

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.16 OF 2014

Atur India Pvt. Ltd.

... Applicant

V/s.

The Commissioner,
Pimpri Chinchwad
Municipal Corporation & Ors.

... Respondents

Mr. S. M. Gorwadkar, Senior Advocate i/b. Abhijeet Ambadas Joshi for
the Applicant

Mr. G. H. Keluskar for the Respondent Nos.1 to 3.

CORAM: K.K. TATED, J.
DATED : DECEMBER 18, 2015

P.C. :

1. Heard the learned counsel for the parties. This petition is filed under section 11 of the Arbitration and Conciliation Act 1996 (for short "the said Act") for appointment of an Arbitrator on the basis of the agreement dated 01/03/2006 and particularly clause 8, which reads thus:

"(a) That in case of any dispute regarding interpretation or meaning of any work of clause of the tender forms or the agreement, or meaning thereof the same shall be referred to Arbitration. The decision or award given by arbitrator will be binding on both the parties. The work of the arbitration will be subject to the provisions of Indian Arbitration and Conciliation Act, 1996."

2. The learned senior counsel for the Applicant submits that the Applicant entered into an agreement on 01/03/2006 for construction of Grade Separator at Khandoba Chowk (Akurdi) on Mumbai-Pune Road amounting to Rs.12,46,00,000/-. He further submits that thereafter the Applicant and Respondent entered into agreement dated 21/12/2007, for additional work of Rs.16.07 crores. He submits that, the Applicant carried out the work and raised bills. He submits that between 24.10.2008 to 15.10.2010 the Applicant raised bills of Rs.10,04,65,829/-. Out of the said amount, the Respondent paid sum of Rs.5,43,65,274/-. For the remaining amount of Rs.4,61,00,555/- the Applicant called upon the Respondent on several occasions. Same was remained unpaid till 11/01/2012. Hence, the Applicant, by letter dated 11/01/2011 called upon the Respondent no.3 regarding the said bills and the interest @ 18% on the delayed payment. The Respondent No.3, by his letter dated 29/01/2011 denied their liability to pay interest on the late payment on the basis of clause 45 of chapter 4 of the terms and conditions of contract. Hence, the Applicant issued letter dated 14/06/2011 to Respondent No.3, showing outstanding amount of Rs.1,57,33,320/- with interest upto 13/06/2011 @ 18% p.a. which was worked out on delayed payment of principal amount.

3. The learned senior counsel for the Applicant submits that as the Respondent failed and neglected to comply with the letter dated 14/06/2011, the Applicant, through their Advocate's notice dated 18/12/2012 called upon the Respondent to appoint an Arbitrator as per clause 8 of the said agreement. He submits that neither the

Respondent paid the amount nor appointed any Arbitrator. Hence, he filed the petition.

4. The learned senior counsel for the Applicant submits that the Respondent filed Affidavit-in-Reply dated 04/03/2015 to oppose the petition. The main contention raised by the Respondent is that as per clause 45 of chapter 4 of the additional conditions of agreement, they are not liable to pay any interest on delayed payment as well as on the security deposit or withheld amount. Clause 45 reads thus:

“Clause 45 :

“No interest on dues”

No interest shall be payable by the Corporation on amounts, due to contractors pending final settlement of claim. Further, no interest shall be payable by PCMC on any delayed amount/payment. No interest shall be payable on security deposit or withheld amount.”

5. The learned senior counsel submits that clause 8 of the said agreement specifically states that any dispute regarding interpretation or meaning of any work or clause of the tender forms or the agreement, or meaning thereof the same shall be referred to Arbitration. The learned senior counsel for the Applicant submits that the Applicant specifically disputed clause 45 of the said tender form, wherein it is stated that the Respondents are not liable to pay interest on the delayed payment. He submits that even if there is a clause 45 “No interest on dues”, the matter can be referred to the Arbitrator to resolve the dispute as to whether the Applicant is entitled to interest on the delayed payment or not. In support of this contention, the learned senior counsel for the Applicant relies on the judgment in the matter of

State of Goa Vs. Praveen Enterprises AIR 2011 Supreme Court 3814.

Paragraph 23 and 32 read thus:

“23. Section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator/s. It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed under Section 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures under Section 11(6) of the Act to ensure compliance by the parties with such procedure. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the Arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under Section 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application under Section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes raised by the Applicant under Section 11 of the Act and not the counter claims of the Respondent.”

32. The position emerging from above discussion may be summed up as follows:

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage earlier to the stage of pleadings before the Arbitrator.

(c) Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counter claims which are not part of the disputes specifically referred to arbitration.”

