

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.64 OF 2020

Abhi Diagnostic Imagings Private Limited	...	Petitioner
Vs.		
Kalyan Dombivali Municipal Corporation	...	Respondent

Mr. Anil D'souza a/w. Mr. Valentine Mascarenhas and Mr. Ernest Tuscano for
Petitioner.

Mr. A. S. Rao i/b. Mr. R. Dighe i/b. Mr. A. S. Rao for Respondent.

CORAM : MANISH PITALE, J.

DATE : APRIL 05, 2023

P.C. :

. Heard learned counsel for the parties.

2. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator in the context of clause 33 contained in lease agreement dated 06.08.2008. The tenure of the lease agreement is 29 years, indicating that its time period extends upto 05.08.2037.

3. The facts in the present case are peculiar and they have presented a situation before this Court requiring a slightly lengthy hearing in the matter. Ordinarily, in the face of the arbitration clause and failure of the procedure in appointment of arbitrator, this Court could have exercised power under Section 11 of the said Act to pass a short order to appoint an arbitrator for resolution of disputes.

4. But, in the present case, a perusal of the arbitration clause itself would show that in the light of the amendments brought about in the aforesaid Act in the year 2015, the clause is hit by Section 12(5) read with Schedule VII of the said Act. A perusal of the said clause would

indicate, why the same is hit by Section 12(5) read with Schedule VII of the said Act. The said clause reads as follows:-

“33. Both the parties to this agreement do hereby agree that if any dispute in respect of the terms and conditions of this agreement or interpretation of any clause of this agreement arises, the same shall be referred to the arbitration i.e.; the Commissioner as a Chief Arbitrator and one representative from the lessee as second arbitrator and their decision shall be final and binding on both the parties.”

5. There can be no dispute about the fact that the post-amendment of the said Act, the Commissioner of the respondent Corporation would not be able to act as a chief arbitrator, and therefore, a neutral arbitrator would have to be appointed.

6. Be that as it may, in the first round of litigation before this Court, the petitioner approached this Court for appointment of an arbitrator by filing Arbitration Petition No.4 of 2013. The same was disposed of on 19.03.2014 by appointment of a senior counsel practising in this Court as the sole arbitrator. Thereafter, it appears that the office of this Court took some time and eventually, by a communication dated 22.12.2014, intimated the learned arbitrator about his appointment. There is nothing on record to show that the learned arbitrator intimated either the parties or this Court about his willingness or otherwise to enter upon reference. The record available pertaining to Arbitration Petition No.4 of 2013 does show a note put up by the office of this Court on 02.06.2014, stating that when the Advocate, then representing the petitioner, was contacted for complete address and contact number of the learned arbitrator, the advocate informed that it was proposed that another arbitrator would be appointed and that a proper letter in that regard would be submitted to the Registry of this Court. The record does not show any such letter forwarded by the advocate then representing the petitioner.

7. Thereafter the Farad Continuation Sheet pertaining to Arbitration Petition No.4 of 2013 records that the said petition was listed on 03.11.2014, when there was no representation on behalf of the parties and the Court simply recorded the address and contact numbers of the learned arbitrator for further action in the matter. It appears that pursuant thereto, the said communication dated 22.12.2014, was addressed by the office of this Court to the learned arbitrator, informing him about his appointment.

8. There is nothing on record to indicate any further development in the matter till the petitioner, on 12.02.2019, sent a letter to the learned arbitrator enclosing a copy of the order passed by this Court. On 15.02.2019, the learned arbitrator acknowledged the receipt of the said letter and informed the advocate for the petitioner that he was unable to accept the appointment for personal reasons.

9. Thereupon, the petitioner addressed a communication dated 26.03.2019, to the respondent Corporation, stating that since the learned arbitrator appointed by this Court, by his letter dated 15.02.2019, had declined to accept the appointment due to personal reasons, a sole arbitrator would have to be appointed for resolution of disputes between the parties. It is relevant to mention here that the disputes had arisen between the parties in the context of the said lease agreement dated 06.08.2008.

