

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION PETITION NO. 418 OF 2017

Union of India, Represented through
The Director General Naval Project, Mumbai .. Petitioner
Vs.
Hindustan Construction Co. Ltd. .. Respondent

Mr.G. Hariharan for petitioner.

Mr.Naushad Engineer a/w. Ms.Meenakshi Iyer, Ms. Prachi Ojha and
Ms.Mathumitha Srinivasan i/b Advaya Legal for respondent.

**CORAM : K.R.SHRIRAM, J.
DATE : 24TH AUGUST 2017**

P.C.

1 This petition is filed under Section 14(2) of the Arbitration and Conciliation Act, 1996 as amended (The said Act) for a declaration that the mandate of the Arbitrator appointed by petitioner in the ongoing arbitration proceedings stands terminated with effect from 31st March 2017 because the Arbitrator has retired from service. For convenience, petitioner is referred herein as UOI and respondent is referred to as HCC.

2 UOI had awarded a contract to HCC for reconstruction and completion of a dry dock associated North and South wharves at Naval Dockyard, Mumbai way-back in 2010. Disputes arose between the parties On 8th August 2013, HCC nominated one Shri A.B.Pawar as their Arbitrator.

On 30th September 2013, UOI nominated Cmde.R.K.Srivastava as their Arbitrator. On 5th January 2014, both the Arbitrators appointed Shri O.P. Goel as Presiding Arbitrator and thereby the Arbitral Tribunal was constituted.

3 On 19th March 2014, the Arbitral Tribunal issued directions and between 14th March 2015 to 10th December 2015, HCC, who is the claimant in the arbitration proceedings, made their oral submissions. On 4th August 2016, UOI, who is respondent in the arbitration proceedings, commenced their oral submissions. On 3rd March 2017, UOI sought leave of the Arbitral Tribunal to file additional documents which was opposed by HCC. On 7th March 2017, UOI filed an application under Section 15 of the said Act for substituting Cmde. Srivastava, as he was due for retirement, with Shri Prakash Makhijani as Arbitrator. The arbitration clause 20.6 of the Contract reads as under :

20.6 Arbitration

“Any dispute in respect of which the decision, if any, of the DDG & CE has not become final and binding pursuant to Clause 20.5 shall be finally settled by arbitration as set forth below :

(i) Arbitration shall be carried out in accordance with the rules of Indian Arbitration & Conciliation Act, 1996 or any statutory amendment thereof. The Arbitral Tribunal shall consist of 3 Arbitrators, one each to be appointed by the employer (a serving Engineer of MoD) and the Contractor, the third to be appointed by the mutual consent of both the arbitrators, by making a

reference to CIDC-SIAC”.

4 The clause provides that the Arbitral Tribunal shall consist of three Arbitrators. The Arbitrator to be appointed by UOI was to be a Serving Engineer of Ministry of Defence. When he was appointed, Cmde.R.K.Srivastava, was a Serving Engineer of Ministry of Defence. Petitioner's case is that Cmde. R.K.Srivastava has retired on 31st March 2017 and therefore he ceased to be a Serving Engineer and therefore lost his authority to continue as an Arbitrator. Shri Hariharan for petitioner relied on judgments of a Single Judge of this Court in ***The Director General of Naval Project (MB) & Anr. Vs. M/s. Continental Construction Ltd.***¹ to submit that once the appointed Arbitrator ceased to be a Serving Engineer, the party can appoint another Arbitrator in his place who will also be a Serving Officer. The counsel also relied on ***Union of India & Ors. Vs. Prabhat Kumar & Bros. & Anr.***² in support of this submission.

5 I do not agree with Shri Hariharan because the facts in the judgments relied upon by him and the facts in this case are different. In those matters, the arbitration clause provided for a situation, if appointed Arbitrator, who would be a Serving Officer, vacates his office. The arbitration clause provided “*if the Arbitrator so appointed resigns from his appointment or*

1 ARBAP/162/2007 A/W. ARBP.315/2008 dt.11th June 2010 (Unreported)

2 1995 Supp.(4) SCC 525

vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him, may appoint him a new Arbitrator in his place". Such a sub-clause as could be seen from the arbitration clause quoted above, is absent in our matter. A similar issue arose, which was considered by a Single Judge of this Court in ***Godawari Marathwada Irrigation Development Corporation V. S.D. Shinde & Co.***³ where the clause was similar to the clause in our matter. In *Godawari* (supra), the arbitration clause provided for the Chief Engineer to send to the Contractor a list of three Officers of the rank of Superintending Engineer or higher and a Superintending Engineer was appointed as the Sole Arbitrator. The Corporation took a stand that upon retirement of the Serving Engineer, he could not continue as an Arbitrator because he did not possess the qualification agreed to by the parties. The Court did not agree with the contention of the Corporation. Shri Hariharan submits that *Godawari* (supra) is not applicable because what the clause in our matter provides is for '*Serving Officer*' and the clause in *Godavari* (supra) says '*Superintending Engineer*'. In my view that makes no difference.

6 Arbitration clause provides who can be appointed as an Arbitrator on behalf of petitioner. The appointment would be of a Serving Engineer of

3 2014 SCC OnLine Bom 4033

Ministry of Defence. Shri Srivastava on the date he was appointed, was a Serving Engineer of Ministry of Defence and therefore his appointment was correctly made. In fact, Shri Hariharan agreed that his appointment was correctly made but the only point he raised that he ceased to be a Serving Officer and therefore he cannot continue.

7 I cannot agree with Mr.Hariharan because arbitration clause does not provide that petitioner may appoint another Arbitrator once the Arbitrator appointed by them vacates his office. In my view, such interpretation as submitted by petitioner does not emanate from the arbitration clause. The clause does not provide that pursuant to retirement of the Serving Officer, who has been appointed as Arbitrator, he shall have to be replaced by another Serving Officer as the Arbitrator and he shall continue till he retires and again to be replaced. An arbitration clause is an agreement between parties to the agreement on method of dispute resolutions. Court cannot read into an arbitration clause something which is non-existent.

8 In absence of an intention in the arbitration clause, if the Court allows the petition, petitioner will again approach this Court once Shri Makhijani retires, to appoint another person as the Arbitrator. It would be absolute waste of time and costs because every time a new Arbitrator is appointed,

parties will have to re-open their entire arguments. In this case, the arbitral reference was first made in August 2013. The claimant, who is respondent herein, has already concluded its arguments before the Arbitral Tribunal and even petitioner, who is respondent in the arbitration proceedings, has also commenced its oral submissions. Moreover, Section 14 does not provide for a situation like in this matter.

9 Petition dismissed.

No order as to costs.

(K.R. SHRIRAM, J.)