IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO.137 OF 2024

Pankaj Madaan .. Applicant

Versus

HealthAssure Private Limited .. Respondent

Ms Manini Bharati *i/b. Mr. Suyash More, Advocate for Applicant.*

Mr. Mohit Khanna *a/w. Ms Kareena Tahilramani i/b. Mr. Pravin Patil, Advocates for Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : February 10, 2025

Pronounced on : February 20, 2025

JUDGMENT :-

Context and Factual Background:

1. This is an Application under Section 11 of the Arbitration and Conciliation Act, 1996 ("***the Act***") in connection with disputes and differences relating to a letter of appointment dated July 5, 2021 ("***Appointment Letter***") by which the Applicant was appointed as a Chief Distribution Officer by the Respondent, which is engaged in healthcare-related services. The parties also executed a Memorandum of Understanding dated July 1, 2021 governing employee stock options to which the Applicant would be entitled.

2. The Applicant's employment with the Respondent commenced on July 1, 2021 and ended on December 31, 2022. According to the Applicant, there were delays in paying his salary and eventually he resigned from his position. However, his dues allegedly remained unpaid. Several emails written by the Applicant between February 3, 2023 and May 29, 2023, were of no avail.

3. A petition under Section 9 of the Act, being Arbitration Petition (L) No. 28717 of 2023 ("***Section 9 Petition***") was filed, which led to a Learned Single Judge of this Court, by an order dated December 15, 2023, granting *ad interim* reliefs by directing the Respondent to issue the relieving letter and to issue Form 16 under the tax laws. On December 15, 2023, the Respondent had resisted the *ad interim* reliefs and sought time to file a reply. The Learned Single Judge granted three weeks to do so. No reply had been filed even when another Learned Single Judge considered the matter on March 28, 2024. Recording the history of the listing of the matter, the Learned Single Judge directed the Respondent to deposit in Court, a sum of Rs. 9,18,648/-, which corresponds to the salary amount claimed by the Applicant. Then too, the Respondent had sought time to file a reply and had unsuccessfully resisted the prayer for deposit.

4. It is clear from the record that the Appointment Letter indeed has an arbitration agreement (found at Page 48 of the Application), which is not reproduced here in the interest of brevity. Suffice it to say that the arbitration clause simply provides for disputes being resolved by arbitration subject to the jurisdiction of courts in Mumbai.

5. By an invocation notice dated July 5, 2023 issued by lawyers for the Applicant, the outstanding amounts claimed by the Applicant were articulated, the nature of the dispute between the parties was recorded,

and arbitration was invoked by suggesting the names of three arbitrators, requesting the Respondent to select one of the names. By a reply dated July 18, 2023, lawyers on behalf of the Respondent did not deny the existence of an arbitration agreement. Instead, the Respondent purported to nominate an arbitrator, and stated that two arbitrators may appoint the third arbitrator, for the arbitration to be conducted by a three-member arbitral tribunal.

6. The material on record would indicate that the Respondent wrote an email dated October 9, 2022 and stated that the official date of resignation would be treated as October 1, 2022, and with a three-month notice period, the employment would cease on December 31, 2022. On October 8, 2022, the Respondent raised issues about the sales effected by the Respondent's sales team during the Applicant's tenure and stated that the Applicant should recover dues from the clients, failing which he would be guilty of non-compliance with performance of his duties, failing which the Respondent would terminate the employment immediately. On December 30, 2022, the Applicant enclosed an "exit form", handed over the material in his possession, requested settlement of his dues, and recorded that he had not been paid for two and half months. It is thereafter that the Applicant has had to follow up for his dues and relieving letter, and appears to have received no response.

7. It is apparent that the advocates traded correspondence until July 2023. By a letter dated August 10, 2023, advocates for the Applicant reiterated the request for appointing a sole arbitrator, pointing out that the number of arbitrators had not been agreed and therefore, under the Act, it would need to be a single-member arbitral tribunal.

