

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO. 251 OF 2015

Vipin Bhimlal Shah

...Applicant

Versus

Slum Rehabilitation Authority

...Respondent

Mr.Sumi Soman, for the Petitioner.

Mr.Jagdish G.(Aradwad) Reddy, for the Respondent.

CORAM : G. S. KULKARNI, J.

RESERVED ON : 23rd August,2017

PRONOUNCED ON : 12th October,2017

JUDGMENT :

1. By this application under Section 11(6) of the Arbitration and Conciliation Act,1996 (for short 'the Act') the applicant is seeking appointment of an arbitrator for adjudication of the disputes that have arisen between the applicant and the respondent.

2. The case of the applicant is that he is a sole proprietor of Vipin Shah & Associates and is carrying on business as Turn-key contractor. The respondent is the Slum Rehabilitation Authority constituted under the

Maharashtra Slum Area (Improvement, Clearances and Development) Act, 1971. The respondent had invited tenders for carrying out the work of refurbishment of the SRA administrative building. The applicant was one of the bidders and his tender was accepted by the respondent. The applicant mobilised necessary resources for commencement and completion of the work under the contract. The work could not be completed within the stipulated date of completion due to various defaults and failures on the part of the respondent and due to various breaches of contract committed by the respondent as alleged by the applicant, though the work under the contract was satisfactorily completed by the applicant. The final bill for the same was submitted by the applicant. The contention of the applicant is that the final bill as submitted by the applicant was illegally changed by the architect appointed by the respondent by making various incorrect deductions which were not acceptable to the applicant. The applicant was informed that due payment of the applicant could not be released unless the applicant accepts the final bill as changed by the architect. In the said circumstances, the applicant was constrained to sign the corrected bill as changed by the architect. The applicant contends that despite long lapse of time after the completion of the work, the respondent failed and neglected, to finalize the accounts of the applicant. The applicant therefore addressed a letter dated 30 September 2013 to the respondent listing out the various amounts due and payable to the applicant by the respondent and called upon the respondent to settle and

pay the said amounts. The respondent, however, failed and neglected to comply with the said request of the applicant. The respondent thereafter addressed a letter dated 9 December 2013 to the applicant raising various contentions which came to be denied by the applicant by his letter dated 10 December 2013. The applicant contends that as the applicant was financially handicapped and in dire need of money, the applicant had no option but to address a letter dated 16 December 2013 to the respondent enclosing therewith a no dues certificate as required by the respondent. It is stated that, even thereafter the respondent refused to release payments to the applicant. The applicant contends that thereafter the applicant under severe economic duress and coercion was required to furnish the undertaking dated 7 January 2014, the contents of which were neither acceptable to the applicant nor agreeable to the applicant. The undertaking and/or no dues certificate was issued by the applicant to the respondent at the instance of the respondent and which was subject to the conditions recorded therein, contended to be a precautionary measures adopted by the applicant. By a communication dated 16 January 2014 the applicant immediately informed the respondent that the undertaking has been furnished by the applicant under economic duress and financial constraints and therefore, the same is not valid and effective as the respondent had not acted in accordance with the obligations recorded in the undertaking. The applicant also recorded that since the disputes and differences have arisen between the parties, the applicant was left with no

option but to invoke the arbitration clause and accordingly requested that the disputes be referred for arbitration. However, despite lapse of 30 days, the respondent failed to appoint an arbitrator. The case of the applicant is that the applicant is entitled to the following claims:-

Sr.no.	Particulars	Amount
1	Towards value of work executed by the applicant	Rs.2,73,02,919/-
2	The amount incorrectly short paid by the respondent while releasing payments against 3 rd , 4 th and 4 th R.A.Bills.	Rs.99,591/-
3	Towards escalation for additional expenses incurred by the applicant	Rs.1,41,84,613/-
4	For quantities of items which exceeded their reasonable deviation limits.	Rs.2,41,31,845/-

3. The applicant in seeking a relief that this Court appoint an arbitrator in exercise of its jurisdiction under Section 11(6) of the Act, refers to clause 96 of the General Conditions of the Contract being the arbitration agreement between the parties which reads thus:-

“Clause 96:-

If any dispute arise in respect of present contract it will be referred to the sole arbitrator nominated by Chief Executive Officer, Slum Rehabilitation Authority and said sole arbitrator will be Secretary Housing Mantralaya or any officer of the same rank. And the decision of the arbitrator will be final and binding on the both the parties. And the procedure of the arbitration will be conducted as per the provisions of Arbitration and Conciliation Act,1996.”

The learned Counsel for the applicant has placed reliance on the decisions of the Supreme Court in the case **“Chairman and M.D., NTPC Ltd. Vs. Reshmi Constructions, Builders and Contractors”**¹; and the

¹ AIR 2004 SC 1330

decision in “*National Insurance Company Ltd. Vs. Boghara Polyfab Pvt.Ltd.*”² to contend that the plea as raised on behalf of the respondent, of the applicant having received the amounts in full and final settlement, cannot be accepted to be conclusive to dismiss the present application and such issues are required to be agitated in the arbitration proceedings.

