

IN THE HIGH COURT OF BOMBAY AT GOA

APPLICATION FOR APPOINTMENT OF ARBITRATOR No. 5 OF 2021

Concept Hospitality Pvt. Ltd.

Thr. Its Managing Director, K. P. Kannampilly

.... Applicant.

V e r s u s

Spazio Leisure Resort, thr. Its prop.,

Ireneu Aleluia Rodrigues And

Rosa Hermengilda Rodrigues

.....Respondent

Mr. Gauravvardhan A.S. Nadkarni and Mr. D. Lawande, Advocates for the Applicant.

Mr. A.D. Bhobe, Advocate for the Respondent.

CORAM : M. S. SONAK, J

DATE : 6th July, 2021

P.C.:

On 29.06.2021, on hearing the learned Counsel for the parties,
the following order came to be made:

'Heard Mr. Gauravvardhan A.S. Nadkarni for the Applicant and Mr. A. D. Bhobe for the Respondent.

2. *This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (said Act), seeking appointment of an arbitrator.*

3. *The record bears out that the Applicant and the Respondent entered into a management agreement dated 18/6/2019. This agreement, in its Article XXVI, contains an arbitration clause, which reads as follows :*

“If any dispute, difference, claim or question shall arise between the parties hereto touching this Agreement or any claim or thing contained in this Agreement or the construction of any article or section of this Agreement or as to any matter in any way connected with or arising out of this Agreement or the operation thereof or the rights, duties and liabilities of either party in connection with this Agreement, then and every such case, shall be referred to the Sole Arbitrator to be appointed in accordance with the Arbitration & Conciliation Act, 1996. The place of sitting for Arbitration shall be the State of Goa”

4. *The record also bears out that on 11/6/2020, the Respondent issued a termination notice purporting to terminate the agreement dated 18/6/2019. The Applicant contested such termination and further, addressed a notice dated 29/8/2020 to the Respondent, purporting to invoke the arbitration clause contained in clause XXVI of the agreement dated 18/6/2019.*

5. *On 7/9/2020, the Respondent raised certain pleas resisting resolution of the disputes by arbitration. However, in the same letter, the Respondent, without prejudice, proposed the name of an arbitrator who could go into the disputes which had obviously arisen between*

the parties.

6. *Thereafter, some correspondence was exchanged with a view to arrive at some settlement of the disputes. However, the record bears out and the learned Counsel for the parties confirm that no amicable settlement was possible.*

7. *Accordingly, the Applicant instituted this application, seeking appointment of an arbitrator.*

8. *Mr. Gauravvardhan Nadkarni, the learned Counsel for the Applicant invited my attention to Section 11(6) of the said Act and submitted that this being an application under Section 11(6-A) of the said Act, this Court is required to confine itself to the examination of the existence of an arbitration agreement. He submitted that in the present case, existence of an arbitration agreement is not even in dispute. He submitted that the issues raised by the Respondents in their replies, resisting resolution by arbitration or in their reply to the present application, are really not the issues which can be gone into at this stage. He submitted that the issues raised lack merit and in any case, these are the issues that will have to be considered by the Arbitral Tribunal. He relies on *Duro Felguera, SA vs. Gangavaram Port Limited*¹; *Mayavati Trading Private Limited vs. Pradyut Deb Burman*², and *Branch Manager, Magma Leasing and Finance Limited and anr. vs. Potluri Madhavalata and anr.*³ in support of his contentions.*

9. *Mr. A.D. Bhobe, the learned Counsel for the Respondent submits that no disputes, as such, have arisen on account of COVID-19 pandemic. He submits that the so called disputes are not arbitrable and, therefore, this*

1 (2017) 9 SCC 729

2 (2019) 8 SCC 714

3 (2009) 10 SCC 103

application may be dismissed.

10. *Having considered the rival contentions in the context of the provisions contained in Section 11 of the said Act, in my judgment, a case is made out for referring the parties to arbitration.*

11. *Clearly, disputes have arisen between the parties and existence of arbitration agreement is not even in dispute. At least, prima facie, the arbitration agreement is quite wide and would encompass the issues which the parties have raised against one another. In any case, as pointed out by Mr. Nadkarni, all such matters can be effectively looked into and resolved by the Arbitral Tribunal once it is constituted. Based on the objections raised in the response to this application, no case is made out to either dismiss this application or not to refer the parties to arbitration.*

12. *In Duro Felguera, SA (supra), this is what the Hon'ble Apex Court has held in the context of the provisions of Section 11(6-A) of the said Act :*

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.”

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one

aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

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59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. V. Patel Engg. Ltd. (2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court’s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

13. In Mayavati Trading Private Limited (supra), the Hon'ble Apex Court has overruled its decision in United Insurance Company Limited vs. Antique Art Exports Private Limited - (2019) 5 SCC 362 and affirmed its ruling in Duro Felguera, SA (supra). These decisions, undoubtedly, support the contentions today advanced by Mr. Nadkarni.

14. For the aforesaid reasons, it is proposed to allow this application and to appoint Hon'ble Mr. Justice A.P. Lavande, Retired Judge of this Court, as an arbitrator.

15. *The matter is now posted on 6th July, 2021 in order to enable Hon'ble Mr. Justice A.P. Lavande to file disclosure statement in terms of Section 12 of the said Act.*

16. *The learned Counsel for the parties state that they will forward an authenticated copy of this order to Hon'ble Mr. Justice A.P. Lavande, at the earliest.*

17. *S.O. to 6th July, 2021.'*

2. Today, the parties have placed on record the Disclosure Statement furnished by Hon'ble Shri Justice A. P. Lavande, retired Judge of this Hon'ble Court. Having perused the same, there can be no difficulty whatsoever in appointing Hon'ble Shri Justice A. P. Lavande, as the Arbitrator in the matter.

3. Accordingly, Hon'ble Shri Justice A. P. Lavande, is appointed as an Arbitrator to adjudicate into the disputes which have arisen between the parties. Needless to add that all contentions of all parties on merits or otherwise are expressly left open.

4. The parties to communicate this order to Hon'ble Shri Justice A. P. Lavande and, further, the parties, to act on authenticated copy of this order.

M. S. SONAK, J.

msr.