

Vidya Amin

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

**ARBITRATION PETITION NO. 95 OF 2018**

M.M. Construction

**... Petitioner**

**V/s.**

Maharashtra State Power Generation Co. Ltd.

Through its Managing Director & Ors.

**... Respondents**

Mr. Viraj Kandpile for the petitioner.

Ms. Gauri Mestha i/b. L.J. Law for the respondents.

**CORAM : G.S.KULKARNI, J.**

**DATE : 4<sup>th</sup> September, 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 arbitrator to adjudicate the disputes and differences, which are stated to have arisen between the parties under the Work Order dated 18<sup>th</sup> September, 2007. The Arbitration Agreement between the parties is contained in Clause 22 of Special Conditions of Contract (Page 27 of the Paper Book). It would be appropriate to note Clause 27(i), (ii), (iii) and (iv):

“22.0 Arbitration

(i) Demand for Arbitration

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, the dispute or difference on any account or as to the withholding by MSPGCL of any certificate to which the contractor may claim to be entitled to or if the Chief General Manager fails to make decision (within 120 days) then and in any such case, the contractor (after 120 days) but within (180 days) of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference to be referred to arbitration.

(ii) The demand for Arbitration shall specify the matters which are in question,, or subject of dispute and difference as also amount to claim itemwise. Only such disputes or difference in respect of which the demand has been made, together with counter claim or set off, shall be referred to arbitration and other matter shall not be included in the reference.

a) The arbitration proceedings shall be assumed to have commenced from the day, a written or valid demand for arbitration is received by the company.

b) The claimant shall submit his claim stating the facts supporting his claims along with all relevant documents and the relief of remedy sought against each claim within a period of 30 days from the date of appointment of arbitral tribunal.

c) The company shall submit its defence statement and counter claim, if any, within a period of 60 days of receipt of copy of claims from the Tribunal thereafter unless otherwise extension has been granted by the tribunal.

(iii) No new claim shall be added during the proceedings by the either party. However, the party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by tribunal having due regard to the delay in making it.

(iv) If the contractor(s) does/do not prefer his/their specific and final claims in writing within a period of 90 days of receiving the intimation from the company that the final bills is ready for payment, he/they will be deemed to have waived his/their claim(s) and the company shall be discharged and released or all liabilities under the contract in respect of

these claims.”

3. The case of the petitioner is that the disputes and differences have arisen between the parties and in this regard, correspondence ensued between the parties from the year 2007. Giving reference to the entire correspondence, the petitioner finally addressed a letter dated 19<sup>th</sup> June, 2013 to the Deputy Chief Engineer (Civil) of the respondent pointing out the various disputes and making a claim of Rs,17,92,316.00. In the last paragraph of the said letter, the petitioner stated as under:

“It is requested to communicate your decision latest by 15.07.2013 failing which we shall be forced to seek action under Cl. 24 for arbitration.”

This letter is placed on record in the compilation of documents as filed on behalf of the respondent.

4. It appears that respondents did not take any decision on the letter dated 19<sup>th</sup> June, 2013 of the petitioner. On a query being made to the learned counsel for the respondents, she is not able to point out any material to indicate that the Chief Engineer has actually taken a decision or decided on the said claim as made by the petitioner more particularly as warranted by Clause No. 22(i) of the Special Conditions of Contract. As there was no decision of the Chief Engineer, the petitioner by its letter dated 22<sup>nd</sup> December, 2017 addressed to the respondent set out all the claims and

invoked the arbitration agreement between the parties, and called upon the respondents to appoint an arbitral tribunal. In paragraph 19 of the said letter, the petitioner stated as under:

“19. **Initiating Arbitration proceedings**

You are competent authority to take your decision on Claimant's claims as contemplated under Clause 22 of S.C.C. and communicate your said decision in writing to Claimant within the period as provided in said Clause. If you find Claimant's claims are admissible, you are requested to pass orders directing concerned officer to release payment of said claim to Claimant immediately and in case, if you find Claimant's any claims as stated hereinafter is not admissible or not acceptable to your office, under such events, you are hereby called upon to appoint arbitrators under said clause for appointment of Arbitrators who shall be retired officer and not the employee of Respondent as per the recent Arbitration & Conciliation (Amendment) Ordinance, 2015 so as to adjudicate Claimant's claims judicially and make and publish his award. Section 11 of the Arbitration and Conciliation Act 1996 provide notice period of 30 days during which, you are required to appointment arbitrators, failing which Supreme Court of India had recently held that your failure to appoint arbitrator within period of 30 days, your rights for appointment of arbitrator under Clause 22 of S.C.C. stands forfeited Hon'ble Chief Justice of Hon'ble High Court at Bombay would exercise your powers to appoint Arbitrator in the matter who may be the Retired High Court Judge or Jr/Sr. Counsel of High Court on filing Claimant's Arbitration application. To avoid forfeiture of your authority under Clause 22 of S.C.C. you are requested to take your action immediately atleast within statutory period as stated above.”

5. As again the respondents did not take any decision on the said letter and failed to appoint an arbitral tribunal, the petitioner has filed the present petition invoking the jurisdiction of this Court under section 11 of the Act.

6. A reply affidavit is filed on behalf of the respondents of Mr. Yogesh Rajendra Amrutkar, Assistant Engineer (Civil) dated 8<sup>th</sup> January, 2019. The plea which is taken on behalf of the respondents, interalia, is that the claim of the petitioner is a delayed claim and therefore, the petition ought not to be

entertained. In paragraph 23 of the reply, the respondents have stated that by letter dated 19<sup>th</sup> June, 2013 addressed by the petitioner to the respondent, the amounts were disputed and after a period of more than 4 years, the petitioner addressed a letter dated 22<sup>nd</sup> December, 2017 to the Managing Director of the respondent and sought to invoke the arbitration agreement (Clause 22 of the G.C.C.). However, there is no material to indicate as to whether, the claim as made by the petitioner and prior to invocation of the arbitration agreement by the petitioner's letter dated 19<sup>th</sup> June, 2019 was in fact addressed by the Chief Engineer as per the requirement of Clause 22(i) as noted above. If the monetary claim being made by the petitioner is in any manner time barred, these issues are required to be urged by the respondents before the arbitral tribunal and certainly cannot be a defence to this petition, which merely seeks appointment of an arbitral tribunal. There are other averments as made in the reply affidavit, which are on the merits of the dispute and which may not be relevant for the purposes of this Petition, including the issue on arbitrability of some of the claims.

7. Also an additional affidavit is filed on behalf of the respondents to place on record the letter dated 20<sup>th</sup> October, 2013 to point out the invocation of arbitration agreement is belated and not in accordance with Clause 22 of the G.C.C. However, the fact remains that when this letter was issued, a decision to be taken on the petitioner's letter dated 19<sup>th</sup> June, 2013 which was required

to be taken by Chief Engineer as per Clause 22(i) of the Arbitration Agreement was pending. The petitioner accordingly had addressed a elaborate notice dated 22<sup>nd</sup> December, 2017 setting out all the claims and invoking the arbitration agreement as set out in paragraph 19, as noted above.

8. Both the parties agree that the jurisdiction as agreed between the parties is with the Court at Mumbai as also the seat of the arbitration would be at Mumbai.

9. In the above circumstances, as there is no dispute in regard to the existence of the arbitration agreement and as the invocation of the arbitration has been made by the petitioner by its letter dated 22<sup>nd</sup> December, 2017 and the respondents, not agreeing to appoint an arbitral tribunal, an arbitral tribunal is required to be appointed to adjudicate the disputes and differences between the parties. The Petition would thus be required to be allowed. Hence, following order:

**ORDER**

- (i) Mr. Suresh Pakale, Advocate of this Court is appointed as a sole arbitrator to adjudicate the disputes between the parties which have arisen under the Work Order dated 18<sup>th</sup> September, 2007.
- (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 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) The petition 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:

10, Veer Nariman Road,  
Elphinston Building, 1<sup>st</sup> floor,  
Fort, Mumbai – 400 001.  
Tel.: 022-22041819  
(M) : 8104833939  
E-mail : suresh\_pakale@yahoo.com

**(G.S.KULKARNI, J.)**