

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO. 7 OF 2016

M/s. Manohar Pitamber
Engineers and Contractor
through its Partner Mr Dhanraj Pitamber Jadwani,
age 45 years occupation contractor
office address: 4/363/1, Timber Market,
opposite Bhagwati Saw Mill,
Bhusawal Taluka Bhusawal District Jalgaon.

...PETITIONER

VERSUS

The General Manager,
South Central Railway,
Secunderabad (A.P.),
representing Union of India

...RESPONDENT

Mr. Girish K. Thigle (Naik), Advocate for petitioner

Mr Manish N. Navandar, Advocate for respondent sole.

CORAM : NITIN W. SAMBRE, J.

DATE : 22nd September, 2017

ORAL ORDER :

This is an application under Section 11 of the Arbitration and
Conciliation Act, 1996.

2. The parties to the present proceedings are not disputing existence of Arbitration Agreement under Section 7 of the Act.

3. The claimant has based his claim in view of the Government of India, Ministry of Railways, Railway Board, Circular dated 20th January 1987, providing a variation clauses, which according to respondent railway, cannot be read in Arbitration Agreement.

4. In the aforesaid backdrop, learned Counsel for the respondent while opposing claim for appointment of Arbitrator would urge that this Court should not appoint Arbitrator, particularly, in view of the fact that date of completion of work in the present case is 20th April 2013, the claim should have been made within period of 120 days to 180 days from the date of presenting final bill. He would submit that for the first time, the notice for appointment of Arbitrator by raising a dispute is issued on 29th March 2016, and as such, this Court should reject the claim of the applicant for appointment of Arbitrator.

5. It is required to be noted that this Court is required to confine itself only to the extent whether there is Arbitration Clause or not. There is no dispute as regards existence of Arbitration Clause, however, the prayer for appointment of Arbitrator is opposed on the

grounds that (a) belated prayer for appointment of Arbitrator is made contrary to the Arbitration Agreement; and (b) on the date of the agreement, since section 16 was not inserted, this Court is required to deal with issue of limitation and other issues on merit, which are sought to be raised by the respondent.

6. In the case in hand, final bill was credited to the account of petitioner by the respondent on 26th June 2013. It is not in dispute that this petitioner preferred Writ Petition being No. 5710 of 2013, which was decided on 3rd March 2014, in which he has lead base for grant of benefit of price variation clause in view of policy of respondent. As such, it has to be inferred that the petitioner is trying to agitate his claim for price variation since then.

7. Apart from above, this Court in an identically placed situation in Arbitration Application No. 5 of 2013 had an occasion to consider the aforesaid limitation, as is sought to be canvassed by the respondent of raising claim within 120 to 180 days from the date of submission of final bill. This Court in the said matter has overruled objection raised by the respondent and has appointed an Arbitrator, vide Order dated September 26, 2013, which order I am informed is not questioned further by the respondent.

8. Apart from above, resistance of the respondent on the issue of appointment of Arbitrator is based on the terms as on date of execution of the agreement is concerned, in my opinion, what is required to consider is not the position as is existing on the date of entering into an agreement, particularly, Arbitration Agreement, but also the law as is existing on the date of filing of application before this Court. The Arbitrator can go into the said issue. This Court is required to appreciate only the issue of existence of Arbitration Agreement.

9. In view of above, the claim of the respondent that this Court must while dwelling upon issue of limitation, whether such claim if within limitation is based on the clause, which could be read in agreement, cannot be gone into at this stage, as it is an issue which can be looked into by the Arbitrator.

10. In this view of the matter, in my opinion, arbitration application needs to be allowed. Shri Justice P.B. Gaikwad (retired) is appointed as Arbitrator.

(NITIN W. SAMBRE, J.)

pjm.