

IN THE HIGH COURT OF BOMBAY AT GOA

APPLN. FOR APPOINTMENT OF ARBITRATOR NO.1 OF 2020

THE ASST. GENERAL MANAGER BHARAT
SANCHAR NIGAM LTD.

... Applicant

Versus

SUNITA SUBHASH ANVEKAR

... Respondent

Mr. C. A. Ferreira and Mr. Shane Gomes Pereira, Advocates for the Applicant.

Mr. S. Redkar and Mr. K. Desai, Advocates for the Respondent.

Coram : M. S. SONAK, J

Date : 4th February, 2021

P.C.

Heard Mr. Ferreira who appears alongwith Mr. S. Gomes Pereira for the Applicant and Mr. Redkar who appears along with Mr. K. Desai for the Respondent.

2. This is an application seeking appointment of Arbitrator in view of clause 24 of the agreement dated 27th December, 2006 between the parties which reads as follows :-

“24. PROVIDED ALWAYS and it is hereby expressed agreed that if at any time there shall arise any dispute, doubt, different or question with regard to the interpretation or in respect of the right, duties and liabilities of the parties hereto or in any way touching or rising out of this presents or otherwise in relation to premises then every such dispute, difference, doubt or question (except the

decision whereof is herein expressly provided for) shall be referred to the sole arbitration of CGM/SSA Head/GM, TD etc. of any person appointed by him (i.e designation of Circle Head where agreement is signed). It will be the term of agreement that either of the parties shall have no objection to any such appointment that the arbitrator so appointed is a BSNL employee and that he had to deal with the matters to which the agreement relates in the course of his duties as BSNL's employee. If the arbitrator so appointed is unable or unwilling to act or neglecting his work or is being transferred or resigns his appointment or vacate his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid by the said CGM/SSA Head/GM, TD. The person so appointed shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. The decision of the arbitrator shall be final and binding on the parties to this deal. The provision of the Indian Arbitration Act, 1996 or any statutory modification or re-enactment thereof and rules made there under for the time being in force shall apply to such arbitration and this deed shall be deemed to be submission to arbitration within the meaning of the said Act”.

3. In this case, there is no dispute that the Respondent had already instituted Regular Civil Suit No.79/2017/A in the Court of Senior Civil Judge, “A” Court, Panaji (Trial Court), in relation to disputes which have arisen between the parties.

4. In such suit, the Applicant herein preferred an application under Section 8 of the Arbitration and Conciliation Act, 1996 (the said Act) urging termination of the proceedings in the suit and reference to

the arbitration in view of the aforesaid clause 24 in the agreement dated 27th December, 2006 between the parties.

5. By order dated 6th December, 2018, this application was dismissed by the learned Trial Court.

6. As against such dismissal, the Applicant herein instituted an Appeal Under Arbitration No.6 of 2019 before this Court. The same was also dismissed by the learned Single Judge of this Court vide judgment and order dated 3rd June, 2019.

7. In the judgment and order dated 3rd June, 2019, the learned Single Judge of this Court may not have agreed the reasoning of the learned Trial Court on the interpretation of the provisions of clauses 23 and 24 of the agreement between the parties. However, the learned Single Judge has held that clause 24 of the agreement cannot be regarded as a valid arbitration agreement having regard to the grounds set out in the Vth Schedule to the said Act.

8. The discussion on this aspect is to be found in paragraphs 11 to 13 of the judgment and order dated 3rd June, 2019 which reads as follows :-