6. The learned senior counsel for the Applicant further relies on the Apex Court judgment in the matter of ***Arasmeta Captive Power Co. Pvt. Ltd. and Anr. Vs. Lafarge India Pvt. Ltd. 2013 (15) SCC 414***, wherein the Apex Court held that at the time of appointment of an Arbitrator, court to examine whether a claim made falls within the arbitration clause. He relies on paragraph 21 which reads thus:

22. In Boghara Polyfab Private Limited (supra) a two-Judge Bench, while understanding and explaining the duty of the Chief Justice or his designate, as defined in SBP & Co. (supra), has ruled thus: -

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

7. The learned senior counsel for the Applicant further relies on the judgment of the Apex Court in the matter of ***M/s.Mandani Construction Corporation (P) Ltd. Vs. Union of India AIR 2010 SC 383***, wherein the Apex Court held that even if there is a clause in the

agreement that, the claimant is not entitled to interest on delayed payment, the Court can refer the dispute to the Arbitrator. In support of this contention, he relies on paragraph 46 to 49 which read thus:

“46. In a subsequent decision of three-Judge Bench in the case of State of U.P. v. Harish Chandra and Company (1999) 1 SCC 63, there was stipulation in the arbitration agreement against grant of interest. The relevant clause namely Clause 1.9 to the aforesaid effect is set out below:

1.9 No claim for delayed payment due to dispute etc. No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in making periodical or final payments or in any other respect whatsoever.

47. Considering the said clause, the Court held that the prohibition in the said clause does not prevent the contractor from raising the claim of interest by way of damages before the arbitrator on the relevant items placed for adjudication. (see paragraph 10 page 67). In saying so, the learned Judges relied on the ratio in the case of B.N. Agarwalla (supra) and G.C. Roy (supra).

48. In Board of Trustees for the Port of Calcutta v. Engineers De Space Age MANU/SC/0735/1996 : (1996) 1 SCC 516, a two-judge Bench of this Court considered the same question. That was a case under the 1940 Act. In Engineers (supra), the so-called prohibition in the contract relating to payment of interest was in Clause 13(g), which is set out below:

13(g) No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or with respect to any delay

on the part of the Commissioners in making interim or final payment or otherwise.

49. Relying on the said clause, the appellant in *Engineers (supra)* argued that there was absolute prohibition against payment of interest. The learned Judges however, relying on the ratio in *G.C. Roy (supra)* held that Clause 13(g) merely prohibits the Commissioner from entertaining any claim for interest but it does not prohibit the arbitrator from awarding interest. The learned Judges held that such clauses must be strictly construed in view of the ratio of the Constitution Bench in *G.C. Roy (supra)*. The reasoning given by the learned Judges in favour of strict construction runs as follows:

".....Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified." (Para 4, page 520)

8. On the basis of this submission and the authorities of the Apex Court, the learned senior counsel for the Applicant submits that the objection raised by the learned counsel for the Respondent by filing an Affidavit-in-Reply on the basis of clause 45 of the terms and conditions

of the agreement is not sustained in law. Hence, this Hon'ble Court be pleased to appoint an Arbitrator as per the provisions of section 11 of the said Act.

9. On the other hand, the learned counsel for the Respondent vehemently opposed the petition. He submits that bare reading of clause 8 of the agreement date 01/03/2006 shows that if there is a dispute between the parties about the interpretation of any clause of the agreement, then the matter can be referred to the Arbitrator. He submits that in the present proceedings, the Applicant is seeking interest on delayed payment @ 18% p.a. He submits that there is specific clause in terms and conditions of the agreement i.e. clause 45 which says that “no interest on dues”. He submits that bare reading of clause 45 shows that even if there is delay on the part of the Respondent to make the payment, the Applicant cannot claim interest. Hence, there is no question of appointing any Arbitrator in the present proceedings, as there is no dispute about the payment of interest. In support of this contention he relies on the Apex Court judgment in the matter of ***Harsha Constructions Vs Union of India 2015 (1) Mh.L.J. 566***, wherein the Apex Court held that unless there is a specific written contract to refer an appropriate dispute to the Arbitrator, the Court has no power to appoint an Arbitrator in such matters. In support of this contention, he relies on paragraph 20 to 23 of the said judgment which reads thus;

“20. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the

disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the Arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been "excepted". Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner; there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act.

21. If a non-arbitrable dispute is referred to an Arbitrator and even if an issue is framed by the Arbitrator in relation to such a dispute, in our opinion, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the Arbitrator. In the instant case, the Respondent authorities had raised an objection relating to the arbitrability of the aforesaid issue before the Arbitrator and yet the Arbitrator had rendered his decision on the said "excepted" dispute. In our opinion, the Arbitrator could not have decided the said "excepted" dispute.

