

Ashwini

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION APPLICATION NO.20 OF 2020**

National Collateral Management Services Ltd	...Applicant
<i>Versus</i>	
Debashis Datta	...Respondent

**Mr Sandesh Shukla, with Mr Karan Dhawan, i/b K Ashar & Co, for
the Applicant.**

**CORAM: G.S. PATEL, J
DATED: 28th January 2021**

PC:-

Atul G.
Kulkarni

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by Atul G.
Kulkarni
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1. The matter was last before me on 5th January 2021 in a VC hearing. The Respondents were absent by then. They had already been served twice.
2. Anticipating that there would be a change in the roster as also in the hearing protocols, I adjourn the matter to today.
3. The matter is a Section 11 application. It has been pending for a long time since February 2020.

4. The entire purpose of arbitration is defeated by delays of this kind. I see no reason why a party to a contract that has an arbitration agreement should be allowed to defeat a contractual disputes resolution mechanism simply by not responding to notices and not coming to Court. Indeed, given the state of the law, for a Petitioner invoking arbitration, this now presents something of a peculiar difficulty. An Applicant can no longer make a unilateral appointment if the other side is simply unresponsive. There are only three modes now available for the appointment of an Arbitrator. An Arbitrator can be appointed by consent, or by an order of the Court in a Section 8 proceeding, or by an order of a Court in a Section 11 Application. There is no other possibility. What seems to be happening in a large number of cases is that simply by not agreeing or consenting to the appointment of an Arbitrator and then simply not coming to the Court all three modes of appointing an Arbitrator and therefore of commencing an arbitration are sought to be defeated. No Court, and certainly no Commercial Court, should even countenance this. Of course we must make reasonable allowance, as we indeed do, for parties who are out of town. We give them more time. We require repeated attempts at service. But once all this has been done, and the party yet remains away, a Court must not find itself helpless, nor throw up his hands and refuse the reference to an arbitration. The law is now clear. An arbitration agreement is not to be denied except on limited grounds. These available grounds have indeed shrunk to almost nothing at this stage at least so far as Section 11 Applications are concerned. Party autonomy will be respected, but parties must be held to the bargain they struck; including in particular the arbitration or dispute resolution contractual provision.

5. In this particular matter perhaps, the situation is even worse. There is a Commodity Sale Agreement between the Applicant and the 1st Respondent as the proprietor of Bharti traders. The 2nd Respondent is not only the manager but was co-mortgagor of the security that was offered as set out in the agreement. It was in May 2014 that Bharti traders through Debashis Datta approached the Applicant for purchasing agricultural commodities including paddy. The Applicant was to purchase paddy by investing 75% of price. The 1st Respondent was to pay the remaining 25%. The Applicant was to get an interest on 13.5% on deferred payment. Ultimately, these terms were incorporated in the Commodity Sale Agreement of 23rd May 2014. A copy is at Exhibit 'A'. Clause 5 at page 24 contains the provision for arbitration. It provides for a reference to a sole Arbitrator. Of course, it says that it is the Applicant who will solely appoint the Arbitrator but that portion of the clause cannot operate. One of the available modes of appointment must be followed. The arbitration is to be in Mumbai.

6. In fact, in correspondence prior to the arbitration the Applicant nominated Mr MPS Rao, learned Senior Advocate of this Court but the Respondents failed to confirm that appointment. Thus, the first mode of appointment-by-consent was defeated. No question arises of an order under Section 8. What remains is this order under Section 11.

7. I will appoint Mr Gautam Ankhad, learned Advocate of this Court, as the sole Arbitrator to decide the disputes and differences

between the parties arising from the Commodity Sale Agreement dated 23rd May 2014.

TERMS OF APPOINTMENT

(a) **Appointment of Arbitrator:** Mr Gautam Ankhad, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Commodity Sale Agreement dated 23rd May 2014.

(b) **Communication to Arbitrator of this order:**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.

(ii) The Advocates for the Applicant will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s **Mr Gautam Ankhad,**
Advocate

Address Oricon House, 7th Floor,
14-K Dubash Marg, Fort,
Mumbai 400 023.

Mobile 99676 61342

Email gautam.ankhad@gmail.com

(c) **Disclosure:** The learned Sole Arbitrator is requested to forward, in hard copy or soft copy (or both), the necessary statement of disclosure under Section 11(8)

read with Section 12(1) of the Arbitration Act to Advocates for the parties as soon as possible. The Advocates for the Applicant will arrange to file the original statement in the Registry. If the statement is forwarded in soft copy, a print out of the covering email is also to be filed in the registry.

- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. The information is to include functional email addresses and mobile numbers.
- (f) **Section 16 application:** The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.
- (g) **Interim Application/s:**
 - (i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be

decided in such manner and within such time as the learned Sole Arbitrator deems fit.

- (ii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.
- (h) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the Arbitrator will be borne by the two sides in equal shares in the first instance.
- (j) **Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (k) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.
- (l) **Procedure:** These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration. The learned sole Arbitrator will of course take all necessary steps regarding issuing of notice to the Respondents.

8. The application is disposed of in these terms. Liberty to the Applicant to recover the costs of this application (and interest on those costs, if permissible in law), in arbitration.

9. 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)