

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**ARBITRATION PETITION NO.57 OF 2015**

M/s.Sanjay J. Avhad

.. Petitioner

vs.

The Garrison Engineer (I) and Anr.

.. Respondents

Ms.A.R.S.Baxi for the petitioner

**CORAM : K.K.TATED, J.**  
**DATED : 04/12/2015**

**PC:**

1 Heard the learned counsel for the petitioner.

2 Though respondents are duly served, no one appeared on behalf of them when the matter was called out.

3 This petition is filed by the petitioner under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator as per the terms and conditions of the agreement dated 25.4.2009.

4 The learned counsel for the petitioner submits that the respondent by their Works Order dated 25.4.2009 directed petitioner to carry out the work of Repairs of sewage lines including cleaning of septic tanks at AF station Deolali. She submits that pursuant to the said Works Order petitioner completed the work and informed the

respondent by letter dated 30.6.2010 for issuing completion certificate. She submits that thereafter the respondents by their letter dated 18.7.2011 and 25.11.2011 disputed the completion of the work. She submits that the respondent by the letter dated 18.7.2011 stated that the petitioner carried out work upto 65% whereas by letter dated 25.11.2011 only 75% work has been carried out. She submits that the respondent failed to show which type of work remained to be carried out. Thereafter, the petitioner by their letter dated 26.11.2013 called upon the respondent to appoint Arbitrator as per clause 70 of the General Conditions of Contract which reads thus:

**“70. Arbitration** – All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an [Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub-Division II of Institution of Surveyor (India) recognised by Govt. of India.] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works of termination or determination of the Contract under Condition Nos.55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos.52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacated his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, *ex parte*, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of

the parties, enlarge, the timing for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute, [ The arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims ]

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract.”

5 The learned counsel for the petitioner submits that though notice was duly served on the respondent, they failed and neglected to appoint Arbitrator. Hence, the present petition.

6 The learned counsel for the petitioner pointed out that though respondents filed their Affidavit-in-Reply dated 26.8.2015 to oppose the present petition they failed and neglected to point out the list of incomplete work.

7 It is to be noted that our Hon'ble Court in the matter of Naginbhai C. Patel vs. Union of India<sup>1</sup> held that if the appointment of arbitrator is not made within a reasonable length of time, the Chief Justice or the person 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 petitioner 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 petitioner. The petitioner waited for 30 days from the receipt of request from the petitioner 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

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1 1999(2) BCR 189

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.”

8 Even the Apex Court in the matter of *Datar Switchgears Ltd. vs. Tata Finance Ltd. And Another*<sup>2</sup> held that if party having responsibility of appointing arbitrator does not do so within 30 days of demand being made by the other party, court can appoint any other person as Arbitrator. Paragraph 19 reads thus:

“19 So far as cases falling Under Section 11(6) are conceded - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed Under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get

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2 (2000) 8 SCC 151

automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court Under Section 11, that would be sufficient. In other words, in cases arising Under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application Under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator Under Section 11(6) is forfeited.”

9      Considering the principle decided by the Apex Court, the present petition requires to be decided because in the present proceeding though the petitioner by legal notice called upon the respondent to appoint the Arbitrator as per clause 70 of the General Conditions of Contract, they failed and neglected to do so. Though the respondents filed the reply in the present petition, failed to remain present when the matter was called out.

10    Office note shows that for last two occasions, no one appeared on behalf of respondents. As no one appeared on behalf of respondent and considering the submissions of petitioner, I am satisfied that petitioner has made out a case for appointment of Arbitrator as per

Clause 70 of the General Conditions of Contract. Hence, following order is passed:

a) Dr.C.S.Suryawanshi, B.E. (Civil) M.Tech.(Struc.), M.E.(Con/Man), LLM, DBM, Ph.D, FIE (IND), FICI FIGS, FICA, MIRC, MIBC, MASET is hereby appointed as Arbitrator having address as under:

706, Anand Vihar CHS Ltd.  
MHADA Complex, Oshivara,  
Andheri (W),  
Mumbai 400 053.

b) Registry is directed to inform the Arbitrator of his appointment in the present case.

c) Petition is disposed of accordingly.

**(K.K.TATED, J.)**