

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION (STAMP) NO.29139 OF 2014

M/s. Asawari Publicity Pvt. Ltd. Petitioner

V/s

**Pune Mahanagar Paravihan
Mahamandal Ltd. & Anr. Respondents**

Mr. A.A. Kumbhakoni, Senior Counsel a/w Mr. L.M. Acharya
i/b Mr. Kunal Bhanage for Petitioner
Mr. Parag V. Dube for Respondent No.1.
Mr. Abhijit P. Kulkarni for Respondent No.2.

CORAM : A.A. SAYED, J.
DATED : 23 JANUARY 2015

P.C.

1 This Arbitration Petition filed under section 11 of the Arbitration & Conciliation Act, 1996 seeks appointment of a substitute Arbitrator, instead and place of the Municipal Commissioner who is named as sole Arbitrator under clause 20 of the Tender Document which forms the subject matter of the arbitration proceedings between the parties.

2 The erstwhile Pune Municipal Transport (PMT) had published a Tender Notice inviting bids for construction of Bus Queue Shelters (BQS) on Bus Rapid Transport (BRT) Pilot

Project between Katraj and Hadapsar via Swargate. The Petitioner participated in the tender process and being a successful bidder was awarded the contract by the erstwhile Pune Municipal Transport (PMT) vide work order dated 6 November 2006. The scope of work involved the setting up of 108 Bus Queue Shelters (BQS) as per the specifications and terms and conditions mentioned in the Tender Document. The work was to be completed within a span of one month from the date of issuance of the work order. Disputes and differences however arose between the parties.

3 On 19 October 2007 the Pune Municipal Transport (PMT) merged with a new undertaking constituted by Pune Municipal Corporation (PMC) and Pimpri-Chinchwad Municipal Corporation (PCMC) namely, Pune Mahanagar Parivahan Mahamandal Ltd. (PMPML), the Respondent No.1. On 26 February 2013, the Petitioner approached the District Court, Pune for interim measures under section 9 of the Arbitration & Conciliation Act, 1996 to restrain the Respondent No.1 from terminating the contract. The Petitioner failed to obtain any injunction against the Respondent No.1. In the Arbitration Appeal filed by the Petitioner before this Court impugning the rejection of injunction by the

District Court, the parties were directed to take steps to get the Arbitrator appointed expeditiously since in the meantime, as the Respondent No.1 had already proceeded to terminate the contract vide a letter dated 21 December 2012 and had demanded royalty from the Petitioner of Rs. 3.15 Crore for the period from 1 December 2006 to 20 December 2012.

4 It is the case of the Petitioner that at the time when the tender document was released and the subject contract was awarded to the Petitioner, the Municipal Commissioner of the Pune Municipal Corporation (PMC) had no affiliation or interest in the Pune Municipal Transport (PMT) nor was he involved in the day-to-day functioning or participated in the decision making of PMT. That position however no longer holds good and the Municipal Commissioner is no more an independent Authority and is an active member of the decision making body of Respondent No.1, is what the Petitioner contends. According to the Petitioner, after the contract was awarded to them, the Pune Municipal Transport (PMT) merged into new body i.e. Respondent No.1 constituted jointly by PMC and PMPML and thereby PMT ceased to exist and the Municipal Commissioner of Pune Municipal Corporation (PMC) who was named as sole

Arbitrator became an Ex-Officio Director in the Board of Directors of the Respondent No.1.

5 Learned Senior Counsel for the Petitioner submitted that the Municipal Commissioner, PMC, is an active member of the decision making body of the Respondent No.1 and is involved in taking vital decisions affecting the rights of the Petitioner qua the subject contract. He submitted that the Municipal Commissioner cannot be a Judge on his own cause. He further submitted that there has been substantial delay in the commencement of the arbitral proceedings and that there has been a change in the Municipal Commissioner twice over and none of the Municipal Commissioners have taken any steps for holding the arbitral proceedings, and did not carry out their functions under the contract. It is submitted that even though the Claim Statements are filed more than a year ago till today even a preliminary meeting has not been held. He therefore, submitted that it is necessary that an independent, impartial Arbitrator, preferably a retired High Court Judge of this Court, be appointed in place and instead of Municipal Commissioner to adjudicate the disputes and differences between the parties. In support of the submission the learned Senior Counsel has relied upon the following judgments:

