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

COMMERCIAL ARBITRATION APPLICATION NO.147 OF 2019

Inspira IT Products Pvt. Ltd.	..Applicant
Vs.	
Tata Consultancy Services Ltd.	..Respondent

Mr.Rohan Sawant with Mr.Samsheer Garud, Bijal Gandhi, Mr.Harsh Noorjani for Applicant.
Ms.Divya Hirwat, Ms.Fereshte Sethna i/b. M/s.DMD Advocates for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 14th OCTOBER, 2019

Judgment:-

This is an application filed under Section 14 and 15 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the applicant has prayed for appointment of a substitute arbitrator, as the sole arbitrator as appointed by this Court has resigned.

2. This Court (K.R.Shriram, J.) by an order dated 12 February 2018 passed in Company Petition No.422 of 2016 appointed an arbitral tribunal of Ms.Manjiri Shah, Advocate of this Court, as agreed between the parties and by consent of the parties. The said order reads as under:-

“1 The counsel for petitioner and the counsel for respondent state that parties have agreed to refer their underlying disputes in this petition to be arbitrated by a sole

arbitrator who can be appointed by this Court.

2 **By consent**, therefore, the following order is passed :-

(a) Ms.Manjiri Shah, an advocate practicing in this Court is appointed as sole arbitrator to arbitrate on the underlying claim in this petition including counterclaim, if any.

(b) The fees, administrative expenses of the Arbitrator and typing charges, if any, to be shared equally between the parties and the same will be costs in the arbitration proceedings.

(c) Within three weeks of receiving a copy of this order either from petitioner or the company, the arbitrator to make a disclosure in writing directly to the parties as required under Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996.

(d) All rights and contentions of these parties are kept open **except to question constitution of the arbitral tribunal.**

3 Petition dismissed as withdrawn.”

(emphasis supplied)

3. It is not in dispute that the learned sole arbitrator so appointed entered reference. Statement of claim came to be filed by the applicant on 4 April 2018. On behalf of the respondent, a statement of defence also came to be filed on 6 September 2018.

4. In the intervening period, the respondent also filed an application praying for an interim award for rejection of the petitioner's claim on the ground of limitation. The learned arbitrator adjudicated the said application and by an order dated 9 July 2018 rejected the said application. The arbitral proceedings in March 2019 had reached upto a stage that respondent's second witness was being cross examined by the applicant.

5. It clearly appears from the record that the respondent had wholeheartedly accepted reference of the disputes to arbitration, as per its consent and as recorded in the order dated 12 February 2018 passed by this Court (supra). Once by consent an arbitral tribunal was appointed, further as to how the parties have accepted the arbitral proceedings also becomes relevant and needs to be seen from the “statement of claim” and “statement of defence”, more particularly in the context of Section 7 of the Act, which defines an arbitration agreement, and in the present case to be precise sub-section (4)(c) of Section 7. It would thus be necessary to note the averments of the applicant “*with reference to arbitration*”, as made in paragraphs 33 and 39 of the statement of claim which read thus:-

“33. By an order dated 12th February 2018, by consent of the parties, the disputes in the Company Petition **were agreed to be referred to the present Arbitral Tribunal.** Hereto annexed and marked Exhibit “V” is a copy of the order dated 12th February 2018.

.....

39. The Purchase Order is dated 24th June 2013. The winding up petition was filed by the Claimant on 18th May 2016 which was within limitation and thereafter by an order dated 12th February 2018 **the disputes were referred to arbitration.** No part of the present claim is barred by the limitation and the claim is within the period of limitation.”

(emphasis supplied)

6. The respondent filed a statement of defence and in dealing with the above paragraphs as made by the applicant in the statement of claim, the respondent stated as under:-

“28. With reference to paragraphs (28) to (33), the Respondent disputes and denies the allegations of the Claimant. In particular, the Respondent denies that the Claimant was entitled to sums under the Subject PO and/or

interest thereon, as alleged in the demand notice dated 23 March 2016 and/or the winding up notice dated 30 March 2016 of the Claimant. The Respondent duly replied to the winding up notice vide its letter dated 19 April 2018, denying the false and frivolous allegations of the Claimant. The Respondent craves leave to refer to and rely upon the notices, replies, letters, pleadings, orders and other documents in relation to the winding up proceedings, when produced. The Respondent denies that it had raised any false or frivolous or belated defences in relation to the alleged claims set forth in the winding-up proceedings.”

.....