10. There was no response to this communication from the respondent Corporation and eventually, the present petition was filed before this Court for appointment of arbitrator, in order to resolve disputes between the parties.

11. On 24.08.2022, this Court noted the issues that could arise in the facts and circumstances of the present case, including an issue as to

whether the petitioner could be said to have abandoned his rights for resolution of the disputes through arbitration. It was also recorded that this Court may have to consider the judgement dated **22.11.2018** in the case of *Deep Deepdharshan Builders Pvt. Ltd. Vs. Saroj Satish Sunderrao Trasikar and others* (**Commercial Arbitration Application No.107 of 2018**) regarding maintainability of the present petition, which could be termed as the second petition filed under Section 11 of the said Act for appointment of the arbitrator.

12. Subsequently, when this petition was listed and the learned counsel for the parties were heard, this Court thought it appropriate to call for the record of Arbitration Petition No.4 of 2013. Upon perusal of the record of the said petition, this Court heard the learned counsel for the parties for some time and the petition was then adjourned for further hearing.

13. Today, when the petition is called out for hearing, Mr. Anil D'souza, learned counsel appearing for the petitioner submits that in the present case, the learned arbitrator appointed by this Court did not enter upon reference and it was only by the letter dated 15.02.2019, that the learned arbitrator intimated the advocate for the petitioner about his inability to proceed in the matter. It was submitted that no proceedings at all were undertaken by the learned arbitrator and in this backdrop, since the disputes between the parties were still alive, there was no alternative for the petitioner but to issue the communication dated 26.03.2019, calling upon the respondent Corporation for appointment of arbitrator in the light of the arbitration clause in the lease agreement.

14. It was submitted that as there was no response from the Corporation, the petitioner had no option but to approach this Court by filing the present petition.

15. The learned counsel for the petitioner refers to Sections 11, 14, 15, 32 and other provisions of the Act to indicate that in the peculiar facts of the present case, there was no other option for the petitioner, but to file the present petition in order to pray for appointment of an arbitrator for resolution of disputes between the parties.

16. Reliance was placed on Section 11(6) of the said Act to contend that since the agreed procedure between the parties for appointment of arbitrator had failed, the present petition was clearly maintainable. It was submitted that clause 33 of the lease agreement, as it stood, was hit by Section 12(5) of the said Act read with Schedule VII thereto and that therefore, this Court ought to exercise power in the interest of justice for appointment of a neutral arbitrator for resolution of disputes. It was further submitted that there was no question of abandonment of arbitration proceedings, because under the scheme of the said Act, there is no other option available to the petitioner but to approach this Court by invoking Section 11(6) of the said Act. It was further submitted that the present petition could not be said to be a second petition under Section 11 of the Act for the same relief, for the reason that the earlier petition was disposed of by the order dated 19.03.2014 and refusal on the part of the learned arbitrator to enter upon reference had created a situation, necessitating filing of the present petition. On this basis, it was submitted that the present petition may be allowed and a neutral person may be appointed as the arbitrator.

17. Mr. A. S. Rao, learned counsel appearing for the respondent Corporation, on the other hand, raised various grounds of objection. Firstly, it was submitted that Section 13 of the said Act would operate in the facts and circumstances of the present case and the petitioner having failed to challenge the arbitrator within 15 days, he had forfeited his right to claim any relief in the present petition. It was then submitted

that in the present case, due to absence of relevant record, since the matter was now more than five years old, the respondent was prevented from demonstrating before this Court that the learned arbitrator appointed by the order dated 19.03.2014, had clearly withdrawn from the arbitral process. Even otherwise, the earlier arbitration proceeding having been initiated, the second petition filed under Section 11 of the said Act was clearly not maintainable. It was further submitted that the arbitral proceeding, which stood vitiated, even according to the petitioner by issuance of notice under Section 21 of the said Act, could not be said to have terminated when the learned arbitrator appointed by this Court could not or did not proceed with the matter, indicating that the arbitration proceedings stood closed. If that be so, the only remedy available to the petitioner was either to file a suit or to take appropriate remedies against closure of such arbitral proceedings.