“11. There is no doubt that both these clauses have to be read harmoniously in order to ascertain the real intention of the parties. It is not possible to accept that the claim of

arrears of rent would not pertain to the dispute as is envisaged in Clause 24 of the agreement. This is because Clause 24 specifically provides for disputes as regards the interpretation or in respect of the rights, duties and liabilities of the parties, touching or arising out of the said agreement or otherwise in the relation to the premises. The right of the respondent to receive and the liability of the petitioner to pay the rent, clearly arises out of the agreement and thus it is not possible to accept that the dispute does not pertain to Clause 24. That apart, a harmonious reading of Clauses 23 and 24 would show that principally the parties had agreed for referral of the dispute as is contemplated under clause 23 to arbitration and all that Clause 23 provides and designates is that the Court at Panaji which would have jurisdiction over the arbitral process in accordance with the provisions of the Act. This is clear from the stipulation in Clause 23 that Indian law would be applicable. If at all the parties agreed as per Clause 23, by way of an option or a choice to resort to the plenary remedy of approaching the Civil Court under section 9 of C.P.C., it was not necessary for the parties to have stipulated that the Indian law shall be applicable, inasmuch as, if the parties are to adopt the ordinary civil remedy before the Civil Court of plenary jurisdiction, it is only the Indian law which is bound to apply. In my considered view the only harmonious way in which both the clauses can be reconciled is that Clause 24 is the clause by which the parties have agreed to refer the disputes to arbitration which are covered by Clause 24. Clause 23 provides for the jurisdiction of the Court at Panaji, which would have supervisory jurisdiction over arbitration process in accordance with the provisions of the Act. Thus the reasoning articulated by the learned trial court, while dismissing the application cannot be sustained. However, at the same time, I find that the ultimate dismissal of the application under section 8 of the Act will have to be sustained at this stage for the reason that prima facie the

later part of Clause 24 cannot be said to be a 'valid arbitration agreement'. This is for the reason that Clause 24 of the agreement in terms provides that the dispute shall be referred to the sole arbitration of the GCM /SSA Head/GM/TD etc. or any person appointed by him. The said clause also specifically stipulates that either parties shall have no objection to any such appointment on the ground that the arbitrator so appointed is a BSNL employee. Such a clause clearly flies in the face of the grounds, as set out in the 5th schedule to the Act, which gives rise to justifiable doubts as to the independence or impartiality of the arbitrator. Although after 2015 amendment to the Act, the role of the judicial authority is limited in terms of the provisions of section 8, the civil court is required to see whether prima facie there is “a valid arbitration agreement”, between the parties. Once the civil court prima facie finds that there is “a valid arbitration agreement”, between the parties covering the dispute, the civil court has no option than to refer the dispute to the arbitration.

12. The decision in the case of Sundaram Finance Ltd. and anr. Finance (supra), in my considered view turned on its own facts.

13. In my considered view, in the present case, prima facie, the later part of the arbitration agreement as contained in Clause 24 of the Lease Deed (stipulating reference of the dispute to the sole arbitration of GCM/SSA Head/GM, TD etc.) cannot be said to be valid in view of the grounds as set out in Fifth Schedule to the Act and for this reason alone, the application under section 8 could not be allowed at this stage. It is, however, made clear that this shall be subject to any order that may be passed in a petition under section 11 of the Act and if an arbitrator is appointed, under section 11 of the Act, the petitioner would be entitled to renew the request under section 8 of the Act. For the present, no case

for interference is made out in the impugned order.”

9. Now that the coordinate Bench has already held that there is no valid arbitration agreement between the parties, there is no question of referring the parties to arbitration.

10. Mr. Ferreira, no doubt, contended that the coordinate Bench had granted liberty to the Applicant to file an application under Section 11 of the said Act. The observations in paragraph 13 only indicate that the judgment and order dated 3rd June, 2019 was made subject to any order that may be passed in a petition under Section 11 of the said Act. However, now that the coordinate Bench has already taken a view that there is no valid agreement between the parties, it is not possible to entertain the present application under Section 11 of the said Act.

11. On the aforesaid ground alone this application is dismissed. There shall be no order as to costs.

12. The learned counsel for the parties state that without prejudice to their rights, the parties will explore the possibility of resolving the main dispute by conciliation/mediation.

13. The parties may do so and in case any assistance is required from the Trial Court in the matter of appointment of

conciliator/mediator, I am sure that the Trial Court would render assistance.

M. S. SONAK, J.

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