4. The respondent has appeared as also has filed a reply affidavit opposing this petition. The respondent does deny that the contract in question was awarded to the applicant for refurbishment of the SRA administrative building. It is contended that for the reasons as set out in paragraph 7 of the reply, the respondent has paid the entire bill amount to the applicant. It is also contended that it was the applicant who had failed to complete the project as per the terms and conditions of the contract within the stipulated time. The respondent contends that in view of the registered undertaking dated 7 January 2014 as furnished by the applicant, it is clear that the applicant has received the amount in full and final settlement under the contract and no amount is due and payable to the applicant. The respondent, thus contends that the petition be dismissed. In support of his contention the respondent has relied on the decision of the Supreme Court in the case “*New India Assurance Company Ltd. Vs. Genus Power Infrastructure Ltd.*”³

2 AIR 2009 SC 170

3 2015(6) Mh.L.J. 545 Supreme Court

5. I have heard the learned Counsel for the parties and with their assistance I have gone through the pleadings and the documents as placed on record. It is not in dispute that the applicant was awarded a contract for refurbishment of the SRA administrative building. It is also not in dispute that the applicant had undertaken the work and that the contract came to be completed, however, according to the respondent on a delay, and not fully complying with the terms and conditions of the contract.

6. Be that as it may, Clause 96 of the General Conditions of the contract executed between the parties, is not in dispute. A bare reading of the above clause clearly indicates that it is an arbitration agreement. All the necessary requisites for the parties agreeing to refer the disputes for arbitration stand satisfied in Clause 96, to come to a conclusion that there exists a valid arbitration agreement between the parties.

7. In view of insertion of sub-section 6-A to Section 11 of the Act by the 2015 Amendment Act, with effect from 23 October 2015, it is clear that the obligation of the Court while considering an application under Section 11(6), shall be confined to the examination of existence of the arbitration agreement, and which shall be, notwithstanding any judgment, decree or order of any Court. Section 11(6-A) reads thus:-

“11. Appointment of arbitrators:.. ...

(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under

sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

8. Considering the above amended provision of the Act, though the respondent relying on the undertaking dated 7 January 2014 contends that the applicant has received the amounts in full and final settlement, in my opinion, this plea cannot be accepted, and more particularly in the facts as noted above. This for the reason that prima facie a perusal of the undertaking dated 7 January 2014 does not give an impression that there is a conclusive settlement between the parties. Significantly, on issuance of the said undertaking, the applicant immediately by his letter dated 16 January 2014 recorded that the undertaking was submitted by the applicant under economic duress and coercion. If this is the factual position, then, necessarily as to whether the applicant has received amounts in full and final settlement is a matter which required to be agitated by the parties in the arbitration proceedings and to be decided by the arbitral tribunal. (See: “*Chairman and M.D., NTPC Ltd. Vs. Reshmi Constructions, Builders and Contractors*” (supra) and “*National Insurance Company Ltd. Vs. Boghara Polyfab Pvt.Ltd.*” (supra))

9. In any event, as noted above, in view of incorporation of Section 11(6-A), the Court need not delve on this issue, as the only necessary consideration for the Court in exercising jurisdiction under

Section 11(6) would be to examine 'whether there is an arbitration agreement between the parties. In the present case, it is not in dispute that there is an arbitration agreement and, therefore, it would be appropriate that the parties are left to agitate their respective pleas, to be adjudicated before the arbitrator.

10. In the facts of the present case, the reliance on behalf of the respondent on the decision in *New India Assurance Company Ltd. Vs. Genus Power Infrastructure Ltd.* (supra), in my opinion is not well founded. In the said case, considering the averments of the respondent as made in paragraph 9 of the petition, the Court was of the view that the plea raised by the respondent was bereft of any details and particulars, and were merely bald assertions. It was also observed that there was no protest or demur raised around the time or soon after the letter of subrogation was signed. However, the facts of the present case are completely different. The applicant here had immediately protested against the purported undertaking of settlement. Further a bare reading of the undertaking, prima facie leaves some manner of doubt about the nature of the settlement to be a final settlement

11. In the circumstances, I propose to appoint Mr. Justice P.D. Kode (Retired) as the Sole Arbitrator to adjudicate the disputes between the parties. In the first instance, the proposed arbitrator shall make a

disclosure in terms of Section 11(8) read with Section 12(1) of the Act and thereafter enter upon the reference. In the event, the disclosure is not made within a reasonable time or the disclosure records the inability of the proposed arbitrator to act as such, it will be open to the parties to apply to this Court for directions. The parties will appear before Mr. Justice P. D. Kode (retired), on a date to be fixed by His Lordship, which be informed to the parties at least 15 days in advance.

12. The arbitration application is disposed of in the above terms.
No order as to costs.

13. A copy of this order be forwarded to Hon'ble Mr. Justice P.D. Kode (Retired).

(G.S.Kulkarni, J)