

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO.22 OF 2022

M/S Linear Enterprises
Through its Authorized Signatory
Mr. Veerendar Mangalge ...Applicant

Versus

M/s. Maha Active Engineers Pvt. Ltd
Through its Director, Mr. Sunil Vidholkar ...Respondent

Mr. A.A. Yadkikar, Advocate for the applicant.
Mr. Rahul Totala, Advocate for respondent.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 21st APRIL, 2023

ORDER :

1. This application is filed under section 11 of the Arbitration and Conciliation Act, 1996 (for short 'Act of 1996') seeking following relief:

"B. This Hon'ble Court may further be pleased to direct the Arbitral Tribunal to continue the Arbitral Proceedings from the stage at which it was as on 17/07/2022 and conclude the same and pass an Award in a time bound manner preferably within One month from the date of Appointment of the Presiding Arbitrator and in any case within the time limit prescribed under the Arbitration and Conciliation Act, 1996."

2. Facts which are not in dispute are that, on 26.06.2021, in view of arbitration agreement claimed by the applicant/claimant, the dispute was referred to the Arbitral Tribunal comprising of one Presiding Arbitrator and two other arbitrators nominated by both the parties. The pleadings of the parties are complete and application under section 16 of the Act of 1996 filed by respondent is directed to be decided at the time of hearing of arbitration proceeding by order passed by this Court in Writ Petition No. 3021 of 2022, wherein certain interim orders passed by the Arbitral Tribunal were challenged and direction was sought to decide interim application dated 29.11.2021 filed by the respondent herein. In the said writ petition, this Court (Coram: Prithviraj K. Chavan, J.) has passed following order:

"22. In the case at hand, it appears that the stage of admission or denial of the document is yet to reach. The points of determination have not yet been submitted by the parties after completion of their pleadings. It also appears from the record that it has already been decided not to lead any oral evidence except the documents on record and lastly no prejudice would be caused if the issue involved is decided at later stage.

23. The learned Tribunal has, therefore, rightly observed that only two or three stages are remained to be approached and, therefore, the ratio

laid down in this case also would not be any assistance to the petitioner.

24. As such, I do not find any reason to interfere with the impugned orders passed by the Arbitral Tribunal by invoking supervisory jurisdiction of this Court. Consequently, the petition being devoid of merits, stands dismissed."

3. Thereafter, the arbitration proceeding commenced further. However, Presiding Arbitrator since is elevated to the bench, retired from the arbitration proceeding on 17.07.2022.

4. Pursuant to the retirement of Presiding Arbitrator, advocate for the applicant forwarded an e-mail to nominated arbitrators requesting them to appoint substitute Presiding Arbitrator in view of section 11(c) read with Section 52 of Act of 1996. Since, no such appointment is made, the applicant has filed the present application.

5. By filing affidavit in reply and by relying on decision of Single Judge of this Court in *Sushma Arya and Ors. Vs. Palmview Overseas Ltd. and Ors.*, (Comm. Arbitration Petition (L) No. 25249 of 2022) and decision of Apex Court in *Velugubanti*

Hari Babu Vs. Parvathini Narasimha Rao and Another, (2016) 14

SCC 126, learned advocate for the respondent has vehemently opposed the prayer of the applicant contending that there is no arbitration agreement in the present case. According to him, arbitration clause in the agreement, which is relied upon by the applicant is forged agreement and therefore, this Court may not exercise jurisdiction under section 11 of the Act of 1996 to appoint Presiding Arbitrator in the present case.

6. Admittedly, Arbitral Tribunal was appointed in the present case and pleadings of the parties are complete before it. Statement of claim is filed by the applicant, which is replied by the respondent. The respondent has questioned the jurisdiction and arbitrality of the dispute by filing application under section 16 of the Act of 1996, before the Tribunal, which is to be decided by the Tribunal at the time of hearing of the arbitration proceeding, pursuant to the directions of this Court.

7. In these peculiar facts, when the Presiding Arbitrator is retired because of his elevation to the bench, I am of the view that, respondent, at this stage, is not entitled to raise issue of non arbitrability and jurisdiction, since these issues are pending for consideration of Arbitral Tribunal.

8. There cannot be any dispute about the legal proposition set out in the citations relied upon by the learned advocate for the respondent. However, in the facts of the present case, the Arbitral Tribunal has proceeded in the matter and parties have filed their pleadings and the issue of maintainability of arbitration proceeding and jurisdiction are pending before the Arbitral Tribunal, the citations are of no help to the respondent.

9. In the result, application is allowed.

10. Shri. S.P. Deshmukh (Retired High Court Judge) is appointed as Presiding Arbitrator in the present matter.

11. Parties to approach him for obtaining his consent to act as Presiding Arbitrator.

12. All the respective contentions of the parties on merits of the matter are kept open.

[NITIN B. SURYAWANSHI, J.]