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

ARBITRATION APPLICATION NO.251 OF 2018

The Municipal Co-operative Bank Ltd.	..Applicant
Vs.	
ABM Knowledgeware Limited	..Respondent

Mr.Zubin Moris with Mr.Nirav Shah i/b. M/s.Little & Co. for Applicant.
Mr.Vikrant Zunzzarrao i/b. M/s.Zunzzarrao & Co. for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 26th MARCH, 2019

P.C.:

Heard learned Counsel for the applicant and learned Counsel for the respondent.

2. This is an application filed under Section 15(2) of the Arbitration and Conciliation Act, 1996 (for short, “the ACA”) whereby the applicant has prayed for appointment of a substitute arbitrator as the learned sole arbitrator as appointed earlier by an order dated 4 December 2009 passed by this Court (Swatanter Kumar, the then C.J.) in arbitration application No.69 of 2009 has resigned from the arbitral proceedings on 4 December 2015.

3. The applicant is a co-operative bank established under the Maharashtra Co-operative Societies Act, 1960. The respondent is a

company incorporated under the Companies Act, 1956. Disputes and differences have arisen between the parties under the agreement for software development, implementation and support services dated 19 August 2000. The applicant had invoked the arbitration agreement as entered between the parties as contained in clause No.23 in the said agreement. The relevant extract of which reads thus:-

“23. Resolution of Disputes

MCB and ABM shall make every effort to resolve amicably, by direct informal negotiations, any disagreement or dispute arising between them under or in connection with this contract.

If after 30 (thirty) days of commencement of such informal negotiations, MCB and ABM have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution by formal arbitration.

All differences arising under and out of, or in connection with this contract shall be referred to 2 (two) Arbitrators: one Arbitrator each to be nominated by ABM and MCB. In case of the said Arbitrators not agreeing, then the matter will be referred to an umpire to be appointed by the Arbitrators in writing before proceeding with reference. The award of the Arbitrators, and in the event of their not agreeing, the award of Umpire appointed by them shall be final and binding on the parties. The Arbitration and Reconciliation Act, 1996, shall apply to arbitration proceedings and venue of arbitration shall be Mumbai.”

4. As there was no consensus in appointing an arbitral tribunal on the part of the respondent, the applicant has approached this Court by filing arbitration application No.69 of 2009 which came to be disposed of by consent of the parties by an order dated 4 December 2009 which reads thus:-

“ The learned counsel appearing for the parties submit that their arbitration dispute be referred to the Sole

Arbitration Mr. Kirti Munshi. With the consent of the learned counsel appearing for the parties, Mr.Kirti Munshi is appointed as Sole Arbitrator. Liberty to the parties to appear before the Arbitrator. The Arbitrator shall enter into the reference and proceed in accordance with law.

2. Application is accordingly, disposed of. No order as to costs.”

5. As contended on behalf of the applicant, learned sole arbitrator as appointed by this Court entered reference. The parties appeared before the learned sole arbitrator and at the stage when the learned arbitrator was recording evidence in cross-examination of the applicant's witness, on 4 December 2015 learned arbitrator resigned. In consequence to the resignation of the learned arbitrator, Advocate for the applicant addressed a letter dated 10 February 2016 to the Advocate for the respondent for further steps to be taken. As there was no concurrence on the part of the respondent, the present application has been filed on 11 December 2017 and since then it is pending for adjudication.

6. A perusal of the record indicates that the application was served on the respondent in August 2018. As submitted by the learned Counsel for the respondent, no reply affidavit is placed on record, hence contentions as raised in the memo of application are taken as uncontroverted. Learned Counsel for the respondent would not oppose for appointment of a substitute arbitrator, but his objection is only to the effect that the applicant even in the circumstances in which the present

application has been filed is required to follow the rules as provided by Section 15(2) of the ACA. It is his submission that only when the rules are followed, the Court can proceed to pass appropriate order pending arbitral proceeding. In support of his submission, learned Counsel for the respondent has placed reliance on the decisions of the Supreme Court in **Huawei Technologies Company Ltd. Vs. Sterlite Technologies Ltd.**¹ and **Yashwith Construction P. Ltd. Vs. Simplex Concrete Piles India Ltd. and Ors.**².

7. Learned Counsel for the applicant opposed the submission as made on behalf of the respondent. He would submit that the arbitral tribunal was appointed by an order passed by this Court on 4 December 2009. It is submitted that the learned sole arbitrator has resigned and the only remedy which was available to the applicant was to approach this Court under Section 15 of the ACA. The learned Counsel for the applicant would submit that the provisions of Section 15(2) of the ACA would be required to be followed, as there are no specific rules which would be applicable in the facts of the case and more so considering the arbitration agreement between the parties.