- i) **North Eastern Railway and Others vs. Tripple Engineering Works, (2014) 9 SCC 288;**
- ii) **P. Dasharatharama Reddy Complex vs. Government of Karnataka and Another, (2014) 2 SCC 201; and**
- iii) **Union of India vs. Singh Builders Syndicate, (2009) 4 SCC 523.**

6 I have heard the learned Counsel for the parties. As stated in the Affidavit-in-Reply of Respondent No.1, the Petitioner has not raised any objection to the terms and conditions of the contract nor challenged the Arbitration clause contained therein. After the disputes arose between the parties, it was the Petitioner who had approached the Arbitrator i.e. the Municipal Commissioner on 16 August, 2012 along with Statement of Claim, requesting the Arbitrator to enter upon the reference. The Written Statement by the Respondent No.1 was filed in August 2013 along-with their own Statement-of-Claim. The Petitioner thereafter filed Written Statement to the Statement of Claim filed by the Respondent No.1. For about two years the Petitioner did not raise any objection to conduct of the proceedings before the Municipal Commissioner. On 11 October 2013 the Respondent No.1 had preferred an Application under section 16 of the

Arbitration & Conciliation Act, 1996 challenging the jurisdiction of the Arbitrator to entertain and decide the dispute filed by the Petitioner on the ground that the same was not and could not be subject matter of Arbitration. On 22 July 2014 the Respondent No.1 filed another Application to include the name of Mr.Shekhar Mundada (former Director of the Petitioner Company) as a party to the arbitration proceedings. Pertinently it is only after the filing of the aforesaid two Applications by the Respondent No.1, that the Petitioner has approached this Court. The Petitioner has not made any grievance about the conduct of the proceedings before the Municipal Commissioner or about the present Municipal Commissioner being biased. The Municipal Commissioner is an Officer of IAS cadre and his services are requisitioned by the State Government. During the Arbitration proceedings two Municipal Commissioners have changed and have been replaced. The Petitioner had clearly accepted the terms and conditions filed in the Tender in 2006. Moreover, no Application has been filed by the Petitioner before the Arbitrator seeking a change of Arbitrator.

7 It has been clarified in the Affidavit-in-Reply of Respondent No.1 that the Municipal Commissioner is not an Officer of

Respondent No.1 - Pune Mahanagar Parivahan Mahamandal Ltd. (PMPML) or Pune Municipal Transport (PMT) and that he looks after the work of Respondent No.1 (PMPML) only as a Director and does not have any administrative powers and the decisions of the Respondent No.1 (PMPML) are taken by the Board of Directors which consists of ten members and the appointment of the Municipal Commissioner is only as Ex-Officio Director. It is averred that the Petitioner only wants to prolong the matter.

8 **Northern Eastern Railway's** case was one where the Supreme Court noted that there was a delay of about two decades in finalizing the Arbitration proceedings and it is in these circumstances that the Supreme Court held that even if the agreement specifically provides for any particular qualification of an Arbitrator, in an appropriate case, the Court is not powerless to appoint Arbitrator under section 11 (6) of the Arbitration & Conciliation Act, 1996. Even in the case of **Union of India vs. Singh Builders Syndicate** (supra), the matter was pending for a number of years when the Respondent therein had made the request for the reference to Arbitration and the cumbersome process of constituting Arbitral Tribunal in terms of the Arbitration

Agreement and the delay on part of the Railways in complying with the provisions of the Arbitration Agreement led to the Arbitration becoming virtually a non-starter. It is in these circumstances, the Hon'ble Supreme Court did not interfere with the High Court appointing a retired Judge of High Court as the sole Arbitrator. Bare reading of the aforesaid judgments bring out that it is only in exceptional circumstances that there can be a deviation from the clause of the Agreement for appointment of Arbitrator. In the present case, I do not find any such exceptional circumstances so as to warrant the appointment of a new Arbitrator which would be at variance with the stipulations in the contract between the parties. I do not find that there is any gross delay in conducting the Arbitral proceedings. In the circumstances, no case for appointing a substitute Arbitrator has been made out.

9 For all these reasons, the Petition is dismissed. No order as to costs.

(A.A. SAYED, J.)

katkam