

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.1183 OF 2019

Vinay Somani & Anr.)....Petitioners

V/s.

Ramesh Somani & Ors.)....Respondents

Mr.J.P.Sen, senior Advocate a/w Mr.Jatin Pore and Ms.Purvi Joshi
i/by DSK Legal for petitioners.

Mr.Ankit Lohia a/w Mr.Nishit Dhruva, Ms.Khushbu Chhajed i/by MDP
& Partners for respondent no.1.

Mr.Devanshu Desai for respondent nos.2 to 4.

CORAM: K.R.SHRIRAM,J
DATE : 9.10.2020

P.C. :-

1. This is a petition filed for substitution of sole Arbitrator under Section 15(2) read with section 14(b) of the Arbitration & Conciliation Act 1996 (the Act) and to seek extension of the period of the sole Arbitrator under Section 29-A of the Act.

2. The facts in brief read as under :-

(a) Respondent nos.2 to 4 (original respondent nos.1 to 3

in the Arbitration proceedings) and Petitioners herein entered into an agreement dated 6th December, 2012 whereby respondent nos.2 to 4, inter alia, sold/transferred/assigned to petitioners, all their rights, title and interest under the Agreement dated 3rd July 2007 executed, inter alia, between one Adinath Builders Private Limited and Respondent Nos.2 to 4, for a total consideration of Rs.8,00,00,000/- (Rupees Eight Crores only). The Agreement dated 3rd July 2007, inter alia, dealt with the entitlement of respondent nos.2 to 4 in the shares of a demerged entity, to which a building named Shreeniwas House was to be transferred from Shrinivas Cotton Mills Limited. The said Shreeniwas House was demerged into an entity named Shreeniwas Abode and House Limited (“the Company”/SAHL”). In the pending arbitration proceedings respondent no.1 has claimed rights in respect of the shares of respondent nos.2 to 4 in the company relying on an alleged Letter Agreement dated 30th March 2011, purportedly executed between the respondent no.1 and respondent no.2.

(b) In view of rival claims, disputes arose amongst the parties. In this regard, following proceedings, *inter alia*, came to be filed in this Court.

Sr.No.	Suit No./Petition No.	Plaintiff/Petitioner
1.	Arbitration Petition No.1068 of 2013	Ramesh Somani
2.	Suit No.218 of 2016	Vinay Somani
3.	Suit No.383 of 2016	Vinay Somani &

		Shrilekha Somani
4.	Commercial Arbitration Application No.30 of 2017 under section 11 of the Act	Ramesh Somani

(c) In the Commercial Arbitration Application No.30 of 2017 under Section 11(6) of the Act filed by Respondent No.1 against Respondent No.2 and others, an Order dated 19th January 2018 in terms of Minutes of Order dated 19th January, 2018 executed amongst the petitioners and respondents (“Agreed Terms”) came to be passed by this Court (“Order”). By the said Agreed Terms, the disputes between the parties (as specified therein) were agreed to be referred to arbitration before the Arbitral Tribunal consisting of the Sole Arbitrator, Mr.Mustafa S.Doctor, Senior Advocate.

(d) The Sole Arbitrator was intimated of his appointment vide letter dated 7th March 2018 issued by the Prothonotary and Senior Master of this Court (“Appointment Letter”). Subsequent thereto, the arbitration proceedings commenced before the Sole Arbitrator and the parties appeared and participated in the said arbitration proceedings. The statement of claim in the said arbitration proceedings was filed by respondent no.1 on 16th April 2018. The statement of defense and counter claim was filed by petitioners on 12th May 2018, the affidavit

in reply (to the statement of claim of the respondent no.1) was filed by respondent nos.2 to 4 on 8th June 2018. Respondent nos.2 to 4 filed their rejoinder/affidavit in reply (to the counter claim of the petitioners) on 25th June 2018. Respondent no.1 filed his rejoinder/affidavit in reply (to the counter claim of the petitioners) in June, 2018. Affidavits of evidence have also been filed and the arbitration is now at the stage of cross-examination of the witnesses. The dates of the affidavits of evidence can be found in paragraph-4(f) of the petition.

