IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 16 OF 2023

Kirloskar Pneumatic Company Ltd .. Petitioner
Versus
Kataria Sales Corporation .. Respondent

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Mr. Sunny Shah a/w. Devanshi Sethi i/b Hemant Sethi, for the Petitioner.
Mr. Dormaan Dalal, for respondent.

CORAM: BHARATI DANGRE, J.
DATED : 21st MARCH 2024

ORAL JUDGMENT:-

1 The arbitration petition filed by the Kirloskar Pneumatic Company Ltd, seek relief of appointment of Sole Arbitrator to adjudicate the disputes with the respondent Kataria Sales Corporation, out of the Dealership Agreement dated 19/06/2013.

The Petitioner being engaged in the business of manufacturing and selling various types of air & gas compressors, accessories, spare parts and providing for after sale services of the equipment struck a deal with the respondent, which is also interalia engaged in the similar business and the business deal found its way in the Dealership Agreement.

2 Pursuant thereto purchase order raised by the respondent Kataria Sales on the petitioner Kirloskar Pneumatic Company, which raised an invoice for an amount of Rs. 14, 86,932 on 27/03/2015, but Kataria Sales refused to pay

the amounts.

The above event was followed by exchange of multiple emails for almost one year with accusations being flunged at each other and explanations offered dealing with the same. However, the parties were unable to reconcile their differences.

3 One more purchase order was placed by Kataria Sales on Kirloskar Pneumatic Company for which it raised an invoice for an amount of Rs. 6,18,879/- but what was received by Kirloskar Pneumatic Company was only part payment, despite the whole amount under the purchase order becoming due and payable.

4 In this background, on 30/10/2018, Kirloskar Pneumatic Company invoked arbitration and appointed Advocate. Anurag Jain to act as a sole arbitrator.

The arbitrator on 23/11/2020 declared an award in its favour directing Kataria Sales to pay to the claimant (Kirloskar Pneumatic Company) an amount of Rs. 29,90,524/- together with interest @ 18% per annum from 22/02/2019 till payment and/or realization. Kataria Sales was also levied with cost of Rs. 4,42,500/-, together with an interest @ of 12% per annum from the date of the award till payment and/or realization.

5 This judgment however faced a challenge before the District Judge, Pune in form of Civil Miscellaneous Application No. 262 of 2021 and by judgment dated 7/01/2023, the arbitral award dated 23/11/2020, passed by the Sole Arbitrator was set

aside on the ground that the Sole Arbitrator was appointed unilaterally by the claimant/ Kirloskar Pneumatic Company and in the wake of the ruling of the Apex Court in case of *Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Limited (2020) 20 SCC 760*, as well as the position of law as laid down in *TRF Limited vs. Energo Engineering Projects Limited (2017) 8 SCC 377*, such an appointment cannot be sustained.

6 It is in this background, the present application is filed by Kirloskar Pneumatic Company, seeking appointment of an Arbitrator as the disputes arising between the parties out of the dealership agreement could be resolved only through the process of arbitration.

7 I have heard learned counsel Mr. Sunny Shah for the petitioner, who would justify the prayer in the petition and seek appointment of the Sole Arbitrator in the background facts. He is opposed in his submission by Adv. Dormaan Dalal representing Kataria Sales, who would raise a preliminary objection about the maintainablity of the petition and according to Mr. Dalal it being 'pre-mature' since the petition is filed under Section 11 (6) without first invoking the arbitration clause under Section 21.

According to him, the dispute commences only from the date on which the request for arbitration is received by the other side, unless otherwise agreed between the parties. According to him, the arbitration clause do not contemplate 're-invocation of arbitration' and it is the submission of Mr. Dalal that without invocation, the proceedings under Section 11(6) are not maintainable.

Highlighting the scheme of the enactment, the submission is by now it is a fairly settled position of law that the cause for filing an application under Section 11, would arise upon the failure to make the appointment of arbitrator within period of 30 days from issuance of the notice by invoking arbitration. He would invoke the relevant observation of the Apex Court in case of *BSNL vs Nortel Networks (India) Private Limited (2021) 5 SCC 738* and in particular the following observation:

"An application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/ dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment."

He would also place reliance upon decision of the learned Single Judge of this Court in case of *Associated Constructions vs. Mormugoa Port Trust (2010), 5 MHLJ 739* and another decision in case of Wadhwa Group Holdings Pvt Ltd vs. Homi Pheroze Ghandhy and anr (CARBAP No.414 of 2019) dated 7/03/2022, to buttress his submission that when there is no invocation, the appointment of the arbitrator cannot be sustained.

Another decision delivered by me in case of *R J Shah and Co Ltd vs State of Maharashtra and ors. (CARBAP NO. 13 of 2021* is also relied upon by Mr. Dalal.

8 In order to dispel the said contention, I must first turn my attention to the Scheme of the Act of 1996 and the procedure for appointment of Arbitrator (s).

In light of an existing 'arbitration agreement' between the parties as contemplated under Section 7 of the Act, the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators.

This provision is however subjected to sub-section (6) of Section 11, which provide for appointment of an arbitrator by the arbitral institution designated by the Supreme Court in case of International Commercial Arbitration or by the High Court, in case of Arbitrations other than the International Commercial Arbitration in the following scenario:

> *"(6) Where, under an appointment procedure agreed upon by the parties,-*
>
> *(a) A party fails to act as required under that procedure; or*
>
> *(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
>
> *(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,"*

9 Chapter- III of the Arbitration and Conciliation Act, 1996 set out the ground for challenge and also set out the challenge procedure, once an arbitrator or arbitrators are appointed.

