

International Commercial Arbitration : *Filing of an application under s.11(9) of the arbitration act given a go bye by Bombay High Court, if consent of the parties exists.*

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It is a cardinal principle of the Arbitration & Conciliation Act, 1996 Act (**Act**) that parties are free to decide the number of arbitrators (provided it is an odd number) as well as the procedure for appointing them. However, if parties are not able to agree on the said procedure, or constitute the arbitral tribunal to their mutual satisfaction, either party has a remedy under S.11 of the Act, which provides a detailed mechanism for appointment of arbitrators through judicial intervention. The Act provides for appointment of arbitrators by consent, failing which the parties, can then approach the Courts to intervene & appoint the Arbitrator / Arbitral Tribunal.

S.2(1)(f) of the Act defines an 'international commercial arbitration' as an arbitration in connection with disputes arising out of legal relationship which must be considered commercial under Indian law, where either of the parties is a foreign national or resident, or is a foreign body corporate or association or body of individuals whose central management & control is exercised in a country other than India, or Government of a foreign country.

In case of an international commercial arbitration, for seeking appointment of arbitrators, a request will have to be filed by a party before the Supreme Court under S.11(9) of the Act.

However, recently the Bombay High Court in the Earnest Business case has even given that a go bye if the parties appoints an arbitrator by mutual consent.

The present article focuses only an aspect of this judgment, i.e. appointment of an arbitrator in an international commercial arbitration('ICA')^a.

Brief background of the Case

The parties to the present case had entered into certain Business Service & Facilities Agreements (**Agreements**), which were determined by efflux of time, under which the deposits were made by the Foreign Party with the lessor of the premises on refundable basis. The parties had also agreed that the said agreement was subject only to the laws of the Union of India & that the disputes between these parties would be subject to the exclusive jurisdiction of the courts at Mumbai.

Upon the determination of the said Agreements the disputes arose between the parties on vacation & handing over of the premises to the Lessor/Indian Party & refund of the Deposits made by the Foreign Party.

In view thereof the Original claimant (**Foreign Party**), i.e. the Respondent in the present case, filed a petition under S.9 of the Act before the Bombay High Court praying for various interim measures of protection.

During the pendency of this S.9 petition, the parties exchanged some names of the persons & concurred to the appointment of one of the persons as a sole arbitrator in writing. The High Court, in

^a International Commercial Arbitration as defined in S.2 (1)(f) of the Act.

its order under the S.9 petition, recorded the consent of the parties & appointed the sole arbitrator to decide the dispute between the parties.

Thereafter, both parties participated & submitted themselves to the arbitration proceedings before the said sole arbitrator. The Petitioner in the present case filed the counter claim & set off against the statement of claim filed by the Foreign Party. Consequently, the sole arbitrator passed an award in favour of the Foreign Party & dismissed the set off & counter claim of the petitioner. Accordingly, the petitioner filed an application under S.34 of the Act before the Bombay High Court impugning the said arbitral award, in which the present judgment came to be passed.

Challenge as to the Appointment & Jurisdiction of the Sole Arbitrator by the Judgment Debtor

It was contended by the Judgment Debtor that the appointment of arbitral tribunal was bad in law as it could be made only before the Supreme Court under S.11(9) of the Act & not by the High Court under S.11(6) & thus, the entire proceedings before the sole arbitrator was without jurisdiction. While impugning the said award it was submitted that the Bombay High Court, while exercising powers under S.9 of the Act, could not have appointed the sole arbitrator & thus such appointment was *ex-facie* beyond its jurisdiction, & was therefore a nullity. Although the said issue of Jurisdiction was raised for the first time in the S.34 Petition but however since the same went to the root of the matter, the Petitioner was entitled to raise the same even at the stage of the Appeal. In support of these the Petitioner relied upon the case of *Anees Bazmee*.^a in support of his contention as the Tribunal's jurisdiction & its appointment.

The Respondent distinguished the said precedent laid down by the Bombay High court & relied by the Petitioner & argued that the Petitioner had voluntarily participated & submitted in the arbitration proceedings before the arbitrator without any protest at any stage & had raised this issue only after receipt of the arbitral award against him.

Since the parties had already agreed to the constitution of the Tribunal, & after exchanging name of different persons to act as Arbitrator mutually came to an agreement to refer their dispute before the said Arbitrator, It was further argued that there was neither any necessity to file any application under S.11(9) of the Act nor such application was filed by the Respondent.

Decision

The High Court held that since there was no dispute about the name of the arbitrator between the parties & that the parties had agreed to the appointment of the sole arbitrator prior in time to an order passed in S. 9 Petition filed by the Respondent/Org. Claimant the filing of an application under S.11(9) of the Act before the Supreme Court was therefore not necessary & thus the Arbitral Tribunal so appointed by consent did not lack jurisdiction while adjudicating upon disputes & differences arose between the parties & it was further noted that an order appointing the arbitrator was not passed in an application filed under S.11(6) of the Act for appointment of an arbitrator & therefore the Bombay High Court did not exercise any powers under S.11(6) of the Act.

Comments

The Bombay High Court thus can be said to summed up its decision by holding that parties can agree on appointment of an arbitrator in any proceedings in court without filing an application under S.11(6) or 11(9) of the Act, as the case may be, including in a S.9 petition or even without

^a (2016 SCC OnLine Bom 3555).

intervention of court, which may give a relief to the foreign parties having receivables in India under an Arbitration Agreement.

it is pertinent to note that such appointment was only with the consent of the parties, & the order under the S.9 petition merely recorded such prior agreement between the parties. Thus, in all other cases, where such agreement between the parties is not in existence, recourse to an application under S.11(9) before the Supreme Court, in an international commercial arbitration, would be proper.

The Bombay High Court, in the present case, took a pro-arbitration stand as it accorded primary importance to party autonomy, notwithstanding the nature & stage of the ongoing proceedings before it. So long as there is consent of the parties, even a High Court can, in any proceeding, appoint an arbitrator for ICA . Although this approach is likely to aid in expediting the movement of matters from courts to arbitration but the sequitur still stands on how the High Court waved the condition & gave a go bye when S. 11(9) pertains only to Apex court, it being a Foreign Award passed in an International Arbitration.

Now it is to be seen & observed how the present judgment affects the yet to be notified amendment to S.11 which has been although amended vide the Arbitration & Conciliation (Amendment) Act, 2019 which received the assent of the President on August 9, 2019. The provisions of said Amendment Act, amending appointment provisions, which is yet to be notified by the Govt of India, proposes an appointment of arbitrator under S. 11 of the Act shall be made, on an application by the party or by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration. Nonetheless, different arbitral institutions may vary & adopt to different procedures of appointment of arbitrators & to the satisfaction & consent of the parties to arbitration agreement.