

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

ARBITRATION PETITION NO.21 OF 2017

Sagar Enterprises Petitioner

Vs.

Bharti Infratel Limited Respondent

Mr. P.G. Sontakke i/by Mr. V.S. Tadake, Advocate for the Petitioner.

Mr. Rajesh Kanojia i/by Deepak Sabharwal & Associates for the Respondent.

Coram : G.S. KULKARNI, J.

Date : 7 SEPTEMBER, 2017

P.C. :

1 By this petition under Section 11 of the Arbitration and Conciliation Act, 1996, the petitioner seeks appointment of an Arbitrator to adjudicate the disputes and differences between the parties arising under the Rate Contract dated 28 March 2007 (page 38 of the paper-book). The contract between the parties was for civil work for RTT/GBT sites for which the rate contract was entered into between the parties. It is not in dispute that the annexure to this rate contract, in Clause 3 defines the scope of work. The arbitration

agreement between the parties appears on page '2' of the rate contract (page 39 of the paper-book), which reads thus :

“ARBITRATION :

“i All disputes, differences and/or claims arising out of this agreement shall be settled by Arbitration in accordance with the provisions of Arbitration and Conciliation Act, 1996 or any statutory amendment thereof.

ii The Arbitration proceedings shall be held at Pune”.

2 The case of the petitioner is that they have executed works under the rate contract and from time to time, various invoices were raised on the respondents. My attention is drawn to the Vendor Reconciliation Statement, appearing at page 73, Exhibit 'D' to the petition, which according to the petitioner would indicate that at some relevant time an amount of Rs.51,321,530/- due and payable by the respondent to the petitioner. A reference is also made to an email dated 3 May 2013 of the respondent to the petitioner where the payment of certain amount has been admitted. As the invoices raised by the petitioner were not honoured, the petitioner had issued a notice dated 29 December 2014 under Sections 433 and 434 of the Companies Act, 1956. In addition to the said notice, the petitioner, by its advocate's letter dated 1 February 2016 addressed to the

respondents recorded that the final amount of Rs.15,44,39,948/- was due and payable under the invoices, and called upon the respondent to make said payment, failing which the respondents were called upon to refer the disputes for arbitration by appointment of an Arbitrator. This notice of the petitioner was not responded. Accordingly, petitioner has approached this Court by filing the present petition.

3 The respondent has appeared as also a reply-affidavit has been filed to oppose the present petition. The contention as raised on behalf of the respondent is that the petitioner has been paid all the outstanding amounts, this, referring to a Discharge Receipt dated 4 December 2012, which according to the respondent has been issued by the petitioner. The respondents contend that this discharge receipt would show that the petitioner has received Rs.82,37,659/- in full and final satisfaction and in discharge of all the claims. It is therefore contended that there are no disputes between the parties. The second objection to this petition is that the contract in question is only a rate contract and therefore the work for which the invoices

are issued would not fall within the ambit of the rate contract and thus in regard to these invoices, the petitioners cannot invoke a reference to the arbitration.

4 Having heard the learned counsel for the parties and with their assistance, having perused the relevant documents as placed on record, it appears to be not in dispute that the rate contract dated 28 March 2007 as noted above was entered into between the parties and which contains an arbitration clause as noted above, where the parties have agreed that disputes arising between the parties under the agreement be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, the venue of the present proceedings to be at Pune. The first objection as urged on behalf of the respondent that it was only a rate contract and it would not include the civil works for which the invoices have been issued, prima facie, cannot be accepted. This for the reason that there is no dispute to the annexures, of this rate contract which define the scope of the work to include the civil work. In any event, the respondents are not in a position to show that apart from the contract titled as rate contract,

there was some other contract, with the petitioner under which the petitioner has executed the work orders. In my opinion, this contention of the petitioners cannot be accepted in considering a Section 11 application, the respondent can raise this plea in defence, in the arbitral proceedings. The second issue in regard to the Discharge Receipt dated 4 December 1992 as referred on behalf of the respondent to contend that the petitioners have received an amount of Rs.82,37,659/- in full and final settlement also cannot be accepted. This for the reason that the discharge receipt is completely silent and does not refer to the invoices. In any event in paragraph 1 of the discharge receipt, the reference records that it is in full and final satisfaction and discharge of all the claims with regard to the work performed and material supplied till 4 December, 2012. Prima facie, the discharge receipt does not cover the entire amount of claim as made by the petitioner. It refers only to a part of the claim and this defence that such an amount to the extent of Rs.82,37,659/- would not entitled to the petitioner, in view of the discharge receipt would always be available to the respondent to be urged in the arbitral proceedings being on the merits of the dispute. It would be for the

arbitral Tribunal to consider the issue as to whether the discharge receipt, which is relied upon by the respondent is a discharge receipt in respect of the entire claim of the petitioner or only it is a part discharge. In the circumstances, the above objections as urged on behalf of the respondent would not preclude the Court to proceed and pass orders under Section 11(6) of the Act. The petition would be required to be allowed, in view of the clear agreement between the parties for referring the disputes to arbitration.

5 The Court accordingly proposes to appoint Mr. Justice D.G. Karnik, Former Judge of this Court as an Arbitrator to adjudicate the dispute between the parties arising under the Rate Contract dated 28 March 2007. In the first instance, the proposed Arbitrator will make a disclosure in terms of Section 11(8) read with 12(1) of the Act, thereafter enter upon reference. In the event, the disclosure is not made in the reasonable time or disclosure discloses the inability of the proposed Arbitrator to act as such, it will be open to the parties to apply to this Court for direction. The parties will appear before Mr. Justice D.G. Karnik, Former Judge of this Court on a date to be fixed by him, which will be informed to the parties atleast 15 days in

advance. The arbitration petition is disposed of in the above terms.

No order as to costs.

6 Copy of this order be forwarded to Mr. Justice D.G
Karnik, Former Judge of this Court.

(G.S. KULKARNI, J.)