31. With reference to paragraph (39), the Respondent disputes and denies the allegations of the Claimant. In particular, the Respondent denies that no part of the alleged claim is barred by limitation and/or that the alleged claim is brought against the Respondent within the period of limitation.”

7. The above averments of the respondent unequivocally indicate that the parties had agreed for adjudication of the disputes by an arbitral tribunal. These averments of the respondent also clearly show that there was not a slightest apprehension on the part of the respondent that the parties had agreed for a reference of the disputes for adjudication by an arbitral tribunal. This position is further compounded from the respondent's own averments as made in paragraph 7 of its “application for interim award on the preliminary issue of limitation” when the respondents comment on commencement of the arbitration in terms of Section 21 of the Act. In paragraph 7 of the said application, the respondent stated as under:-

“7. The alleged disputes between the parties came to be referred to arbitration vide an Order passed by the Hon'ble High Court on 12 February 2018 in Company Petition No.422 of 2016, which constitutes the date of commencement of arbitration within the meaning of section

21 of the Arbitration & Conciliation Act, 1996. On that date, any purported claims against the Respondent were barred by limitation.”

(emphasis supplied)

8. It appears that after the conclusion of the cross-examination of the applicant's witness, on 26 March 2019 the respondent filed an application for filing additional evidence. During the hearing of the said application, it appears that there arose some friction and disharmony in the arbitral adjudication. The result was that the learned arbitrator resigned and in doing so, passed the following order:-

“1. The Application such as the one that has been made today i.e. on 26th March 2019 shows a distrust of the Respondent in the fairness of this Tribunal in concluding the present arbitration. In such a scenario, I do not wish to continue as the Arbitrator. Hence, I resign as the Arbitrator in the present matter.”

(emphasis supplied)

9. In the above circumstances, the present application is filed under Sections 14 and 15 of the Act for appointment of a substitute arbitrator.

10. In opposing this application, a counter affidavit has been filed on behalf of the respondents. Paragraph 3 of the reply of the respondent clearly recognises that by an order dated 12 February 2018 passed by this Court in Company proceedings, “by consent of the parties”, the sole Arbitrator came to be appointed to adjudicate the disputes between the parties, keeping all contentions of the parties open, except to question of constitution of the arbitral tribunal, to adjudicate upon the disputes. In

paragraph 5 the respondent has stated that the respondent was of the belief that the arbitral tribunal would adjudicate the disputes expeditiously and a free and full opportunity would be available to the respondent to present its case, consistent with the requirements of the Arbitration and Conciliation Act, 1996. In paragraph 6 of the affidavit, the respondent has commented upon the purported procedural and other lapses which according to the respondent were encountered during the course of the arbitration and are the grievances of the respondent against the arbitrator. Paragraph 7 are the respondent's comments on the arbitral proceedings held on 30 January 2019 and cross examination of respondent's witness and the questions which were posed to the said witness. Paragraphs 8 to 18 are the contentions of the respondent in regard to the arbitral procedure and the events which had taken place during the recording of evidence. However, what is stated in paragraph 19 of the counter affidavit is the ground on which the present petition is being opposed, namely the respondent contending that the arbitral proceedings commenced, based on oral consent of Counsel for the parties, and not on the basis of any agreement in writing and/or joint application between the parties. Thus according to the respondent there is no valid arbitration agreement between the parties in the manner required under Section 7 of the Act. It is further contended that as there is no signed document and/or correspondence evincing an arbitration agreement, it cannot be said that in law there is an arbitration agreement between the

parties. In paragraph 23 of the counter affidavit the respondent has referred to the decision of the Supreme Court in *Kerala State Electricity Board & Ors. Vs. Kurien E.Kalathil & Ors.*¹ to support the above contentions, and more particularly the observations in paragraph 35 of the decision when it is observed that a reference of disputes to arbitration under Section 89 of the Code of Civil Procedure could be done only when the parties agree for settlement of their disputes through arbitration in contradistinction to other methods of alternative dispute resolution mechanism. It is also held that for reference of the parties to arbitration, oral consent of the Counsel without a written memo of instructions does not fulfill the requirement under Section 89 of the CPC.

11. Thus the contention as urged on behalf of the respondent is that in the present case as there was an oral consent made by the counsel for parties, there is no arbitration agreement between the parties within the meaning of Section 7 of the Act.