18. In this regard, learned counsel appearing for the respondent Corporation relied upon the judgement of the Rajasthan High Court in the case of *Vimlesh Bansal and another Vs. Ashok Kumar* (**judgement and order dated 26.05.2022 passed in S. B. Arbitration Application No.51 of 2020**). Thereupon, the learned counsel appearing for the respondent Corporation referred to the provisions of the Maharashtra Municipal Corporations Act, 1949, to contend that remedies were available to the petitioner under the provisions of the said Act for redressal of his grievance. It was further submitted that the mandatory requirements under the provisions of the said Act for a valid agreement were not satisfied in the present case. In that regard, he referred to a copy of the agreement on record to demonstrate that the necessary requirements were not satisfied. On this basis, it was submitted that the present petition deserved to be dismissed.

19. This Court has considered the material on record in the backdrop

of the contentions raised on behalf of the rival parties.

20. At the outset, this Court is not inclined to accept the contention raised on behalf of the respondent Corporation that the earlier petition i.e. Arbitration Petition No.4 of 2013, is still pending before this Court. The record shows that on 19.03.2014, the petition was disposed of by appointing a sole arbitrator. Although the record does show that the petition was listed on certain dates after 19.03.2014, it was more in the nature of follow-up action required in the light of appointment of the learned arbitrator, including issuance of appropriate letter / intimation from the Registry of this Court to the learned arbitrator.

21. The record as available before this Court shows that although an office note indicates that the then advocate for the petitioner submitted that another person was to be appointed as the sole arbitrator, no letter was ever submitted on behalf of the petitioner for that purpose. The record also shows that after the order was passed on 03.11.2014, recording the detailed address of the arbitrator appointed by this Court, on 22.12.2014, an intimation from the office of this Court did go to the learned arbitrator about his appointment. There is nothing on record to show that the learned arbitrator intimated either of the parties or the office of this Court about his consent or his inclination to enter upon reference. The matter rested there till, on 12.02.2019, a communication was addressed to the learned arbitrator on behalf of the petitioner. A copy of the order of this Court was enclosed with the said communication, in response to which, the learned arbitrator on 15.02.2019 expressed his inability to accept the appointment for personal reasons. Such communication addressed by the learned arbitrator for the first time to the advocate for the petitioner would indicate that he had withdrawn from his office. In fact, it appears that he never accepted his appointment as the sole arbitrator. This would

indicate the necessity for appointment of a fresh arbitrator in the peculiar facts and circumstances of the present case.

22. It is in this backdrop that the petitioner addressed the said communication dated 26.03.2019 to the respondent Corporation for appointment of arbitrator. It is undisputed that the respondent Corporation did not send any reply or communication to the petitioner in response to the said letter dated 26.03.2019.

23. This Court is of the opinion that in such circumstances, the petitioner is justified in invoking Section 11(6) of the aforesaid Act, as it pertains to a situation where the agreed procedure between the parties for appointment of arbitrator failed. This Court is not in agreement with the contention raised by the learned counsel appearing for the respondent Corporation, that Section 13 of the Act would apply to the facts and circumstances of the present case. There was no question of the petitioner approaching the arbitrator within 15 days to challenge the arbitrator. In the facts and circumstances of the present case, the situation to invoke Section 13 of the Act itself had not arisen. It is also not the case of the respondent Corporation that the claims, that the petitioner intends to make in the light of the disputes between the parties, can be said to be either time-barred or stale. Therefore, it cannot be said that the respondent Corporation is justified in harping upon the time gap of more than five years between the disposal of the earlier petition and the filing of the present petition.

