

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION APPLICATION NO. 197 OF 2018**

N.K.Gade, Engineers & Contractors.

... Applicant

Vs.

1.The Union of India & Ors.

...Respondents

Ms.Jaymala J.Ostwal I/b. J.J. Associates, for the Applicant.

CORAM : G.S.KULKARNI, J.

DATED: 8 January 2019

P.C.:-

1. Heard the learned Counsel for the applicant.
2. By an order dated 11 December 2018 this Court had issued notice to respondents returnable on 5 January 2019. Hamdast was permitted. The learned Counsel for the applicant states that accordingly steps are taken and the respondents are served. She also submits that the contesting respondent no.4-Executive Engineer, National Highway Division, Pune is already served and an affidavit of service to that effect is being tendered and is taken on record.
3. Accordingly this application under Section 11 of the Arbitration and Conciliation Act,1996 (for short 'ACA') is taken up for hearing.
4. The case of the applicant is that disputes and differences have arisen between the parties under the agreement dated 5 April 2013 in respect of “the work of construction of improvement to riding quality programme in

kilometer 109 to 140 Kalyan-Malshej-Ahmed Nagar Road Section 10 N.H. 222 bearing job.no.222-NH-006-MH-2012-13-935". According to the applicant, the work under the contract was satisfactorily completed in or about March 2014 before the stipulated date for completion of the work and also respondent no.4 paid the final bill.

5. The applicant contends that however respondent no.4 retained an amount of Rs.67.62 lakhs as security deposit for the rectification of work in the event any defect is found during the defect liability period. In the year 2015, respondent nos.2 to 4 transferred the entire work executed by the petitioner to third agency.

6. Respondent no.4 thereafter refunded to the petitioner the performance security. However, instead of refunding the entire amount, respondent no.4 retained an amount of Rs.27.05 lakhs. The applicant thereafter entered into the correspondence requesting respondent no.4 to refund an amount of Rs.27.05 lakhs with interest at the rate of Rs.18% per annum. This correspondence can be referred as letters dated 23 October 2015, 5 April 2016, 14 July 2016, 17 October 2016, 17 January 2017 and 30 October 2017 as annexed to the petition.

7. As there was no response to the letters of the applicant, the applicant by its letter dated 30 November 2017 issued a legal notice to

respondent requesting to refer the dispute in regard to the release of Rs.27.05 lakhs with interest to the Review Expert as per clause (36) of the contract. However, as again there was no response, the applicant by letter dated 29 January 2018 issued notice and requested respondent no.4 to constitute an arbitral tribunal for adjudication of the dispute between the parties. As there was no response to the above invocation letter, the present application has been filed.

8. As the respondents have not appeared, the averments as made in the application are required to be taken as uncontroverted. Clause 3 of the contract is the arbitration clause between the parties which reads thus:-

“3. Arbitration (CGG Clause 25.3)

The Procedure for arbitration will be as follows:

25.3(a) In case of Dispute or difference arising between the Employer and a domestic Contractor relating to any matter arising out of or connected with this agreement such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The parties shall make efforts to agree on a sole arbitrator and only if such an attempt does not succeed and the Arbitral Tribunal consisting of 3 arbitrators one each to be appointed by the Employer and the Contractor and the third Arbitrator to be chosen by the two Arbitrators so appointed by the Parties to act as Presiding Arbitrator shall be considered. In case of failure of the two arbitrators appointed by the parties to reach upon a consequences within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the *Council, Indian Roads Congress.

(b) The Arbitral Tribunal shall consists of three Arbitrators one each to be appointed by the Employer and the Contractor. The Third Arbitrator shall be chosen by the Two Arbitrators so appointed by the parties and

shall act a presiding arbitrator. In case of failure of the two arbitrations appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the *Council, Indian Roads Congress.

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the *Council, Indian Roads Congress shall appoint the arbitrator. A certified copy of the order of the Council, Indian Roads Congress, making such an appointment shall be furnished to each of the parties.

(d) Arbitration proceedings shall be held in India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(e) The decision of the majority of arbitrators shall be final and binding upon the parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(f) Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of the arbitration proceedings.”

9. Thus, it is clear that there is an arbitration agreement between the parties. The applicant has invoked the procedure for resolution of the dispute and subsequently the arbitration clause by its letter dated 30 October 2017 and 30 November 2017 respectively. However, there was no response to both these attempts of the applicant. In the above circumstances, the applicant has appropriately invoked the jurisdiction of

this Court under Section 11(6) of the Act. Considering the above facts and circumstances of the case, in my opinion, the applicant would be entitled to the reliefs in this application. Accordingly the following order:-

ORDER

(I) Mr.S.B.Bakhariya, Advocate on the Panel of Arbitrators of this Court is appointed as a prospective arbitrator to arbitrate the disputes and differences between the parties under the agreement dated 5 April 2013.

(II) The learned prospective 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 and Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to the parties.

(III) All contentions of the parties on merits of the matter are expressly kept open.

(IV) Office to forward a copy of this order to Mr.S.B.Bakhariya, Advocate alongwith a copy of the Memo of this application.

10. The Arbitration Application is disposed of in the above terms. No costs.

(G.S.KULKARNI, J.)