

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

ARBITRATION APPLICATION NO.256 OF 2016

Shankaraiah Ashanna Ayyori)....Applicant
V/s.

Union of India)....Respondent

Ms.Sumi Soman for the applicant.
Mr.Y.R.Mishra for the respondent.

CORAM : K.R.SHRIRAM,J
DATE : 16.11.2017

P.C.:-

1 This application is filed under section 11 of the Arbitration and Conciliation Act 1996 (the said Act). Respondent had invited tenders for carrying out work of structural repairs of PHP (Port Health Organization), Building at 7, Mandlik Road, behind Taj Hotel, Colaba, Mumbai. The applicant submitted his offer which was accepted by respondent and work was awarded to applicant vide letter of acceptance dated 21.12.2013. Clause-25 of the General Clauses of Contract-Settlement of Disputes and Arbitration reads as under :-

“Clause 25.....

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the

concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General of works, CPWD as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him

by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

2 The dispute arose due to alleged non payment of bills raised by the applicant and therefore, it is the case of the applicant that despite calling upon respondent to make payment, Executive Engineer of respondent not only failed to make payment but even failed to respond to communications. Applicant therefore, by letter dated 14.8.2015 requested Superintending Engineer of respondent to give his decision in writing on the disputes within the time period stipulated under the contract. As the Superintending Engineer failed

to give his decision on the disputes referred to him, the applicant, in accordance with the terms of contract, referred the dispute to Chief Engineer of respondent for his decision vide communication dated 14.10.2015. As the Chief Engineer has also failed to give his decision, the applicant addressed a communication dated 16.11.2015 and requested respondent to constitute the Dispute Redressal Committee and to refer the disputes to the committee. Respondent responded and intimated to the applicant, details of the constitution and members of the Dispute Redressal Committee vide letter dated 19.1.2016. Applicant referred the dispute to the Disputes Redressal Committee vide his communication dated 28.1.2016 and requested the committee to give its decision within the time stipulated in the contract. It is alleged in the petition that even the Disputes Redressal Committee failed to give its decision on the disputes and therefore, applicant addressed communication dated 4.7.2016 to the Chief Engineer of respondent invoking arbitration and referring the disputes for arbitration in the format as prescribed by the respondent and called upon the Chief Engineer to appoint sole arbitrator. It is alleged that respondent has failed to comply with the requisitions contained in the said letter dated 4.7.2016 invoking arbitration and hence this application has been filed.

3 In the affidavit in reply, none of these allegations made in the application has been denied. It is a stand of the respondent that no amount is payable to applicant. Respondent, relying upon the following portion from clause-25, is alleging that this application is not maintainable. The portion on which respondent is relying upon reads as under :-

“It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General of works, CPWD as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.”

4 According to respondent, this Court has no jurisdiction to appoint an arbitrator because the above portion of clause-25 is a conditional clause whereby the parties agreed to refer dispute to arbitration of the person appointed by Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD (the said Authorities) otherwise the matter shall not be referred to arbitration at all. It is the case of respondent that as no person is appointed by the said Authorities pursuant to the said clause, the matter cannot be referred to Arbitration at all and parties are free to take recourse to Civil Courts in accordance with Law.

Respondent has also taken a stand that section 11 of the said Act comes into play only when there is an arbitration agreement between the parties but there is a failure of procedure to appoint an Arbitrator. According to respondent, this is not a case of failure of procedure for appointment of arbitrator which will enable the Court to exercise its jurisdiction but a situation where there is no arbitration agreement.

5 Mr.Mishra counsel for respondent strongly opposed the application of applicant. He submitted that there is no outstanding dues to applicant. He also submitted that the provisions of the arbitration clause expressly mandates that no person other than a person appointed by such Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD should act as an arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all. He submitted that the said clause is conditional upon the aforesaid authorities appointing an arbitrator and since no person is appointed by any of the aforementioned authorities, this Court ought not to exercise its jurisdiction under Section 11 and refer the parties to arbitration. He further submitted that failure of the said condition renders the arbitration agreement nugatory.

6 As I understand, according to respondent, the intention of parties was that the dispute will not be referred to arbitration at all if the arbitrator is not appointed by the authorities mentioned in the clause quoted above. In other words, it means that if the said authorities mentioned above depending on their whims and fancies or ipse dixit probably to harass a party, may decide not to appoint an arbitrator, no arbitration can be commenced.