24. The record shows that the lease agreement is alive till 05.08.2037. There is nothing to show that the respondent Corporation has terminated the lease. There is material on record to show that the petitioner has grievances and that the disputes have arisen in the context of the terms of the lease agreement. The arbitration clause contained in the lease agreement could certainly be invoked by the petitioner in such

circumstances for resolution of disputes. It is settled law that when there is an arbitration agreement executed between the parties, there is a bias towards sending the parties for arbitration, in order to resolve the disputes. The Court, at the stage of examining the petition filed under Section 11 of the said Act, is required to test as to whether there is indeed an arbitration agreement between the parties; whether there are disputes between them and also as to whether the petitioner has invoked the arbitration clause.

25. In the present case, it is not disputed that clause 33 of the lease agreement provides for resolution of disputes through arbitration. This Court has found that as per the terms of the lease agreement, it cannot be said that the disputes between the parties can be resolved before any special fora or courts. It is not even the case of the respondent Corporation that the Rent Control Legislation applies. In this situation, the law laid down by the Supreme Court in the case of *Vidya Drolia Vs. Durga Trading Corporation*, **(2021) 2 SCC 1**, would apply and therefore, an arbitrable dispute has come into existence. The documents on record show that on 26.03.2019, the petitioner did invoke the arbitration clause, but the agreed procedure between the parties could not lead to the appointment of an arbitration and in any case, the respondent Corporation did not consent to the proposal made on behalf of the petitioner for appointment of a sole arbitrator.

26. In these circumstances, this Court is convinced that the present petition deserves to be allowed. Insofar as the contention raised on behalf of the respondent Corporation regarding validity of the very agreement is concerned, the nature of disputes sought to be raised can be ventilated before the arbitrator in the arbitration proceedings and all such questions can be kept open.

27. As regards reliance placed on the judgement in the case of **Vimlesh Bansal and another Vs. Ashok Kumar** (*supra*), the facts of the said case are clearly distinguishable for the reason that in paragraph 3 of the said judgement, the Rajasthan High Court recorded that while closing the proceedings, the arbitrator in the said case had dismissed the claim of the claimant. It was also recorded in paragraph 9 of the said judgement that when the arbitrator had terminated the proceedings, the only course available for the applicant was to invoke Section 14 of the said Act and the second application under Section 11 thereof was not maintainable in the facts and circumstances of the said case. In view of the facts of the present case, noted hereinabove, the said judgement is clearly inapplicable and cannot assist the respondent Corporation in resisting the prayer made in the present petition, particularly when the learned arbitrator in the present case did not even commence the proceedings, leave alone dismissing the claim or closing the proceedings.

28. In view of the above, the petition is allowed. Considering the nature of disputes between the parties, it would be appropriate that a counsel of some standing of this Court is appointed as the sole arbitrator for resolution of disputes between the parties. Accordingly, Mr. Ram S. Apte, Senior Advocate is appointed as the sole arbitrator. The details of the learned arbitrator are as follows:-

Mr. Ramchandra S. Apte,
4th Floor, Room No.27,
Kamer building, Cawasjee Patel Street,
Fort, Mumbai - 400 001.
Mobile No.:98690 05795
Email Id: adv.rsapte@gmail.com

29. The parties undertake to inform the learned arbitrator at the earliest about the order passed today.

30. Learned Arbitrator is requested to communicate his consent and disclosure statement in terms of Section 11(8) and 12(1) of the Arbitration and Conciliation Act, 1996 to the Registrar (Judicial) of this Court, within four weeks from today.

31. The fees of the learned arbitrator shall be as per Schedule IV of the Act.

32. All questions, including the contention noted in paragraph 26 above, are kept open for decision of the learned arbitrator.

33. The learned arbitrator would be at liberty to decide the venue of the arbitration.

34. The petition stands disposed of.

(MANISH PITALE, J.)

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