12. In the alternative, it is argued that for the purpose of appointing a substitute arbitrator under Section 15(2) of the Act, the respondent is now not prepared to consent to the appointment of a substitute arbitrator, as Section 15(2) stipulates that where the mandate of the arbitrator terminates, a substitute arbitrator shall be appointed

1 (2018)4 SCC 793

according to the rules, that were applicable to the appointment of the arbitrator being replaced. According to the respondent, this would necessarily contemplate a reference to order dated 12 February 2018 which was passed by consent and now the respondent is not prepared to grant a further consent for continuation of the arbitral proceedings or for appointment of an arbitral tribunal. It is thus contended that the applicant would not be entitled for appointment of a substitute arbitrator.

13. In my opinion, the contention as urged on behalf of the respondent that there is no arbitration agreement between the parties is not well founded as would be apparent from the following discussion.

14. It is clear that this Court by an order dated 12 February 2018 passed in Company Petition No.422 of 2016 (supra) recorded the consent between the parties to refer the underlying disputes to be arbitrated by a sole arbitrator and by consent of the parties appointed an arbitral tribunal, keeping all contentions of the parties open except to question the constitution of arbitral tribunal. The learned sole arbitrator entered reference. The applicant filed its statement of claim, the respondent also filed its statement of defence. The applicant examined its witnesses who were cross-examined on behalf of the respondent. The respondent also filed an application for an interim award contending that the applicant's claims are barred by limitation.

15. The respondent thus always accepted that there is an arbitration agreement between the parties and that the arbitral tribunal will have jurisdiction to adjudicate the disputes between the parties. Moreover, the express statements of the parties in the pleadings on record of the arbitration, confirms an arbitration agreement between the parties, in a manner known to Section 7 sub-section (4)(c) of the Act, which recognizes an arbitration agreement between the parties by exchange of 'statement of claim and defence' in which the existence of agreement is alleged by one party and not denied by the other. It would be relevant to note Section 7 which reads thus:-

"7. Arbitration agreement.-

.. . . .

(4) An arbitration agreement is in writing if it is contained in-

(a)

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.;"

16. An arbitration agreement existing between the parties in terms of Section 7(4)(c) is clear from the averments as made by the applicant in the statement of claim (as made in paragraphs 33 and 39) and acceptance and/or of no denial of these specific averments, by the respondent in dealing with these paragraphs in the statement of defence. Considering these unambiguous statements in the pleadings of the parties, there can

be no manner of doubt, that there is an arbitration agreement between the parties in terms of Section 7(4)(c) of the Act. There can be no other meaning which can be attributed to these statements and expressions as clear from a cumulative reading of these paragraphs of the statement of claim and the statement of defence.

17. It is hence required to be observed that it is not merely consent of the learned Counsel for the parties recorded in the order dated 12 February 2018 passed by this Court which forms the basis for the parties being before the arbitral tribunal, but the further acts, namely an unambiguous version of the parties in the pleadings before the arbitral tribunal recognizing an arbitration agreement between the parties, re-enforcing the solemn consent of the parties as recorded in the order dated 12 February 2018 passed by this Court, that the disputes by consent be referred to arbitration by appointing an arbitrator.

18. In the facts of the case it is surprising as to how the respondent is raising such an objection when not only the parties were before the arbitral tribunal without any issue on the existence of the arbitration agreement, so arrived between the parties as noted above, but the parties with full consciousness proceeded with their respective contentions before the arbitral tribunal. The arbitration was in progress for more than one year and had reached a stage when the respondent's second witness was

being cross-examined, when the learned sole Arbitrator resigned. All these circumstances also militate against the contention of the respondent that there is no arbitration agreement between the parties.

19. In the facts of the present case, the decision of the Supreme Court in *Kerala State Electricity Board & Ors.* (supra) would not assist the respondent. This was a case where the High Court by consent of the parties appointed an arbitral tribunal. Such a consent of the Counsel was not agreeable to the appellant-Kerala State Electricity Board and accordingly, a review petition was filed being Review Petition No.542 of 2009 which came to be dismissed by the High Court on 23 June 2009 and the order passed by the High Court dismissing the review petition was also the subject matter of challenge before the Supreme Court. It is in this context the Supreme Court has made observations in paragraphs 35 and 36 observing that the reference of disputes to arbitration under Section 89 of the CPC can be done only when the parties agree for settlement of their disputes through arbitration and that an oral consent of the counsel without written memo of instructions, does not fulfill the requirement under Section 89 of the CPC. Surely, this is not a situation in hand. As noted above in the present case, not only the parties consented through their counsel but also confirmed their agreement to arbitrate the disputes in arbitration, in the exchange of statement of claim and defence as recognized by Section 7(4)(c) of the Act. The respondent now cannot

turn around and contend that there is no arbitration agreement between the parties.

