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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ARBITRATION APPLICATION NO.6 OF 2021

M. T. PHAD, THR. ITS PROPRIETOR M. T. PHAD
VERSUS
PURNA GLOBAL TEXTILES PARK LTD., THR. ITS
CHAIRMAN

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Mr A. K. Gawali, Advocate for applicant
Mr S. R. Vakil, Advocate for respondent

CORAM : SMT. BHARATI DANGRE, J.

DATE : 28th January, 2022

PER COURT:

1. By the present application, appointment of the sole Arbitrator is sought by invoking powers under Sections 11(5) 11(6) of the Arbitration and Conciliation Act in respect of the discord between the applicant and the respondent, who was awarded the contract and the dispute pertains to the final bill amount and the security deposit.

2. The agreement between the parties consisted of an arbitration clause to the following effect :-

“25.1 The Arbitration shall be conducted in accordance with the arbitration procedure stated below.

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The procedure for arbitration will be as follows :

(a) In case of Dispute or difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Indian Council of Arbitration / President of the Institution of Engineers (India). The international Centre for Alternative Dispute Resolution (India).

(b) If one of the parties fails to appoint its arbitrator in pursuance of Sub – Clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Indian Council of Arbitration/President of the Institution of Engineer (India). The International Centre for Alternative Dispute Resolution (India), both in cases

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of the Foreign Contractor as well as Indian Contractor, shall appoint the arbitrator. A certified copy of the order of the Indian Council of Arbitration / President of the Institution of Engineers (India). The International Centre for Alternatives Disputes Resolution (India), making such an appointment shall be furnished to each of the parties.

(c) Arbitration proceedings shall be at either Aurangabad or Mumbai and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(d) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses or Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(e) Where the value of the contract is Rs.50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties; failing such agreement, by the appointing authority, namely the Indian Council of

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Arbitration/President of the Institution of Engineers (India)/The International Centre for Alternative Disputes Resolution (India).”

3. On the applicant instituting Special Civil Suit No.1/2018 before the learned Civil Judge Senior Division, Basmath, the respondent filed an application under Section 8 of the Arbitration and Conciliation Act, by making reference to the arbitration clause in the agreement. Accordingly, the application was granted.

4. The applicant invoked the arbitration clause and by issuing Advocate's notice dated 20/01/2020, called upon the respondent to choose among the three names suggested by him, to act as the Sole Arbitrator. However, since the respondent did not respond to the said notice, again a fresh notice was issued on 21/02/2021, calling upon the respondent to choose among the three names suggested by the applicant, to act as the Sole Arbitrator. In absence of any response to the said Advocate's notice, the present proceedings were filed.

5. On 16/07/2021, recording the objection of the respondent, to the effect that, without approaching the appointing authority,

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the present application has been directly filed. The submission of the learned Counsel for the applicant to the effect that on 14/06/2021, fresh communications have been issued to appointing authority, requesting them to appoint the Arbitrator, was placed on record and awaiting their response, the matter came to be adjourned. The applicant has also filed on record an additional affidavit sworn on 30/06/2021, where he make the following statement :-

*“04. The applicant submit that, the applicant by advocate’s notice had called upon the President Indian Council of Arbitration, the President Institute of Engineers (India), and the President of International Center for alternate Dispute Resolution (India), giving reference to the Arbitration Application No.6/2021, and the Arbitration clause calling upon them to appoint the sole arbitrator within 15 days by virtue of advocate’s notice dated 11/06/2021. Annexed hereto and marked as **EXHIBIT “X-1”** is the copy of advocate’s notice alongwith the acknowledgment receipt.*

05 The applicant submit that, till this date there has been no response from either of the three appointing authorities appointing sole arbitrator and therefore, it is necessary for this Hon’ble High Court to exercise powers U/Sec. 11(6) of the Arbitration Act, 1996 as

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amended in 2019 and appoint Sole Arbitrator as prayed in the Arbitration Application.”

From perusal of the affidavit, it is apparent that the applicant has complied with the procedure contemplated in the arbitration clause, but the Arbitrator could not be appointed as per the procedure contemplated and therefore, it is now open for this Court to exercise the powers under Section 11(6) of the Arbitration and Conciliation Act.

6. The learned Counsel for the applicant and the learned Counsel for the respondent express their consensus to the appointment of Justice R. M. Borde, Former Judge of the Bombay High Court, to act as an Arbitrator.

7. In the wake of consensus being expressed, the Hon'ble Justice R. M. Borde is appointed as an Arbitrator for resolving the dispute in terms of arbitration clause. This order shall be brought to the notice of the learned Judge by the Registrar of this Court, and thereupon, the learned Arbitrator shall follow the due procedure before he commences the arbitration proceedings within a period of two weeks.

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In the wake of the aforesaid direction, the arbitration application is disposed of.

The fees of the learned Arbitrator shall be due and payable as per the Rules.

(SMT. BHARATI DANGRE, J.)

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