

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Arbitration Petition NO. 63 OF 2019

M/s. Superior Aircon Private Limited ...Petitioner

Versus

Union Of India And Ors ...Respondents

Ms.Sarita Yadav i/b. Uday Shankar Samudrala, for the Petitioner.

Mr.A.R.Singh with Mr.B.B.Sharma with Ms.Aditi Guatam, for
Respondent Nos.1 & 4.

CORAM : G.S. KULKARNI, J.**DATE : 18th October, 2019****PC.:**

1. Heard the learned Counsel for the petitioner and the learned Counsel for the respondents.

2. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') whereby the applicant has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties which are stated to have arisen under the contract for the work of Administrative Building for NIAM at Baramati, District Pune, for providing VRV/VRF type air-conditioning system. A tender came to be issued for the work in question. The petitioner's tender came to be accepted by issuance of an acceptance letter dated 24 December 2013. The general conditions of contract in clause 25 provide for an arbitration agreement between the parties. It provides for three layers of mechanism in clause 25(i) which would enable the contractor to approach the Executive Engineer and then

Engineer-in-charge with any claim under the contract in question.

3. From perusal of the record it appears that having submitted a final bill and having received the final bill and considering that the amount which is offered and paid was not as per the petitioner's entitlement, the petitioner by its letter dated 24 July 2017 addressed to the Executive Engineer (E) invoking clause 25 and called upon the Executive Engineer to take decision on the said representation in regard to the work which is actually carried out and the amount which would become payable. It appears that the final bill was raised for Rs.40,51,037/- and the amount which is paid is Rs.23,58,136/- which was according to the petitioner was completely de hors the rates which were submitted by the letter of the petitioner dated 21 August 2014 and 4 August 2015. The petitioner has also given detail break up of the amounts and the actual amounts which became payable. However, it appears that the Executive Engineer did not decide the petitioner's appeal/representation which was submitted under Clause 25. The petitioner thereafter again addressed a letter dated 25 September 2017 resubmitting the appeal and calling upon now the Superintendent Engineer to decide the said appeal in terms of Clause 25. Against the decision taken by the Superintendent, the petitioner had approached the Chief Engineer (WZ-II) by its letter dated 11 August 2018 reiterating the claims which were made before the Executive Engineer and the Superintendent Engineer. However, there was no response to this appeal as made by the petitioner. The petitioner finally on 3 October 2018 invoked the arbitration agreement and issued a notice for appointment of arbitrator. This notice was also not responded. In the said notice requesting for appointment of an arbitrator, the petitioner sets out all the details of the claims in the form of statement of claim. As again this notice was not responded, the petitioner addressed another letters dated 26 November 2018, 15

December 2018 and 14 January 2019 and fifth and final reminder of 2 February 2019.

4. It can be seen from the record that belatedly on 27 February 2019 (Exhibit I, page 41 of the paperbook) the petitioner's appeal was responded by the Chief Engineer interalia contending that the prayer made by the petitioner is time barred. According to the petitioner, this letter does not in any manner justify the respondents' fault inter-alia of short payment made under the bills. The petitioner accordingly sent a letter dated 7 March 2019 disputing the decision as taken by the Chief Engineer on the petitioner's appeal and reiterated the request for appointment of arbitral tribunal, failing which the petitioner approached this Court by filing this Section 11 application. Again this was responded by the Office of Chief Engineer by its letter dated 3 April 2019 stating that the claim is time barred.

5. It is on the above premise that the petitioner has filed this petition invoking the arbitration agreement and has approached for appointment of arbitral tribunal on refusal of the respondent to appoint an arbitral tribunal.

6. On perusal of the record it is quite clear that the petitioner has followed the procedure as agreed between the parties in Clause 25 of the General Conditions of the Contract. The petitioner has made appeal, the appeal however appears to have fell on deaf ears for almost two and half years and belatedly the same was responded. However, the actual amounts which according to the petitioner, are due and payable to the petitioner are clearly not agreed and accepted by the respondent whereby it can be clearly said that there is dispute which has arisen between the parties. The principal opposition by the respondent as seen

from its letter dated 27 February 2019 and a final letter dated 3 April 2019 appears to be that the claim is time barred. This issue of limitation is required to be urged before the arbitral tribunal. This cannot be the issue which would amount to an acceptable opposition for this Court not to exercise jurisdiction under Section 11 of the Act in appointing an arbitrator. There is clearly an arbitration agreement between the parties in clause 25 of the General Conditions of the Contract and the petitioner has invoked the arbitration agreement.

7. Considering all these circumstances, in my opinion, the petitioner has made out a case for appointment of arbitral tribunal. The petition is accordingly required to be allowed. Hence, the order:

ORDER

(i) Mr.Aseem Naphade, Advocate of this Court is appointed as a sole Arbitrator to arbitrate the disputes and differences the parties under the contract for the work of Administrative Building for NIAM at Baramati, District Pune, for providing VRV/VRF type air-conditioning system and acceptance letter dated 24 December 2013.

(ii) The learned prospective Sole Arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act,1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

(iii) The fees payable to the arbitral tribunal shall be governed in

accordance with the provisions of Bombay High Court (Fees Payable to Arbitrators) Rules, 2018;

(iv) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;

(v) All contentions of the parties are expressly kept open;

(vi) The application is disposed of in the above terms. No costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:-

“31, Shanti Building, 3rd Floor,
Banaji Street, Fort,
Mumbai-400001.
Contact No.22818377

[G.S. KULKARNI, J.]