

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 13940 OF 2023

IN

ARBITRATION PETITION (L) NO. 92564 OF 2020

Jayesh Pramodbhai Thakkar

...Applicant/
Petitioner

Versus

Sahinder Pritamsingh Khanuja & Ors.

...Respondents

Mr. Ankit Lohia i/by Mr. Preet Chheda for the Petitioner.

Mr. Uzair Z. Kazi a/w Ms. Ankita Sharma i/by YMK Legal for the
Respondents.

CORAM : R.I. CHAGLA J

DATE : 9 August 2023

ORDER :

1. By this Interim Application the Applicant/Petitioner is seeking appointment of retired Judge of this Court in substitution of sole arbitrator, who had been appointed by this Court vide order dated 3rd June 2023.

2. Although, there is no dispute insofar as the appointment

SHARAYU
PANDURANG
KHOT

Digitally
signed by
SHARAYU
PANDURANG
KHOT
Date:
2023.08.22
17:39:41
+0530

of an Arbitrator in substitution of sole arbitrator of this Court is concerned, the dispute is with regard to the venue of arbitration.

3. Mr. Lohia, learned Counsel appearing for the Petitioner has referred to the order dated 30th June 2022 passed by this Court appointing an Arbitrator in place of and in substitution of the sole Arbitrator appointed vide order dated 23rd February 2021 of this Court. This Court had in the operative part of paragraph 3(ii) of the said order dated 30th June 2022 directed as under :-

“3(ii) The venue of arbitration shall be left open to the Arbitrator to determine. However, from the clause of Development Agreement executed between the parties, it is noted that the seat of the Arbitration is Kalyan. It would be also open for the learned Sole Arbitrator appointed by this Court to determine as to whether the proceedings should be in person or through Video Conferencing.”

4. Mr. Lohia has submitted that it is clear from paragraph 3(ii) of the said order that the venue of arbitration was left open for the Arbitrator to determine.

5. Mr. Lohia has referred to certain facts after the passing of the said order. He has drawn this Court's attention to the fact that subsequent to the passing of the said order, Mr. R.G. Ketkar (retired Judge of this Court) had attempted to hold arbitral meetings. There are orders passed by this Court from time to time including orders dated 11th November 2022, 26th April 2023 and 27th April 2023, wherein this Court had observed that a dispute has been raised by the Respondents as to the venue of arbitration and due to which arbitral proceedings could not commence. The Respondents had insisted on the arbitral proceedings being conducted at Kalyan. Accordingly, the parties were directed to appear before the Arbitrator appointed by this Court and it was for the Arbitrator to determine the venue of arbitration. This was in light of the appointment order of 30th June 2022 passed by this Court.

6. The Respondents had applied for determination of the question of venue of arbitral proceedings before the Arbitrator Mr. R.G. Ketkar (retired Judge of this Court).

7. By order dated 23rd June 2023, the Arbitrator considering the totality of the circumstances held that it would not be

appropriate to hold meetings at any place other than Kalyan. The Arbitrator withdrew from his office as Arbitrator in terms of Section 14(1)(b) of the Arbitration and Conciliation Act, 1996. The parties were directed to move this Court for substitution of the Arbitrator, which the Petitioner has done by the present Interim Application.

8. Mr. Kazi, the learned Counsel appearing for the Respondents has submitted that the Arbitrator appointed in substitution is required to hold the arbitration at Kalyan. This in accordance with Section 20(3) of the Arbitration Act. The factors to be considered is the venue which the Arbitrator considers as appropriate for consultation for hearing of witnesses/experts or the parties, or for inspection of documents, goods or other property. Section 20(3) of the Arbitration Act is applicable in the present case since the parties have not agreed to the venue of arbitration. He has submitted that the erstwhile Arbitrator in determining the question of venue of these arbitral proceedings has taken the said provision into consideration arriving at a finding that it would be in the best interest of the parties to hold the arbitral meetings at Kalyan. He has accordingly, submitted that the Arbitrator to be appointed by this Court should follow the order of the substituted Arbitrator dated

23rd June 2023.