Respondent's Objections:

8. When the matter came up before me, this time around too, Learned Counsel on behalf of the Respondent had instructions to submit that the Respondent should be given time to file a reply raising objections to the Application being allowed. When it was pointed out that this Court's review is required to be confined to the existence of an arbitration agreement (under Section 11(6A) of the Act), and that evidently the Respondent has even recommended an arbitrator's name (although as a second arbitrator for a three-member arbitral tribunal), Learned Counsel submitted that this Court cannot appoint an arbitrator under this Application.

9. According to him, the provision quoted by the Applicant was Section 11(6) of the Act, which would only apply if there was an appointment procedure agreed between the parties. The provision the Application ought to have quoted was Section 11(5) of the Act, but since Section 11(6) had been quoted despite the absence of any agreed procedure for appointment of an arbitrator, Learned Counsel for the Respondent would submit, this Application deserves to be rejected. This is the objection that Learned Counsel submitted, he would articulate in detail in the reply he sought to file.

10. When asked what his views were about the flow of benefits under the substance of the law when a wrong provision may have been quoted, Learned Counsel for the Respondent would instead cite two judgements[1] – one of this Court and another of the Supreme Court – only to articulate the well-known difference between Section 11(5) and Section 11(6) of the Act. He would reiterate that this Application is not

1 Bablu Namdev Navratne Vs Khimji Sanda Krishna Enterprises, Thane & Ors – 2016 (3) Mh.L.J 858 And Swadesh Kumar Agarwal Vs Dinesh Kumar Agarwal & Ors. – 2022 SCC OnLine SC 556

maintainable. Judgement was reserved and the Learned Counsel was given time overnight to confirm with the Respondent if they were serious about raising such objections or if they would be willing to proceed to arbitration, when evidently, the Respondent has acknowledged the existence of an arbitration agreement. It was also highlighted that frivolous objections in commercial disputes, could lead to imposition of costs.

11. On the next day, Learned Counsel mentioned the matter when the Court presided, and stated that this Court may rule on the objection raised. It was prayed by him that since no time of the Court had been wasted, costs ought not to be imposed.

Analysis and Findings:

12. Without getting into the merits of the matter, what is evident is that clearly there are disputes and differences between the parties, and indeed an arbitration agreement is in existence. It is also seen that the arbitration agreement in the Appointment Letter would show that the parties did not determine the size of the arbitral tribunal. As stated earlier, the arbitration agreement simply provides that disputes and differences between the parties shall be subject to arbitration under jurisdiction of the courts in Mumbai.

13. Consequently, in the absence of any determination of the number of arbitrators in the arbitration agreement, under Section 10(2) of the Act, the arbitral tribunal must statutorily and necessarily comprise a Sole Arbitrator. Strangely, for a dispute over salary payable for two and half months, the Respondent, without basis in the arbitration agreement, recommended that the arbitration should be conducted by a three-member arbitral tribunal, that too when it was well known that

the arbitration agreement did not record determination of the number of arbitrators.

14. A few facets of the matter ought to be noted. The employment of the Applicant with the Respondent ceased in December 2022 i.e. over two years ago. Through a good part of 2023, the Applicant has been following up with the Respondent. Thereafter, arbitration was invoked (one and half years ago, in July 2023) asking the Respondent for consent to any one of three suggested names. The amount claimed was primarily towards salary and related payments (Rs. 9,18,648/-) and Rs. 5 lakh towards stock options. In that very month, the Respondent indeed acknowledged the existence of the arbitration agreement between the parties. The Section 9 Petition came to be filed in October 2023. It took a direction from this Court in December 2023, just to release the relieving letter and Form 16 (a statutory document).

15. In March 2024, with failed attempts to prolong the matter with pleadings, a deposit of the salary component was directed. Now, yet again, in February 2025, the Respondent has instructed his Counsel to seek time to file a reply. The core substance of the objection sought to be reduced to writing in such reply is that the sub-section number quoted in the Application is erroneous.

