

Vidya Amin

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO. 123 OF 2018

M/s. Pal Construction Engineers
& Contractors

... **Petitioner**

V/s.

Garrison Engineer (South)-Pune & Ors.

... **Respondents**

Smt. Anjali R.S. Baxi for the petitioner.

Mr. B.B. Sharma i/b. Mr. Dharmesh Joshi for respondent nos. 1 to 3.

CORAM : G.S.KULKARNI, J.

DATE : 18 October, 2019

P.C.:

Heard learned counsel for the petitioner and learned counsel for the respondents.

2. This is a Petition filed under section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the petitioner has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences, which are stated to have arisen between the parties under the Contract titled as IAFW-2249. The Arbitration Agreement is contained in Clause 70 of the Contract IAFW-2249. There is no dispute in regard to the existence of the Arbitration agreement.

3. Learned counsel for respondent nos. 1 to 3, however, would object to

this petition on the ground that the invocation of the arbitration by the petitioner is by a letter dated 31 August 2004 (Exhibit 'E') and considering the provisions of Article 137 of the Limitation Act, the petition is required to be held not maintainable, as barred by limitation.

4. Countering the submissions as urged on behalf of respondent nos. 1 to 3, learned counsel for the petitioner has drawn my attention to the letter dated 10 November 2017 issued on behalf of the petitioner and on the said letter, the concerned authority of the respondents has made following remarks while forwarding the petitioner's request for appointment of an arbitral tribunal:

“1. **HQ CEPZ, Pune:** with a request to confirm that consent to appointment of an arbitrator has been forwarded to Engineer-in-Chief as directed by HQ-CESC, Pune, vide letter No. 800006/b-218/540/E8 dated 6th October, 2016 and if not then please accord due priority, Sir.

2. **HQ CESC Pune** – wrt your HQ letter no. 800006/B-218/540/E8 dated 6th October 2016.”

(emphasis supplied)

5. Learned counsel for the petitioner has also drawn my attention to the letter dated 30 November 2017 of the respondent to contend that the respondents' contention is not of the right of the petitioner to seek appointment of an arbitral tribunal being time barred, but that the claim of the petitioner being time barred, as seen from paragraph 3 of the said letter

of the respondents, which reads thus:

“3. CE Pune zone vide their letter No. 83489/PNA/06/E8 dated 18 November 2016 has intimated that due to failure of the contractor to submit final bill, the same has been prepared by the Department and passed by PCDA. However, payment of Rs.17,467/- has not been released as the contractor has not signed the final bill. Hence no Boo is considered necessary. They also brought out that claims of contractor are barred by limitation.

4. In view of the above, the issue may please be looked into at your end and suitable directions issued to resolve the issue.”

6. Having heard the learned counsel for the parties and having perused the record, at the first blush, the contention as urged on behalf of the respondents was felt attractive, namely, that the petitioner having invoked the arbitration agreement on 31 August 2004 and having not approached before this Court for a period of three years, as provided under Article 137 of Limitation Act, the petition should be treated as time barred. However, as seen from the recent communication as addressed by the respondent and referred above, for whatever reason, it appears that the issues as raised by the petitioner were pending for consideration with respondents in regard to the financial details as payable to the petitioner. Further, in regard to the request as made by the petitioner, the concerned authority has made a specific remark on the letter of the petitioner dated 10 November 2017 as noted above that the request made by the petitioner to appoint an arbitrator be confirmed and that a consent was being sought. In my opinion, such a remark and a consent made by the concerned authority to appoint the arbitrator cannot be

overlooked, even considering the provisions of Article 137 of Limitation Act. Such remark would be required to be accepted as a material consideration in considering the issue of limitation. It would mean, that in November 2017 if the respondents have consented for appointment of an arbitral tribunal and there was no express rejection thereafter on the part of the respondents to appoint an arbitral tribunal although initially a consent was forwarded by one authority to another, in my opinion, benefit of such acceptance by the respondents is required to be granted to the petitioner, to accept such a cause of action to file a petition under section 11 of the Act, seeking appointment of an arbitral tribunal without insisting on a technical or a pedantic approach to call upon the petitioner to file a delay condonation application. Thus, it is in the interest of justice that the petitioner need not be called upon to file separate application praying for condonation of delay, considering this remark as endorsed in the letter dated 10 November 2017 by the respondents. This apart it is quite clear that the respondents also do not consider that the matter is closed and that the disputes need not be referred to arbitration.

7. Even otherwise the petitioner in these circumstances cannot be rendered remediless.

8. As there exists an arbitration agreement between the parties as also a

request is made for appointment of arbitral tribunal and request was positively accepted in November 2017 by the respondents, an arbitral tribunal needs to be appointed. Hence, the following order:

ORDER

- (i) Mr. Anurag Jain, Advocate of this Court is appointed as an arbitrator to adjudicate the disputes between the parties which have arisen under the Contract titled as IAFW-2249.
- (ii) The learned prospective sole arbitrator, ten 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 Registrar (Judicial-I) 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 as prescribed under the 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) Office to forward a copy of this order to the learned Arbitrator on

the following address:

Varun Capital, Office No. 501,
CTS no. 364 + 365/13,
Next to Hotel Sudama,
Opp. Jangli Maharaj Temple,
Shivajinagar, Pune – 411 005.
(M) – 9833759856
E-mail : ajassociateslaw@gmail.com

9. The petition is disposed of in the above terms. No costs.

(G.S.KULKARNI, J.)