

Aura

IN THE HIGH COURT OF BOMBAY AT GOA
Application for Appointment of Arbitrator No.6 2021

Ms. Leopoldina Erodina D'Mello,
Camarcazana, Mapusa, Bardez, Goa

...Applicant

Versus

Mr. Cedric William Francis Pinto,
Duler, Mapusa, Bardez, Goa.

...Respondent

Mr. Rohit Bras De Sa, Advocates *for the Applicant.*

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

CORAM: M. S. SONAK, J

DATED: 5TH AUGUST, 2021

P.C.

1. Heard Mr. De Sa, the learned counsel for the applicant and Mr. A.D. Bhobe, the learned counsel for the respondent.

2. This is an application seeking appointment of an arbitrator.

3. The parties have entered into the agreement for Development cum Sale dated 6/3/2013. Clause 27 of this agreement reads as follows:

27. It is hereby agreed that all the disputes which may arise between the parties to this agreement

whether in relation to the interpretation of the clauses and conditions of the agreement and about the performance of these presence or concerning any act or commission of other party or the dispute, or any of them or in relation to any matter whatsoever concerning this agreement, shall be referred to arbitration in accordance with the provisions of the Indian Arbitration Act 1940.”

4. Thereafter, the parties have also entered into a sale deed as well as Memorandum of Understandings. Now, disputes have arisen between the parties and, therefore, this application seeks appointment of arbitrator.

5. The respondents have resisted the appointment of arbitrator. Mr. Bhobe, the learned counsel for the respondent submits that after the agreement for Development cum sale, culminated into the execution of the sale deed, there is no question of referring to the arbitration clause in the agreement. He further submits that the record would bear out that there is no dispute whatsoever regards compliance with the terms and conditions of the agreement of Development cum sale. He submits that at the highest, what is falsely alleged is some non-compliance with the subsequent agreements, which contain no arbitration clauses. He, therefore, submits that this application for appointment of arbitrator may be dismissed.

6. Mr. De Sa submits that the mother agreement in the present case is the agreement for development cum sale dated 6/3/2013. He submits that according to the applicant there is breach of this agreement and, therefore, the disputes which have been arisen relate to this agreement dated 6/3/2013. He relies on *Chloro Controls India Private Ltd. Vs. Severn Trent water Purification INC and others (2013) 1 SCC 641*.

7. In such matters my jurisdiction is quite limited.

8. In *Duro Felguera, SA Vs. Gangavaram Port Limited, 2017 (9) SCC 729*, the Supreme Court in the context of Section 11 (6A) of the Arbitration and Conciliation Act 1996 has made the following observations:

“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.

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.”

9. In *Mayavti Trading Private Limited Vs. Pradyut Deb Burman, and Branch Manager. Magma Lesing and Finance Limited and anr. vs. Potluri Madhavalata and anr.*, (2019) 8 SCC 714, 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)*.

10. Therefore, what is relevant at this stage is the existence of the arbitration agreement. The issues raised by Mr. Bhobe may very well be considered by the Arbitral Tribunal, once the same is constituted. Merely because, the arbitrator is to be appointed that does not mean that this Court has ruled one way or the other on the rival contentions between the parties.

11. Mr. R. G. Ramani, learned Senior Advocate of this Court is proposed to be appointed as Arbitrator. He has furnished his disclosure statement making it clear that no circumstances which are likely to affect his ability to devote sufficient time to the arbitration and his ability to finish the entire arbitration within twelve months exist as on date. He has also declared that he has no past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, which may give rise to justifiable doubts as to his independence or impartiality.

12. This statement of disclosure is to be kept on record.

13. Having regard to the aforesaid, Mr. R. G. Ramani, the learned Senior Advocate of this Court is appointed as Arbitrator to adjudicate into the disputes that have arisen between the parties.

14. The contentions raised by Mr. Bhobe are kept open and will undoubtedly be considered by the Arbitral Tribunal now appointed.

15. All contentions of all the parties on merits are kept open to be decided by the Arbitral Tribunal.
16. The application for appointment of arbitrator is disposed of in the aforesaid terms. There shall be no order as to costs.
17. All concerned to act on authenticated copy of this order.

M. S. SONAK, J.

MARIA AURA
PEREIRA



Digitally signed by
MARIA AURA PEREIRA
Date: 2021.08.06
17:18:13 +05'30'