9. Having considered the submissions, it is required to be noted that by order dated 30th June 2022, the Arbitrator Mr. R.G. Ketkar (retired Judge of this Court) was appointed in substitution of the sole Arbitrator appointed by this Court vide order dated 23rd February 2021. The previous Arbitrator was infact a sitting Judge i.e. Principal District and Sessions Judge on contract basis. In the said order, as per the operative part which has been extracted above, this Court had left the venue of arbitration to be determined by the Arbitrator. This was in line with Section 20(3) of the Arbitration Act.

10. Section 20(3) of the Arbitration Act provides as under :-

“Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.”

11. Accordingly, in the event that there was no agreement between the parties, it was for the Arbitral Tribunal to meet at a place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

12. The Arbitrator appointed by this Court vide order dated 30th June 2022 was holding the arbitral proceeding at a venue of his choice. However, the Respondent insisted on the venue of arbitration being that of Kalyan.

13. There have been orders passed by this Court from time to time, wherein it has been noted that the arbitral proceedings could not commence in view of the belligerent stand taken by the Respondent that the venue of arbitration be that of Kalyan. This Court has noted that it is left to the Arbitrator to determine the venue of arbitration.

14. It is necessary to note that by an order dated 23rd June 2023, the Arbitrator Mr. R.G. Ketkar (retired Judge of this Court) has considered the question of venue of arbitration. In his

view, it would not be appropriate to hold the meeting at any place other than Kalyan. He has considered that the convenience of the parties is of paramount importance. He has observed that it would be in the best interest of the parties to hold meetings at Kalyan. No prejudice will be caused to the Claimant. However, considering his inability to continue as arbitrator, he has by the said order withdrawn from the office of the Arbitrator in terms of Section 14(1)(b) of the Arbitration Act. It is relevant to note that in paragraph 45 of the said order dated 23rd June 2023, the erstwhile Arbitrator has hastened to add that this order will not preclude the next Arbitrator to hold meetings at any place he/she considers appropriate in terms of Section 20(3) of the Arbitration Act.

15. Accordingly, in my view Mr. R.G. Ketkar, the Arbitrator appointed by this Court has correctly left it to the Arbitrator appointed in substitution to determine the venue of arbitration in terms of Section 20(3) of the Arbitration Act. This necessarily will be after taking into consideration the orders passed by this Court including the order dated 30th June 2022 as well as the order of erstwhile Arbitrator dated 23rd June 2023.

16. Considering that the Petitioner and the Respondents have agreed for appointment of an Arbitrator in substitution of the Arbitrator, Mr. R.G. Ketkar (retired Judge of this Court), the following order is passed.:-

- (i) Mr. Sandeep K. Shinde (retired Judge of this Court) is appointed as a Sole Arbitrator to decide the disputes between the Petitioner and the Respondents.
- (ii) The venue of arbitration shall be determined by the Arbitrator as per Section 20(3) of the Arbitration and Conciliation Act, 1996 after taking into consideration the orders passed by this Court including the order dated 30th June 2023 as well as order of the erstwhile Arbitrator dated 23rd June 2023.
- (iii) It will be open for the Arbitrator appointed by this Court to determine as to whether the proceedings should be held in person or through Video Conferencing.

- (iv) Office to inform the Sole Arbitrator regarding his appointment.
- (v) The Sole Arbitrator is requested to file his Disclosure Affidavit of Arbitration under Section 11(8) and Section 12(1) of the Arbitration and Conciliation Act, 1996 within a period of three weeks from the date of receipt of the notice issued by the Registrar Judicial-I and provide copies to the parties.
- (vi) Parties to appear before the substituted Arbitrator on the date fixed.
- (vii) Fees of the Arbitrator will be payable in accordance with the Bombay High Court (O.S.) Rules, 2018.
- (viii) The Interim Application is disposed of accordingly.

17. At this stage, the learned Counsel appearing for the Respondents states that the Respondents intend to file counterclaim in the arbitration proceedings. This will be left to the

Arbitrator appointed by this Court to determine whether to allow the filing of the counterclaim in accordance with law. This is also upon considering the objection of the Petitioner to the filing of the counterclaim on the ground of limitation.

[R.I. CHAGLA J.]