20. In so far as the respondent's alternative contention that the respondent can no more continue the consent as made earlier, for this Court to exercise jurisdiction under Section 15 is wholly misconceived. Once it is recognized that there is an arbitration agreement between the parties and the arbitrator was appointed by this Court, in the same manner and method a substitute arbitrator would be required to be appointed. Hence it can only be the Court which will now exercise jurisdiction under Section 14 and 15 of the Arbitration Act to appoint a substitute arbitrator. The law in this regard is well settled as seen from the decision of the Supreme Court in *Shailesh Dhairyawan Vs. Mohan Balkrishna Lulla*². In this case the respondent had filed a suit in the Bombay High Court against the appellant and some others, seeking a declaration that the development agreement dated 27 December 2004 together with a power of attorney of even date had stood terminated and for certain other reliefs. On 3 October 2008 the parties to the suit entered into consent terms largely settling the disputes between them. However, with regard to two specific differences, the plaintiff and defendant no.1 agreed to refer the said differences to an arbitration of a retired Judge of the Supreme Court. Several meetings were held by the named arbitrator,

the arbitration proceedings continued to drag until by letter dated 22 January 2011, the arbitrator resigned. Respondent/plaintiff therefore filed an application, in the disposed of suit, for appointment of a substitute arbitrator. This application was dismissed by the Court observing that an appointment can only be made under Section 11(5) of the Act. Pursuant to the dismissal of the said application, the plaintiff filed an application under Section 15(2) of the Act for appointment of a substitute arbitrator. The High Court appointed a retired judge of the High Court as a substitute arbitrator. In challenging the decision of the High Court, a contention was raised, that by an agreement between the parties a named arbitrator was appointed as recorded in the consent terms. It was contended that under Section 15(2) of the Act when the mandate of the named arbitrator terminates, there being no rules that would apply to the appointment of an arbitrator being replaced, Section 15(2) would not have any application, and this vital fact was missed by the High Court. The Supreme Court taking a review of the law and considering the decisions in *SBP & Co. Vs. Patel Engineering Ltd.*³, *Yashwith Construction (P) Ltd.* (supra), in *ACC Ltd. Vs. Global Cements Ltd.*⁴, held that the High Court was the appointing authority and the said appointing authority having been approached by the respondent for appointment of a substitute arbitrator, the appointment of a substitute arbitrator so made by the High Court would be required to be held as an appointment

3 2005(8) SCC 618

4 (2012) 7 SCC 71

according to the rules. The relevant observations in that regard are required to be noted which reads thus:-

“21. On the facts of the present case, it is clear that Bombay High Court applied its mind to the consent terms as a whole and appointed Mrs. Justice Sujata Manohar as arbitrator for the disputes that were left to be resolved by the parties. The said appointing authority has been approached by the respondent for appointment of a substitute arbitrator, which was then done by the impugned judgment. **This would therefore be “according to the rules that were applicable to the appointment of the arbitrator being replaced” in accordance with Section 15(2) of the Act.** We, therefore, find that the High Court correctly appointed another independent retired Judge as substitute arbitrator in terms of Section 15(2) of the Arbitration Act, 1996. The appeal is, therefore, dismissed.”

(emphasis supplied)

21. As a sequel to the above discussion, unhesitatingly this application needs to succeed, and a substitute arbitrator would be required to be appointed. Hence, the following order:-

ORDER

- (i) Mr. Jamshed Lentin, Advocate of this Court, is appointed as a prospective substitute Arbitrator.
- (ii) The learned prospective substitute 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 & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties.
- (iii) The Arbitral proceedings shall commence from the stage the proceedings had reached before the erstwhile arbitral tribunal.

(iv) All contentions of the parties on merits of the disputes are expressly kept open.

(v) The fees payable to the learned Arbitrator shall be governed by the provisions of the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.

(vi) At the first instance, the parties shall appear before the substitute arbitrator within 15 days from today on a date which may be mutually fixed by the sole arbitrator;

(vii) The application is disposed of in the above terms. No costs.

(viii) Office to forward a copy of this order to the learned substitute Arbitrator by e-mail and by post at the following address:-

“Address – Examiner Press Building, 2nd Floor, Dalal Street,
Fort, Mumbai – 400 023.

Contact No. 9820090098 / 022-22672780

E-mail:- jamshedlentin@hotmail.com
jamshedlentin@gmail.com”.

[G.S. KULKARNI, J.]