator to resolve the disputes and differences, as arisen between the parties under the agreement 28th April, 2016.

3] Respondent some time in the year 2015-16 had floated a tender inviting bids for Designing, Making and Operation of Hop on Hop off bus services in Mumbai. The applicant participated in the tender process, and was declared to be successful bidder. The work orders dated 7th September,

2015 and 8th December, 2015 came to be issued in favour of the applicant by the respondent.

4] The case of the applicant is that after completion of the work order, the applicant requested respondent to hand over the buses by writing several letters, however, the respondent neither complied nor replied the letter, and ultimately the buses were required to be parked at a BEST Bus Depot. On 7th March, respondent terminated the contract alleging certain irregularities.

5] A notice dated 11th February, 2019 was issued by the petitioner to the respondent invoking the arbitration agreement in terms of the agreement dated 28.4.2016. The arbitration clause reads thus :

"7.3 Arbitration

7.3.1. If any dispute or differences shall arise between MTDC and H J Services as to their respective rights, duties, obligations under their agreement or touching any other matter or thing connected with this agreement such dispute or difference shall be determined by mutually agreeable arbitrator/s from panel of arbitrators, finalized by MTDC".

6] It is now submitted on behalf of the respondent that under the Arbitration and Conciliation (Amendment) Act, 2015, respondent are ready to appoint an arbitrator on its panel. This is opposed on behalf of the petitioner

7] The contention of Mr. Bharti that the arbitrator on the panel of

MTDC now being appointed by the Court cannot be accepted. On a default committed on behalf of the respondent in not appointing arbitrator within the prescribed time as called upon by the applicant, it can be very well observed that the respondent has forfeited its right to appoint an arbitrator in terms of the arbitration clause. The law in regard to such a right being forfeited is now well settled. In **Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr.**¹ the Supreme Court in paragraph 19 observed thus:-

“19. So far as cases falling under Section 11(6) are concerned—such as the one before us – no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party cease. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”

8] In a subsequent decision in **Deep Trading Company Vs. Indian Oil Corporation & Ors.**² the Supreme Court referring to the decision in

1 (2000)8 SCC 151

2 (2013) 4 SCC 35

Dara Sitchgears Ltd. held thus:-

“19. If we apply the legal position expounded by this Court in **Datar Switchgears** to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 9-8-2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not dis-entitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.”

9] In a recent judgment in **Aravali Power Company Pvt. Ltd. Vs. M/s.Era Infra Engineering Ltd.**³, the Supreme Court in regard to the rights of the respondent therein being forfeited observed thus:-

“20.5 Similarly, in *Denel (Proprietary) Ltd. Vs. Ministry of Defence* [(2012) 2 SCC 759; (2012) 2 SCC (Civ) 37], the relevant clause provided for sole arbitration of the Director General, Ordnance Factory, Government of India or a government servant appointed by him. It was observed that since no arbitrator was appointed in terms of the governing clause within the stipulated period the respondent had forfeited the right to make an appointment of an arbitrator.”

(emphasis supplied)

10] Considering the above clear position in law, certainly the contention of the respondent that they should be permitted to appoint an arbitrator from their panel cannot be accepted.

³ AIR 2017 SC 4450

11] Having heard, learned counsel for the parties and in view of the consensus between the parties that the disputes and differences be referred to the arbitral tribunal, and the application is required to be disposed of by following order.

Order

i] Mr. Vikram Deshmukh, Advocate of this Court, is appointed as the prospective sole Arbitrator to adjudicate the disputes and differences between the parties, arising under the agreement dated 28th April, 2016.

ii] The prospective sole arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the provisions of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

iii) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today at a date and time as may be fixed by the prospective arbitrator.

iv) All contentions of the parties including on merits of the matter are expressly kept open.

(vi) The Arbitration petition is disposed of in the above terms. No costs.

3. Office to forward a copy of this order to the learned Arbitrator on the following address:-

Chamber of Mr. D.J. Khambata, Senior Advocate
3rd floor, Mulla House,
51, M. G. Road, Mumbai 400 001.

[G. S. KULKARNI, J]