8. I have heard learned Counsel for the parties. I have perused the record and more particularly the earlier order passed by this Court on 4

1 2015(5) ARBLR 247(SC)

2 AIR 2006 SC 2798

December 2009 in arbitration application No.69 of 2009. It is clear and not in dispute that there is an arbitration agreement between the parties. It is also not in dispute that the applicant had approached this Court earlier when an order came to be passed appointing an arbitral tribunal. Further it is not in dispute that the learned arbitrator was appointed by this Court, but in the midst of the proceeding on 4 December 2015, the learned arbitrator resigned from the office of arbitrator. The obvious consequence of the learned sole arbitrator so appointed resigning is that the parties are rendered to the same position as the parties stood when the parties consented before this Court on 4 December 2009, for appointment of an arbitral tribunal, and this Court recording consent of the parties appointed the learned sole arbitrator.

9. In so far as the decisions which are relied on behalf of the respondent to contend that the rules are required to be followed by the applicant in invoking the jurisdiction of this Court under Section 15(2) of the ACA, learned Counsel for the respondent is unable to point out any rules which would be applicable taking into consideration the arbitration agreement between the parties. I have also noted the arbitration agreement. It does not contemplate any specific rules to be followed. Moreover, the Supreme Court in the decision in **Huawei Technologies Company Ltd. Vs. Sterlite Technologies Ltd.** (supra), in

paragraph 4 has observed thus:-

“4. Under Section 15(2) of the Act in a situation where the mandate of an arbitrator terminates, a substitute arbitrator is required to be appointed according to the rules that were applicable to the appointment of the arbitrator who is replaced. In *Yashwith Constructions (P) Ltd. v. Simplex concrete Piles India Ltd. And Anr.* MANU/SC/8227/2006 : (2006) 6 SCC 204, the term 'rules' appearing in Section 15(2) of the Act has been understood to be referring to the provisions for appointment contained in the arbitration agreement or any rules of any institution under which the disputes are to be referred to arbitration. In the present case, admittedly, there are no institutional rules under which the disputes between the parties are to be referred to arbitration and, therefore, the expression “rules” appearing in Section 15(2) of the Act will have to be understood with reference to the provisions for appointment contained in the Supply Contract.”

10. Learned Counsel for the respondent in raising this objection however would not dispute that the Advocate for applicant after resignation of learned sole arbitrator had issued a notice dated 10 February 2016 (page 64 of the paperbook) and thereafter again issued notice dated 11 April 2016 (page 67 of the paperbook) pointing out the resignation of the learned arbitrator and had requested that the arbitrator so appointed by this Court be re-appointed. However, as there was no concurrence in this regard by the respondents to the both letters, which were addressed by the learned Advocate for the applicant. Thus the decision as relied on behalf of the respondent would surely be not applicable. Moreover it needs to be noted that the letter dated 10 February 2016 of the applicant was responded by the letter of Advocate for the respondent dated 12 February 2016 informing the applicant, that

the Advocates are seeking instructions from their client-respondent. However, there is nothing on record on behalf of the respondent that they had any other instructions or that the respondent had called upon the applicant to take any steps or adhere to any rules.

11. Thus considering the facts of the case, it appears that the objection as urged on behalf of the respondent is without any substance, as also has no basis in law. The decisions relied on behalf of the respondent would also not be applicable considering the facts of the present case. It needs to be noted that this application is pending for quite some time, a reply affidavit could have been placed on record to raise such contention and as to why the prayers should not be granted. Admittedly such objection is required to be considered on the basis of some material that some rules would exist so as to make sub-section 15(2) applicable to the facts of the case. Accordingly application is required to be allowed. Hence the following order:-

ORDER

(i) Mr.Rashmin Khandekar, Advocate of this Court, is appointed as a prospective sole Arbitrator to arbitrate the disputes and differences between the parties, subject matter of the present proceeding, in substitution of the arbitral tribunal as appointed earlier.

(ii) The learned sole prospective 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) Learned sole prospective arbitrator shall continue the proceeding from the stage as reached by the presiding learned arbitrator.

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

(v) All contentions of the parties on merits of the matter are expressly kept open;

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

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

address: 11C, Examiner Prem Building, 1st floor, Dalal
Street, Kala Ghoda, Fort, Mumbai – 400 001.

Contact No. 022-22650121.

[G.S. KULKARNI, J.]