3. On 17.7.2019 the learned Arbitrator expressed his inability to continue with the reference for reasons as mentioned in paragraph-4(f) of the petition. While withdrawing from his office the arbitrator suggested to the parties that in order to ensure continuity of the arbitration proceeding and to avoid any unnecessary delay, parties should agree to the name of the substitute arbitrator who could continue from the stage from where the sole Arbitrator had withdrawn. Respondent no.1 vide letter dated 22.8.2019 addressed to the learned Arbitrator with a copy to petitioners expressed a view that instead of naming a substitute arbitrator the appropriate method for substitution would be to approach this Court for new arbitrator. Since respondent no.1 was the original applicant in the petition under

Section 11 of the Act in which the consent minutes of order was taken on record, the petitioners' Advocate asked respondent no.1's advocate vide their letter dated 28.8.2019 as to whether respondent no.1 would be filing a petition in this Court for appointment of a substitute arbitrator. In the petition it is averred that no reply was received to the said letter. That has not been denied in the affidavit in reply filed by respondent no.1. Petitioners therefore, had no option but to approach this Court by this petition which was filed on 17.9.2019. Respondents have filed affidavits in reply opposing the petition. Since the regular Court to whom this matter was assigned (G.S.Patel,J) recused the matter has been placed before this Court for hearing.

4. I have to also note that at the beginning of the hearing, the Court asked the counsels whether they could agree on the name so that precious judicial time could be saved in view of the extreme circumstances under which Courts are functioning and there are so many urgent applications pending. Shri Lohia and Shri Desai said their instructions are to oppose the application as, between their respective clients, the matter has been resolved.

5. Mr.Sen for petitioners suggested that His Lordship Mr.Justice S.J.Vazifdar (retired), former Judge of this Court and later

Chief Justice of Punjab & Haryana High Court, be appointed as substitute sole arbitrator.

6. Mr.Lohia though has no objection to the name, stated in the affidavit in reply, they have opposed this petition itself and therefore, he cannot agree to the suggestion made by the Court. Mr.Desai for respondent nos.2 to 4 states that he has no objection to Justice Vazifdar (retired) being appointed but they have filed an affidavit opposing this petition and the petition should be dismissed.

7. Mr.Lohia's objections are two fold. He says under section 15(2) it is provided that a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced and therefore, petitioners should have filed an application under section 11(6) read with Section 14, read with section 15 of the Arbitration & Conciliation Act 1996 and cannot approach this Court by way of this petition as petitioner has not referred to section 11 of the Act in the petition. Mr.Lohia relied upon a judgment of this Court in ¹*SAP India Pvt. Ltd., Vs. Cox & Kings Pvt. Ltd.* and the judgment of the Apex Court in ²*Yashwith Construction Pvt. Ltd. Vs.Simplex Concrete Piles India Ltd. & ors.* to submit that the

1 Comm.Arbitration Petition 351 of 2019 decided on 30.4.2019

2 MANU/SC/8227/2006 decided on 3.7.2006.

substitute appointment will be under Section 11(6) read with section 14 & 15 of the Act. In my view it is a technical defect and not fatal to the petition.

8. Mr.Lohia's submission that an application should be filed under Section 11(6), is rather strange because original application under section 11 was filed by Mr.Lohia's client who despite the request by the petitioners, has not approached this Court for appointment of substitute arbitrator.

9. Mr.Sen requests that section 11 be also read into the petition and if required he will amend the petition. Leave to amend granted. Amendment to be carried out within one week from today.

10. The other point which Mr.Lohia raised, which was supported by Mr.Desai, is that respondent no.1 on the one part and respondent nos.2 to 4 on the other part have entered into a settlement and resolved all their disputes. Mr.Lohia stated that settlement is pursuant to an affidavit dated 7.8.2018 in the arbitral proceeding where respondent no.2 on behalf of respondent nos.2 to 4 has admitted that there is a binding agreement dated 30.3.2011 between the respondent nos.2 to 4 and respondent no.1. Mr.Desai stated that the settlement was arrived at after the arbitrator withdrew from the

matter. None of the affidavits filed on behalf of any of the respondents even mentioned the dates on which the settlement was arrived at. Mr.Desai stated it was arrived at in August-2020 but no affidavit has been filed confirming the same.

