

THE HIGH COURT OF MEGHALAYA

ARB.Application No. 5 of 2013

1. **M/s Walchandnagar Industries Limited.** A company incorporated and registered under the Indian Companies Act, 1882 with its Registered Office at 3, Walchand Terraces, Tardeo Road, Mumbai – 400 034, through its authorized representative mrs. Dipti S. Ramani.

...Petitioner

-Versus-

M/s JUD Cements Ltd, (Earlier JUD Cements Pvt. Ltd.) having its Registered office at Hanumanbux Umadutt, G.S.Road, Police Bazar, Shillong – 793 001 and other office at Anil Plaza, 4th Floor (B-1), Near ABC, Bhangagarh, G.S.Road, Guwahati 781 005.

...Respondent

Mr. K.K.Mahanta, Sr. Advocate, Mr. K.Singha, Advocate, present for the petitioner.

Mr K.Paul, Mr. S.Thapa, Ms. R. Dutta, Advocate, present for the respondent.

Date of Hearing 16th December, 2013

Date of Judgment & Order 16th December, 2013

JUDGMENT AND ORDER

HON'BLE PRAFULLA. C.PANT, CHIEF JUSTICE

By means of this application moved under Section 11 (6) of the Arbitration and Conciliation Act, 1996, the applicant has sought appointment of arbitrator.

2. Heard.

3. Brief facts of the case are that the applicant entered into an agreement with the respondent on 9-8-2007 whereby the applicant was

required to supply the respondent a Clinkerisation plant for a contract price of ₹ 95 crores excluding taxes/duties. The machinery was required to be imported from Japan. It is pleaded that the respondent out of ₹ 9.5 crores required to be paid as advance, paid only ₹ 1 crore to the applicant. It is alleged that in November, 2008, the respondent informed the applicant that due to financial constraints, the term of the agreement could not be complied with and sought time till April, 2009 for making payment of outstanding dues. It is further alleged that the respondent handed over 2(two) cheques dated 30-7-2009 and 30-10-2009 each of ₹ 6 crores but the same on presentation before bankers got dishonoured. It is further stated that on 23-1-2012, the applicant appointed Hon'ble Mr. Justice V.P.Tipnis (former Judge, Bombay High Court) as arbitrator and called upon the respondent to appoint second arbitrator by serving notice. When no response was received, Arbitration Application No. 146 of 2012 was filed before the Bombay High Court under Section 11 of the Arbitration and Conciliation Act, 1996. The respondent opposed the said application before the Bombay High Court and raised objection as to territorial jurisdiction of said Court. The Bombay High Court vide its order dated 15-3-2013 dismissed the application on the ground of lack of territorial jurisdiction. Hence, this application before this Court.

4. The respondent has opposed the application before this Court on the ground that after dismissal of the application by the Bombay High Court, this Court cannot entertain the arbitration application under Section 11 of the Arbitration and Conciliation Act, 1996. It is also contended on behalf of the respondent that the applicant should have filed an appeal before the Supreme Court against the order of the Bombay High Court. It is also argued that since the Bombay High Court did not grant liberty to the applicant to file this petition, as such, the same cannot be entertained by this Court.

5. From the pleadings of the parties, it is clear that the execution of the agreement dated 9-8-2007 is not disputed. It is also not disputed that the agreement contains the arbitration clause for taking decision on the dispute between the parties. This fact is also not disputed that after appointment of Hon'ble Mr. Justice V.P.Tipnis (Retd.Judge, Bombay High Court) as first arbitrator by the applicant, the respondent did not appoint second arbitrator in response to notice dated 23-1-2012. The original agreement has been filed by the applicant and deficiency of court fee as pointed out by the respondent has also been made good.

6. In the above circumstances, the only point raised by the respondent which is required to be answered is whether after the Bombay High Court dismissed the application under Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court can entertain this application or not. Had the Bombay High Court gone into the merits of the application as to whether an arbitrator is to be appointed or not, what is being argued on behalf of the respondent could have been accepted, but in the present case from the copy of the order dated 15-3-2013 passed by the Bombay High Court in Arbitration Application No. 146 of 2012, it appears that said application was dismissed on the ground that it was outside the territorial jurisdiction of said Court.