16. Therefore, one and half years later, despite there having been an intervention under Section 9 of the Act with no surprise being sprung on the Respondent, the commencement of arbitration is nowhere in sight. The Respondent indulging in frivolous objections in a bid to delay the commencement of arbitration proceedings.

17. Indeed, the Application ought to have cited Section 11(5) instead of citing Section 11(6), but this does not change the substance of what

has transpired and the reason or the purpose for which the Applicant has had to come to this Court. Indeed, it is trite law that mentioning a wrong section of law in an application would not be fatal to a case if the substance of the application is clear and no prejudice is caused by citation of a wrong provision. What is writ large from the record of proceedings in the matter is that there is no prejudice caused to the Respondent by the citing of Section 11(6) instead of Section 11(5) of the Act. The Respondent has already been directed to deposit the salary component in this Court under Section 9 of the Act. The Respondent has always been aware of the nature of the dispute, the precise content of the dispute and the attempt of the Respondent to expand the size of the arbitral tribunal having failed.

18. If the Respondent was not frivolous, it would have desired to proceed to arbitration particularly when it has been directed to deposit the salary amount. What is apparent is that the direction to deposit causes no injury to the Respondent, and it is cynically issuing instructions to its Counsel to prolong the proceedings. The intent evidently appears to frustrate the commencement of arbitration to which the parties have agreed. Arbitration invoked one and half years ago, despite the existence of the arbitration agreement being acknowledged, is yet to even commence. It is the Respondent that has delayed the commencement by suggesting a three-member arbitral tribunal despite being aware that the parties had not agreed on a three-member arbitral tribunal.

19. The Respondent was itself aware that there was no agreement on the procedure for appointment. It is the Respondent's case that Section 11(5) would give the Applicant the right to seek this Court's direction to appoint a sole arbitrator. The substance of the Application would show

that the Applicant is seeking to enforce his right to have an arbitrator appointed, which is a statutory right available under Section 11(5) of the Act. The citing of Section 11(6) in the Application would not invalidate the core substance in the application, namely, a prayer for appointment of a sole arbitrator (Prayer clause (a) on Page 34). Therefore, no prejudice can at all be caused to the Respondent by a wrong sub-section having been quoted in the Application.

20. Therefore, having regard to the background facts and the conduct of the parties hitherto, this Application deserves to be allowed in exercise of my powers under Section 11(5) of the Act. It matters not that the sub-section cited in the Application is Section 11(6) – evidently an error, but an error that is far from being fatal to the Application.

Directions and Order:

21. Consequently, this Application is hereby ***finally disposed of*** in the following terms:-

A] Ms. Nandini Singh Modi, an advocate of this Court, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above. The Learned Arbitrator's address is as follows:-

Office Address:- 29/29A, Alli Chambers,
Nagindas Master Road,
Fort, Mumbai- 400023.

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from uploading of this order on the website of this Court. The Applicant shall provide the contact and communication particulars of the parties to the arbitral

tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the arbitral tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the arbitral tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

22. Taking into account the conduct of the Respondent in these proceedings, the repeated attempts to prolong proceedings by seeking time to file a reply in the Section 9 Petition, (and not filing it at all), and now again in this Application, seeking time to file a reply (only to raise an objection in writing about the wrong sub-section being quoted), the Respondent shall pay costs in the sum of Rs. 10,000 to the Applicant, no later than two weeks from today. I have consciously tempered the

costs to the lower side, only bearing in mind the overall scale of the dispute. The arbitral tribunal shall factor in these costs should it become necessary for it to consider imposition of costs on either party when making the final award.

23. With the arbitral tribunal having been appointed by this order, nothing will survive in the Section 9 Petition, and the deposit made thereunder would need to abide by the outcome in the arbitral proceedings. However, since the Section 9 Petition was not listed on February 10, 2025, the Registry shall list the matter on the Supplementary List on the third working day after this order is uploaded on the website of this Court, to enable me to examine if there has been compliance with the order dated March 28, 2024, and to then finally dispose of the Section 9 Petition.

24. All actions required to be taken pursuant to this judgment shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]