

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA.

APPLICATION FOR APPOINTMENT OF ARBITRATOR NO.

11 OF 2018

MOHANDAS N. VIRGINKAR(DEC)

REP. BY HIS LRS.,

...Applicants.

VS

P. G. VIRGINCAR AND CO., THR. ITS

PARTNER AND 4 ORS.

...Respondents.

Mr. J. P. Mulgaonkar, Senior Advocate with Ms. Asmita Tirodkar,
Advocate for the applicants.

Mr. I. Agha and Mr. K. Morajkar, Advocates for the respondent no.
2(A)(B), 3 and 4.

CORAM: SANDEEP K. SHINDE, J.

DATE : 11 AUGUST 2022

ORDER.:

1. This is an application under Section 11(6) read with Section 15(2) of the Arbitration and Conciliation Act, 1996(for short "the said Act") for the appointment of a sole arbitrator in substitution of the first arbitrator late Shri Justice G. D. Kamat.

2. The application filed by the applicants under Section 11(6) of

the said Act was allowed by order dated 12.12.2002, whereby Shri Justice G. D. Kamat, retired Chief Justice of Gujarat High Court was appointed as a sole arbitrator to decide the dispute amongst the parties. The learned sole arbitrator passed a preliminary award dated 31.5.2008, declaring that the partnership between the claimant and the respondent stood dissolved as from 30.4.2002. The respondent nos.1 to 4, filed an application under Section 34 of the said Act for setting aside arbitral award dated 31.5.2008 in the District Court, South Goa, at Margao. That by judgment and order dated 10.10.2017, the learned Principal District Judge, South Goa rejected the objection in the said arbitral award dated 31.5.2018.

3. Arbitration proceedings were to be continued from the stage of passing of said interim preliminary award 31.5.2008, however, due to the unfortunate demise of the learned sole arbitrator during the intervening period, the mandate of the learned arbitrator was terminated and is required to be substituted by appointment of another arbitrator.

4. Thus, this application is moved by the applicants.

5. The appointment of a substitute arbitrator is governed by

Section 15 of the Act which essentially provides that when the mandate of the arbitrator terminates, then a substitute arbitrator shall be appointed according to rules, that were applicable for the appointment of the arbitrator being replaced.

6. The Apex Court in the case of *Yashwith Construction (P) Ltd. Vs Simplex Concrete Piles India Ltd and another, (2006)6 SCC 204*, interpreted this phrase of Section 15 (2) of the Act. In this case, dispute arose between Yashwith Construction and Simplex Concrete Piles India Ltd. The managing director of Simplex Concrete Piles India Ltd was appointed the arbitrator. He ultimately resigned and appointed a substitute arbitrator as his replacement. This replacement was challenged by moving an application for appointing arbitrator. The High Court dismissed the application stating that, there was no occasion for the High Court to invoke its powers under Section 11(6) of the Act. This decision was challenged by Yashwith Construction before the Supreme Court. It was held, “the Section 15(2) contemplates, appointment of the substituted arbitrator or replacement of the arbitrator, by another, according to the rules that were applicable to the appointment of the original arbitrator and term "rules" in

Section 15(2) obviously refers to provisions, for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration.” As such, held that Section 11(6) of the Act has application only, when a party or the person concerned had failed to act in terms of the arbitration agreement.

7. Mr. Mulgaonkar, learned Senior Counsel appearing for the applicant relied on the judgment in the case of *Ignatius Tony Pereira Vs Pifran Sanjivan Fernandes, 2016 SCC online Bom.5470*, wherein it was held that once an application under Section 11 of the said Act is made, right of other party to appoint an arbitrator in accordance with the agreement gets extinguished. The right under the agreement, of a party, to appoint an arbitrator, stands extinguished, once an application under Section 11(6) is made and it does not revive if the arbitrator appointed by the Chief Justice resigns and/or his mandate is terminated. The learned Single Judge, thus, held if the arbitrator was appointed by Chief Justice and/or his designate in accordance with Section 11 of the Act, 1996 read with the applicable rules, the arbitrator would have also to be appointed by the Chief Justice or by

his designate in the same manner.

8. In view of the law laid down in the above decisions, here, in the case at hand, since the parties to this application have agreed, to appoint Shri P. V. Sawaikar, Retired District Judge, Goa as a sole arbitrator to adjudicate the dispute between the parties, jurisdiction under Section 11(6) of the Act is not attracted.

9. In view of the above, I pass the following:

ORDER

- i Shir P. V. Sawaikar, retired District Judge, is appointed as a sole arbitrator to adjudicate the dispute between the parties, who shall continue arbitration proceedings from the stage of interim preliminary award dated 31.5.2008 to arbitrate and decide the dispute between the applicants and the respondents.

10. Application is allowed and disposed of in aforesaid terms.

SANDEEP K. SHINDE,J.