

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO.11 OF 2018

M/S MR MUTHA, ENGINEERS AND CONTRACTORS
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Shri Mantri R.R. a/pw Shri Sancheti R.R.
Advocate for Respondent : Shri Rajale G.B.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: April 30, 2019

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PER COURT :-

1. This matter was heard extensively on 3.4.2019, 4.4.2019 and was posted today, by consent, for passing orders. Further submissions of the respective sides have been considered by this Court.

2. The applicant prays for an appointment of an arbitrator in the light of clauses 54 and 55 of the Work Order Contract dated 29.7.1983. The contract provided for raising a dispute within 30 days, from the end of the defect liability period. The defect liability period, therefore, concluded on 8.5.1987. For the sake of clarity, clauses 54 and 55 are reproduced as under:-

"54. Settlement of Dispute (For SOB works)

If the contractor considers any work demanded of him to be outside the requirement of the contract, or considers any drawings, record or ruling of the Executive Engineer, K.I.P. Dn. No. 3 SIRUR on any matter in connection with or arising out of the contract or the carrying out of work to be unacceptable he shall promptly ask the Executive Engineer, in writing, for written instructions or decision. Thereupon, the Executive Engineer shall give his written instructions or decision within a period of 30 days of such request.

Upon receipt of the written instructions or decision the contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Executive Engineer fails to give his decision in writing within a period of 30 days after being requested, or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the contractor may within 30 days after receiving the instructions or decision appeal to upward authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal.

If the contractor is dissatisfied with this decision, the contractor within a period of thirty days from receipt of the decision shall indicate his intention to refer the dispute to Arbitration, failing which the said decision shall be final and conclusive.

55. Arbitration (For works costing less than Rs. 50 lakh)

All the disputes or differences in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows.

Within 30 days of receipt of notice from the contractor or his intention to refer the dispute to arbitration the Chief Engineer (S.P.) IRRIGATION DEPARTMENT PUNE-6 shall send to the contractor a list of three officers of the rank of Superintending Engineers of higher, who have not been connected with the work under this contract. The contractor shall within 15 days of receipt of this list select and communicate to the Chief Engineer, the name of one officer from the list who shall then be appointed as the sole Arbitrator. In case contractor fails to communicate this selection of name within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within 30 days as stipulated the contractor shall send a similar list to the Chief Engineer within 15 days. The Chief Engineer shall then select one officer from the list and appoint him as the sole Arbitrator within 15 days. If the chief Engineer fails to do so, the contractor shall communicate to the Chief Engineer the name of one officer from the list who shall then be the sole Arbitrator.

The arbitration shall be conducted in accordance with the provision of the Indian Arbitration Act, 1940 or any

statutory modification thereof. The Arbitrator shall determine the amount of costs to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payments due to the contract shall not be withheld unless they are subject matter of the arbitration proceedings.

All awards shall be in writing and in case of award amounting to Rs. one lakh and above, such awards shall state the reason for the amount awarded. Neither party is entitled to bring a claim to arbitrator if the arbitrator has not been appointed before the expiration of 30 days after defects liability period."

3. The applicant appointed an Arbitrator on 21.2.1994. The Arbitrator was a former employee of the establishment. A RCS No. 296 of 1994 was filed by the establishment on 13.4.1994. By judgment dated 18.12.1995, the suit was decreed as against the applicant, defendant No.1 and the Arbitrator, defendant No.2. While concluding that the appointment of the Arbitrator was illegal as he was a former employee of the establishment, the trial Court, however, concluded in its answer to issue No.6 that the establishment / plaintiff could not prove that the appointment of the Arbitrator was barred by the law of limitation.

4. The applicant preferred RCA No.113 of 1996 and by judgment and order dated 24.8.2001, the appeal was dismissed. The applicant moved a Second Appeal before this Court bearing No.1074 of 2004. By judgment dated 1.3.2016, the Second Appeal was dismissed. However, while sustaining the conclusion of the trial Court, that the Arbitrator was ineligible for appointment, this Court further concluded that the period of limitation prescribed by the Work Order Contract was exhausted and after the expiry of the said period, the Arbitrator was appointed. It was also concluded that the Clause providing for limitation for appointment of an Arbitrator is a valid clause and as per Clause 55, the time started running against the Contractor one month after the defect liability period was over.

5. It is noteworthy that this applicant has suppressed the judgment of this Court in the Second Appeal by not placing the copy of the judgment on record and by consistently canvassing that the appointment of the Arbitrator is set aside only because he is a former employee of the establishment. It is the State authorities, who have produced the Second Appeal judgment dated 1.3.2015. The said judgment was assailed before the Honourable Apex Court by the applicant, which copy of the order dated 4.7.2016, rejecting the SLP, is placed on record.

6. In my view, it is obvious that the applicant has not placed the copy of the Second Appeal judgment on record in order to make this Court believe that the appointment of the Arbitrator is held to be within limitation by the trial Court and this finding has not been upset. When this finding was specifically upset by the second appellate Court, the conduct of the applicant is writ large from the record in not placing the second appeal judgment on record.

7. In view of the above, this application being devoid of merits is, therefore, dismissed. Considering the law laid down by the Honourable Apex Court in the case of Kishore Samrite Vs. State of UP and others, (2013) 2 SCC 398 and Bhaskar Laxman Jadhav and Ors. Vs. Karamveer Kakasaheb Wagh Education Society and Ors. [AIR 2013 SC 523], holding that if a litigant suppresses a material information, he should be penalized, which is squarely applicable to this case, I am imposing costs on the applicant. Learned Advocate for the respondent submits that the costs may be donated for the treatment of poor patients.

7. In view of the above, the applicant shall deposit costs of Rs.25,000/- on/or before 15.6.2019 and the learned Registrar (J) shall place the matter for reporting compliance before this Court on 21.6.2019. On depositing costs of Rs.25,000/-, the Registrar (J)

shall transmit the said amount to the Government Medical College and Hospital, Aurangabad, **through Medical Officer, High Court Dispensary, Aurangabad**, by Demand Draft (Demand Draft be drawn in the name of “**Dean, Government Medical College and Hospital Dengi Samiti, Aurangabad**”).

(RAVINDRA V. GHUGE, J.)

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