7. Learned counsel for the respondent submitted that the applicant cannot be allowed "forum shopping" or "window shopping". Had the application not been dismissed by the Bombay High Court on the ground of territorial jurisdiction only, that too, on the objection of the respondent, it could have been contended that the applicant is attempting to obtain the orders from this Court after being unsuccessful before the Bombay High Court. But in the present case, copy of the objection filed by the respondent before the Bombay High Court (Annexure - A with the rejoinder affidavit) shows that the respondent himself had pleaded that the

jurisdiction to appoint an arbitrator lies with the Courts in Meghalaya or the Courts in Gauhati. Relevant paragraph 5, 6 and 7 of objection filed by the respondent before the Bombay High Court are being reproduced below:

“5. This Respondent further states that, as detailed in the Contract, it was clearly agreed between the parties that the Applicant was to deliver all the consignments of the Machinery and Equipment at the new Clinkerisation plant which was being set up by the Respondent at Meghalaya. The Respondents therefore submits that the Contract was to be performed in Meghalaya.

6. The Respondent further states that negotiations preceding the Contract were held in Guwahati, the Contract was signed at Guwahati, and moreover, the Respondent has its registered office at Shillong as can be ascertained from the cause title of the present application.

7. In the circumstances aforesaid and in view of the express agreement between the parties as contained in Article 16.1, the Respondent states that it is either the Courts in Meghalaya or the Courts in Gauhati which can have jurisdiction to decide the present Application as the principal civil court of original jurisdiction for the aforesaid disputes between the parties would be the place where the cause of action has occurred and / or where the Respondent resides or has his principal place of business”.

8. In view of the above objection before Bombay High Court, it is not open for the respondent to take the plea that this Court cannot entertain the present application. Attention of this Court is drawn to the case of ***Jain Studios Ltd vrs Shin Satellite Public Co. Ltd (2006) 5 SCC page 501.*** In said case, the Apex Court has held that after the arbitration application was heard and rejected, the relief cannot be sought by an indirect method by filing review petition. There is no such situation in the present case. Similarly, the case of ***Sarguja Transport Service vrs State Transport Appellate Tribunal, M.P., Gwalior and ors (1987) 1 SCC page 5*** is of little help to the respondent for the reason in said case, the writ petition was filed before the same Court after withdrawing the earlier petition without seeking liberty to file afresh.

9. Relying on the case of ***SBP & Co. vrs Patel Engineering Ltd. and anr (2005) 8 SCC page 618***, learned counsel for the respondent submitted that against the order passed by the Bombay High Court rejecting the application under Section 11(6) of the Arbitration and Conciliation Act, 1996, the applicant could have only filed an appeal by seeking leave appeal under Article 136 of the Constitution of India. It is true that appeal does not lie before the Division Bench of the High Court against the order passed by the Chief Justice or the designated Judge under Section 11(6) of the Act, but it does not mean that where the respondent himself has raised an objection as to the territorial jurisdiction of a Court and such Court dismissed the petition on that ground alone, the petition before the competent Court cannot be entertained.

10. For the reasons as discussed above, the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 deserves to be allowed. Having given opportunity to suggest names (of the arbitrator) to the parties, this Court appoints Hon'ble Mr. Justice Pronoy Kumar Mushahari (Retd. Judge, Gauhati High Court) as sole arbitrator who may enter into the arbitration and decide the dispute. The Registry is directed to obtain the consent of Hon'ble Mr. Justice Pronoy Kumar Mushahari (Retd. Judge, Gauhati High Court) in this connection. With the direction as above, this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 stands disposed of. The original agreement filed by the applicant maybe returned to said party after keeping the copy thereof on record.

(Prafulla.C.Pant)
CHIEF JUSTICE
16th December 2013