7 Applicant has, in the application, listed all the correspondence which he has addressed to the said authorities seeking redressal of his claims and the authorities have not even bothered to respond. Even in the affidavit in reply, there is no denial. Considering the averments in the petition, it is rather clear in this matter that intention of respondent and the said authorities was only to harass the applicant.

8 It should be remembered that respondent is Union of India represented by the Executive Engineer. This controversy is also required to be viewed from another perspective : the policy of Union of India to encourage resolution of disputes by arbitration. It is now a stated legislative intent that alternative dispute resolution mechanism must be encouraged and, therefore, courts are required to exercise

their jurisdiction to resolve the disputes to hold the parties to their bargain to resort to arbitration of the disputes. It will be useful to reproduce paragraph-96 from the Judgment of the Apex Court in ¹***Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors.*** and the same reads as under :-

“96. Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessary to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers.”

9 Thus, the arbitration clause must be interpreted in favour of sustaining the arbitration agreement as opposed to permitting the parties to resile from the same on baseless grounds.

10 The stand of respondent that this court cannot exercise its jurisdiction under Section 11 and that dispute will not be referred to arbitration at all if the said authority mentioned in the clause decides, arbitrarily or in his/her ipse dixit, not to appoint an arbitrator, is misplaced. The clause quoted above should be interpreted to mean that dispute cannot be referred to arbitration to a person who was

1 (2013) 1 SCC 641

otherwise ineligible under the provisions of Arbitration & Conciliation Act, 1996. I find support from an unreported order of Delhi High Court passed in ²***B.E.Billimoria & Co. Ltd. Vs. Rites Limited & Anr.***

11 When one reads the entire clause 25 of the General Clauses of Contract as quoted above, it is quite clear that intention of the parties itself is to refer all disputes to arbitration if earlier attempts to resolve by various mechanism failed.

12 In the present case, it is not the case of respondent that it is impossible for an arbitrator appointed by the authority to act as such. There is nothing on record why respondent do not wish or is unable to or did not appoint arbitrator.

13 The Apex Court in its judgment in the matter of ³***Datar Switchgears Ltd. vs. Tata Finance Ltd. & Anr.*** has held that if the party that had a right to make an appointment does not make the appointment before the application under Section 11 is filed, forfeits that right to make appointment. Respondent having failed to make the appointment, has forfeited its right to appoint arbitrator.

2 Arbitration Petition No.716/2016 & IA No.15567/2016 decided on 31.1.2017

3 (2000) 8 Supreme Court Cases 151

14 Even in the affidavit in reply there is no explanation as to why the said authority did not even respond let alone appoint an arbitrator. Respondent cannot take such an arbitrary and a don't care attitude. The said authorities and respondent should realize that they are public bodies.

15 This application has to succeed. The following order therefore, is passed :-

ORDER

(i) Mr.Aurup Dasgupta, an advocate practicing in this court, having his office at 5th Floor, Aban House, Saibaba Marg, Rampart Road, Fort, Mumbai-400 023, Mobile No.9820932941, Tel No.66356901/02/03, is appointed as sole arbitrator to arbitrate on all disputes and differences including, counter claim, if any, arising out of and in connection with the tenders invited for carrying out work of structural repairs of PHP (Port Health Organization) building at 7 Mandlik Road, behind Taj Hotel, Colaba, Mumbai read with work order/letter of acceptance dated 21.12.2013;

(ii) The fees, administrative expenses, typing charges and venue charges shall be shared equally between the

parties and the same will be cost in the arbitral proceeding ;

(iii) Within 3 weeks of receiving a copy of this order either from the advocates for applicant or for respondent, the learned Arbitrator shall file with the parties, disclosure in writing as required under Section 11(8) read with section 12(1) of Arbitration and Conciliation Act, 1996 ;

16 In my view, this is a fit case to impose cost on respondent. Respondent to pay sum of Rs.25,000/- as cost to petitioner for this application. This amount to be paid within 4 weeks from today by way of cheque drawn in favour of advocate for applicant.

17 Application disposed.

(K.R.SHRIRAM,J)