

Ashwini

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION APPLICATION NO. 74 OF 2020**

Vipul Suresh Mehta

...Applicant

Versus

Jiten Shah & Anr

...Respondents

**Mr Sidharth Samantaray, with Ms Khyati Kanani, i/b Kanani & Co,
for the Applicant.**

CORAM: G.S. PATEL, J

DATED: 22nd January 2021

PC:-

1. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996. There is a Joint Venture Agreement dated 18th December 2012. Clause 13 of this Agreement (page 36 contains a provision for arbitration). There is a named Arbitrator. In default, there is a provision for reference to a three-Member tribunal.

2. An order on this application has been much delayed for reasons entirely beyond Mr Samantaray's or the Applicant's control. The reason is simply this: the Respondents have, ever since this Petition was filed and attempted to be moved some time in October 2019, evaded service. In this endeavour, all the way from late October/mid-

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November 2019 and through all of 2020, they have been entirely successful, that is to say they have evaded every attempt at service. My orders of 19th November 2019 and then 23rd November 2020 as also 17th December 2020 and on 14th January 2021 make this more than abundantly clear.

3. The conduct of these Respondents runs to precisely this pattern. They have a history of conducting themselves like this. In paragraph 5 of my order dated 23rd November 2020, I made note of an order passed by the Hon'ble Mr Justice SJ Kathawalla as long ago as on 11th December 2015, where the Court noted precisely the same attempts being made by these two Respondents. In fact, at that time, there was a question of a lookout notice. I followed that order myself. On 17th December 2020, I noted that the lookout notice was still very much operative but the 1st and 2nd Respondents had not being intercepted anywhere. Even attempts of service through Court have failed.

4. No party to a contract can defeat a contractual obligation simply by evading service of the statutorily permissible application to a Court. In another manner of speaking: enough is enough. The Respondents have been shown every indulgence. Mr Samantaray and his clients may perhaps need to be complimented for their patience, but mine is wearing thin. I refuse to allow the authority and order of this Court to be undermined by this utterly disgraceful conduct. Every facility has been made available to the Respondents to attend court and defend themselves. Throughout the pandemic, they had the opportunity to join the hearing by video conferencing. This

facility is available even now, even as I dictate this order in open Court. From earlier this month, the Respondents have the opportunity of coming to physical Court itself. I do not see what more any Court or any Applicant can possibly do.

5. As matters stand, therefore, the Application is entirely uncontested. I will not, however, make an order of reference to the arbitration of Mr Kishor Patel, the named arbitrator. This is likely to cause more problems than it will solve going ahead. Equally, it is not possible to unilaterally rewrite the terms of the contract to provide for a sole arbitrator. The default provision in Clause 13 for a reference to a three-Member tribunal will have to be followed. I will make the necessary provisions in that regard.

6. The application is thus allowed, accepting the nomination of Mr Firoz Bharucha as learned Advocate of this Court as the Applicant's nominee Arbitrator. The Respondents will have until 8th February 2021 to nominate their Arbitrator. Should they fail to do so, Mr Naushad Engineer, learned Advocate of this Court, will stand appointed as the Respondents' nominee. The two arbitrators i.e. Mr Bharucha and the Arbitrator nominated by or on behalf of Respondent will then appoint a nominator presiding arbitrator. They will do so by 26th February 2021 and the arbitration will proceed thereafter.

7. The application is disposed of in these terms.

8. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)