22. We, therefore, hold that it was not open to the Arbitrator to decide the issues which were not arbitrable and the award, so far as it relates to disputes regarding non-arbitrable disputes is concerned, is bad in law and is hereby quashed.

23. We also take note of the fact that the contract had been entered into by the parties on 24.4.1995 and the contractual work had been finalised on 31.3.1997. The Award was made on 21.9.2002 and therefore, we uphold the portion of the award so far as it pertains to the disputes which were arbitrable, but so far as the portion of the arbitral award which determines the rate for extra work done by the contractor is concerned, we quash and set aside the same."

10. The learned counsel for the Respondent also relies on the judgment of the Allahabad High Court in the matter of ***Union of India***

Vs. M/s. Madnani Construction Corporation (P) Ltd. AIR 2003 Allahabad 346. This authority cannot be considered, since it has been overruled by the Apex Court in the matter of ***M/s.Mandani Construction Corporation (P) Ltd. Vs. Union of India AIR 2010 SC 383.***

11. On the basis of this submission, the law declared by the Apex Court in the matter of Harsha Constructions (Supra), the learned counsel for the Respondent submits that there is no substance in the present proceedings and same be dismissed with costs.

12. Heard the learned counsel for the parties. It is to be noted that in the present proceedings in the agreement dated 01/03/2006, there is a specific clause of appointment of an Arbitrator, in case of any dispute regarding the interpretation or meaning of any clause of the tender form of the agreement. It shows that if there is delay in payment on the part of the Respondent, then also the Applicant can invoke the arbitration clause to claim interest. At the most, the Arbitrator can decide whether the Applicant is entitled to interest or not in spite of clause 45 of the terms of the agreement which is reproduced herein above.

13. Apart from that, the Apex Court, in the matter of Madnani Construction Pvt. Ltd. (Supra) specifically held that in spite of the specific provision in the agreement that the interest is not payable on delayed payment, then also the said issue can be decided by the Arbitrator considering the facts and circumstances of the case. The

Authority cited by the learned counsel for the Respondent in the matter of Harsh Construction is not applicable because in that case the Apex Court held that it is not open to the Arbitrator to decide the issue which were not arbitrable.

14. It is to be noted that this Court in the matter of **Naginhai C. Patel vs. Union of India 1999(2) BCR 189** held that if appointment of an arbitrator is not made within a reasonable length of time, the Chief Justice or the Judge designated by him may himself make the appointment. Paragraph 4 reads thus:

“4 I have carefully considered the rival submissions. In the instant case, the Applicant waited for 30 days from the date of demand for appointment of arbitrator and having failed to get response from the appointing authority within that period, approached the Chief Justice of this Court for appointment of arbitrator under sub-section (6) of section 11 of the Act. I do not find any infirmity in this action of the Applicant. The Applicant waited for 30 days from the receipt of request from the Applicant and on the failure of the appointing authority to appoint an arbitrator within such time, approached the Chief Justice under sub-section (6) of section 11 of the Act with a request to appoint the arbitrator. The absence of time limit in sub-section (6) of section 11 does not mean that the aggrieved party cannot request the Chief Justice or the person designated by him to take the necessary measure if no appointment is made by the appointing authority within a reasonable time. What is reasonable length of time will depend upon the circumstances of each case. If the appointment is not made within a reasonable length of time, the Chief Justice or the person designated by him may himself make the appointment. Ordinarily, 30 days should be reasonable length of time. Admittedly, this petition has been filed after lapse of 30 days from the receipt of demand by the respondents. That being so, no objection can be taken by the respondents to the filing of the present application. The purported appointment made by the

appointing authority during the pendency of this application is no appointment in the eye of law. It is non est. In view of the facts and circumstances set out above, in the instant case, it is for the Chief Justice or the person designated by him to make the appointment having due regard for considerations likely to secure the appointment of an independent and impartial arbitrator.”

15. Considering these facts and the law declared by the Apex Court as well as this court, in the above referred matters, I am of the opinion that the Applicant has made out a case for allowing this petition.

16. Hence, following order is passed:

- a. Arbitration petition is allowed.
- b. Mr. A. L. Alaspurkar, Retired District Judge, 1/31, Dhanishta, Tarangan Complex, Behind Cadbury Factory, Pokhran Road No.1., Thane (W) – 400 605 is appointed as an Arbitrator in the matter.
- c. The Arbitration Petition stands disposed of accordingly.

17. At this stage the learned counsel for the Respondent seeks stay of this order. I do not find any reason to stay the order. The oral request is rejected.

(K.K. TATED, J.)