11. In any event whether the agreement between respondent no.1 and respondent nos.2 to 4 will put an end to the arbitration reference will have to be decided by the learned Arbitrator who will consider the same. This court in a petition of this nature cannot go into the merits of the *inter se* arrangement between the parties.

12. In any event, section 14(1)(b) and sub-sections-(1) & (2) of section 15 of the Arbitration & Conciliation Act 1996 read as under :-

“14. Failure or impossibility to act- (1) *The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if*
(a)..... and
(b) *he withdraws from his office or the parties agree to the termination of his mandate.*

15.Termination of mandate and substitution of arbitrator- (1) *In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-*
(a) *where he withdraws from office for any reason ; or*
(b) *by or pursuant to agreement of the parties.*
(2) *Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced”*

13. The arbitral reference came into effect pursuant to the order dated 19.1.2018 in which consent minutes of order was filed by all the parties to this petition. The learned sole arbitrator has withdrawn from the office for reasons as mentioned in paragraph-4(f) of the petition. Therefore, this Court will have to only look to the minutes of order dated 19.1.2018 to appoint a substitute arbitrator or where the arbitrator is being replaced.

14. As Mr.Lohia and Mr.Desai had no objection to the appointment of Mr.Justice S.J.Vazifdar (Retd.), I hereby appoint Mr.Justice S.J.Vazifdar (Retd.) as the sole arbitrator in place of Mr.M.S.Doctor. The sole arbitrator shall continue from the stage where the proceedings were left. Arbitrator to file declaration under Section 11(8) read with Section 12(1) of the Act, directly with the parties.

15. Having considered the affidavits in reply, all the points raised are on the merits of the arbitral dispute which have to be raised before the learned Arbitrator and Arbitrator will give his findings on the same. This Court is not expressing any opinion or views on the

points or objections raised by respondents.

16. The arbitral proceedings have been stalled due to circumstances beyond the control of petitioners and also due to non-co-operation by respondents by not accepting the correct suggestion put forth by Mr. Mustafa S. Doctor to appoint the substitute by consent and later not filing a petition under section 11 of the Act and reading the affidavit opposing the petition by respondent no.2 to respondent no.4 as well, I am inclined to extend the time of the arbitral Tribunal to complete the arbitral proceedings and publish an award upto 31.12.2021. I am giving such an extended time also because of the pandemic situation and physical hearings may not be possible.

Petition disposed.

17. In the beginning itself, this Court had mentioned to all the counsels that it would be better if they all agree to the name of Justice Vazifdar or any other person as sole arbitrator before whom all points can be raised and that would save substantial judicial time, particularly in the current situation. It was also made clear that if petition is dismissed or petition is allowed, losing party will be saddled with substantial costs. But counsels for respondents on instructions were not agreeable and wanted to oppose.

18. In the circumstances, the respondent no.1 and respondent nos.2 to 4 each shall give donations as under :-

(1) Rs.50,000/- to P.M.Cares (Covid-2019) Relief Fund.

(2) Rs.50,000/- to Maharashtra Chief Minister (Covid-2019) Relief Fund.

Respondents shall find out the details from the website of these funds and make donations within one week.

19. After this order was dictated, Mr.Desai stated that settlement happened after the arbitrator withdrew in August-2019 and not in August-2020 as recorded earlier. I have to note that when I told Mr.Desai then why the date is not mentioned in the affidavit in reply filed by respondent nos.2 to 4, Mr.Desai again stated it was after, but carefully avoided mentioning the date. Again when the Court said if it was after filing the affidavit in reply then they should have filed a further affidavit. Mr.Desai kept quiet. Therefore, this Court recorded Mr.Desai's statement earlier. I must express my displeasure with the conduct of respondent no.2 to respondent no.4.

(K.R.SHRIRAM,J)