Chapter- V of the Act relate to the Conduct of Arbitral proceedings and it includes provisions for determination of the rules of procedure, the place of arbitration, language, etc.

In this chapter, Section 21, which in normal parlance is referred to as 'invocation of arbitration', though this specific terminology is not part of the Section is to be found.

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For the sake of convenience the Section itself deserve a reproduction.

"21. Commencement of arbitral proceedings.- *Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

10 Reading of the Section would clearly indicate that the arbitral proceedings in respect of a particular dispute, commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent.

In other words, section 21 has fixed the date of commencement of the arbitral proceedings, premised on the arbitration agreement between the parties and Section 21 provide that the commencement shall be the date on which the respondent received a request from the applicant for referring the dispute to arbitration.

11 The above procedure is normally understood as 'invocation of arbitration' proceedings i.e. triggering of the process, which is accepted between the parties as a mode for settlement of the dispute/s that has arisen between the parties, to an arbitration agreement.

When the above provision is read as it stands, it shall be applicable to all arbitration proceedings, unless it is otherwise agreed between the parties. The moment a request for referring a dispute to arbitration is received by one party from the other, it

shall mark the commencement of arbitral proceedings.

12 Upon receipt of such a notice at the end of the respondent, the applicant has triggered the arbitral proceedings, but if the party at the other end fails to act as required i.e. agree to the appointment of the arbitrator or a panel of arbitrators as decided between the parties and set out in the arbitration agreement, which comply the test of Section 7, or if the parties, who have appointed the respective arbitrator fail to reach a consensus, under the procedure, upon an application being preferred under sub-section (6) of Section 11, the arbitrator/s shall be appointed to take the process of arbitration ahead.

Once an arbitral tribunal is constituted in this manner, follows the regime of arbitration, which is set out in chapter -V by filing of statement of claim and defence, hearing, appointment of an expert etc and this proceeding would culminate on declaration of an award by the arbitrator under Section 31.

13 The argument of Mr. Dalal, will have to be appreciated in the aforesaid statutory scheme, as it is his contention that when an unilateral appointment of an arbitrator was frowned upon and resultantly, the award passed by such an arbitrator, who was *de jure* ineligible to act is set aside, once again the arbitration, will have to be invoked by issuing a notice under Section 21.

The above argument on its face is fallacious, since the petitioner has already forwarded a request to the respondent for referring the dispute, that had arisen between them to

arbitration and the arbitral proceedings in respect of that dispute has commenced. Merely because the award passed by an ineligible arbitrator is set aside, is not sufficient enough to give new contour to the dispute, as the dispute between the parties still remain the same but now what is sought by the petitioner today, is appointment of a competent arbitrator to arbitrate the dispute and the petitioner expect the arbitrator to be eligible to act as such i.e he shall be a neutral and independent person and his appointment is not in teeth of Section 12 of the Act of 1996 or schedule V and VII of the Act.

14 Dispute which in colloquial language is understood as a disagreement between two parties is often referred to as altercation, squabble, bickering etc. As per Cambridge dictionary the word dispute is defined as ‘an argument or disagreement, especially an official one between, e.g workers and employers or two countries with a common border’

The disagreement between the parties before me arose long back, when the respondent refused to pay the amounts due under the invoices and made only part payment.

This constrained the petitioner to invoke arbitration, and once again it must be clarified that when it is said that it invoked arbitration, what it did was it forwarded a notice to respondent apprising it about the amount due and payable under the Dealership Agreement between the parties, with respective obligations cast on each of them and which contained the clause, providing that any dispute that would arise between the parties shall be referred to and settled through Arbitration.

The only problem arose, is the appointment of an Arbitrator was unilaterally made by the petitioner and as such it was capable, of casting a doubt on the independence and impartiality of the arbitrator and hence not permissible in law.

Though the Sole Arbitrator unilaterally appointed continued with the proceedings and even declared an award dated 23/11/2023, it is set aside on 7/01/2023, by the competent Court on this very ground.

15 In the sequence of events mentioned above, when the arbitration mechanism is already triggered and the proceedings have commenced upon the issuance of the notice by the petitioner to the respondent on 30/10/2018, and therefore when the petitioner now seek appointment of an independent and impartial arbitrator, through the mechanism of sub-section (6) of Section 11, I do not deem it necessary that it should be preceded by a fresh notice under Section 21, though the respondent preferred to call it as ‘invocation notice’, as the arbitration proceedings are already commenced and the respondent is aware about the existence of a dispute and also of the fact, that this dispute in terms of the agreement between the parties deserve to be resolved through an independent arbitrator.

For the above, the submission of Mr. Dalal do not deserve any consideration and is rejected.

16 In the wake of the above by exercising the power under sub-section (6) of Section 11 following order is passed:

In the wake of the above, Mr. Jayprakash Shridhar Kapare (Retd. District Judge), is appointed as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the petitioner and the respondent. The details of the Arbitrator are as below:

Name :- Mr. Jayprakash Shridhar Kapare (Retd. District Judge)

Address :- H705, Saptsur Society, DSK Wishwa Dhayri, Pune-411041

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s.11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Registrar Judicial-II, of this Court to be placed on record.

The Arbitrator, shall after entering the reference fix the date of first hearing and issue further directions as are necessary.

The Sole Arbitrator shall be entitled for the fees as per Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

All rights and contentions of the parties are kept open.

(SMT. BHARATI DANGRE, J.)

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