

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 31 OF 2019

M/s.Pal Construction Engineers and Contractors. ..Petitioner

vs.

M/s.Hindustan Aeronautics Ltd. & Ors.

..Respondents

Ms.Anjali R. Shiledar Baxi, for the Petitioner.

CORAM : G.S. KULKARNI, J.

DATE : JULY 27, 2022.

P.C.:

1. 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 for adjudication of disputes and differences which have arisen between the parties under the agreement executed in May, 2012, for the work of construction of new fire station and modification works at ATC building in the aerodrome area, under Tender dated 10 July 2012 as issued to the petitioner by the respondents.

2. The arbitration agreement between the parties is contained in Clause 51 whereby the parties have agreed that all the questions and disputes under the contract in a manner as provided in such clause, shall be referred to a sole arbitration of the Managing Director / General Manager, and if the Managing Director / General Manager is unable or

not willing to act, then some other person appointed by the Managing Director / General Manager, shall appointed as arbitrator who is willing to act as Arbitrator. It was also agreed between the parties that the Arbitration and Conciliation Act, 1996 shall become applicable to such arbitration. Clause 51 of the agreement reads thus:

“51. Arbitration

Except where, otherwise provided for in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs drawings to the specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute, the same whether arising during the progress of the work or after the completion or abandonment thereof will be referred to the sole arbitration or the Managing Director / General Manager and if the Managing Director / General Manager is unable or willing to act to the sole arbitration some other persons appointed by Managing Director / General willing to act as such Arbitrator. The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such managing Director / General Manager as aforesaid at the time of such transfer, vacation of office or inability to act, will appoint another person to act as arbitrator in accordance with the terms of the contract. Such person will be entitled to proceed with the reference from the stage at which it was left by his predecessor. Subject as aforesaid the provision of the Arbitration and Conciliation Act, 1996 or and statutory modification or re-enactment thereof and the rules made there under and for the time being in force will apply to the arbitration proceeding under this clause. It is a term of the contract that the party involving arbitration will specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute. The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award. The work under the contract will, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the contractor will be withheld on account of such proceedings. The Arbitrator will be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing. The arbitrator will give a separate award in respect of each dispute or difference referred to him. The venue of arbitration will be such place as may be fixed by the Arbitrator in his sole discretion. The

award of the arbitrator will be final, conclusive and binding on both the parties to the contract.”

3. It is the petitioner’s case that the disputes and differences having arisen between the parties under the contract in question, the petitioner addressed a notice dated 25 August 2017 to the respondents stating that all efforts were taken to resolve the dispute, subject matter of the petitioner’s letters dated 17 March 2017, 19 April 2017, 20 April 2017 and 29 July 2017. The petitioners accordingly invoked the arbitration agreement and called upon the respondents to appoint an arbitral tribunal. It appears that there were some discussions between the parties with an intention to resolve the disputes, in the meetings held on 12/13 October 2018 and 15 January 2018. However, the disputes could not be resolved.

4. On the above backdrop, the respondents on 20 October 2018 addressed a letter to the petitioner as also to the Additional General Manager (Works) of the respondent at Aircraft Division Nasik, Township PO, Ojhar, interalia recording the petitioner’s request that a sole arbitrator be appointed. It was stated that to such request as made by the petitioner, the Competent Authority had accorded approval for appointment of Mr. Jayant Chaitram Shirsale, a Retired Judge, as a sole arbitrator, in terms of Clause 51 of the General Conditions of the contract and in confirmation with Schedule VII to Section 12(5) of

the Arbitration and Conciliation Act, 1996. Paragraphs 5, 6 and 7 of such letter are required to be noted, which read thus:-

“5. In view of the request made by M/s.Pal Constructions, the Competent Authority has accorded approval for appointment of Retd. Judge Shri.Jayant Chaitram Shirsale, as Sole Arbitrator, in terms of Clause 51 of the General Conditions of Contract and in confirmation with the Schedule 7 to Section 12(5) of Arbitration and conciliation Act 1996, as amended.

6. The Sole Arbitrator shall decide the question of arbitrability amongst others. The arbitration cost shall be initially borne equally by the parties with the final costs being determined by the Tribunal. The venue of arbitration shall be at Nasik.

7. The Sole Arbitrator shall endeavour to pass his final award within a period of 12 months from the date the Arbitral Tribunal enters upon the reference subject to provisions of Section 29, 29A and 29 B of Arbitration and Conciliation Act,1996 as amended.”

5. The petitioner’s replied to the above letter of the respondents by their Advocate’s letter dated 23 October 2018 interalia stating their inability to agree for appointment of the learned Arbitrator as suggested by the respondent, as he was being unilaterally appointed by the respondents’ aforesaid communication dated 20 October 2018. The petitioner hence suggested the names of some other arbitrators and requested the respondents to select any nominee arbitrator who can be appointed. However, no action was taken on such letter by the respondents. A final request letter dated 30 November 2018 was addressed by the petitioner through its Advocate to the respondent reiterating the request for appointment of arbitral tribunal. However, the respondents did not accept the request, hence, the present petition came to be filed on 8 January 2019.

6. This Court on 18 October 2019 by the following order issued a notice to the respondent and also permitted private service to be effected by all permissible modes. The order reads thus:-

“ Issue notice to the respondents, returnable on 20 November 2019. In addition to the Court notice, learned Advocate for the petitioner is permitted to serve the respondents by all permissible modes including hand delivery and place on record affidavit of service before the returnable date.

2. Stand over to 20 November 2019.”

7. In pursuance of the above order, an affidavit of service dated 25 November 2019 is already placed on record. The respondents as also the Advocates for the respondent has addressed an e-mail to the Advocate for the petitioner stating that the instructions have been issued to M/s.M.VKini & Co. to appear for the respondents. It is thus, clear that the respondents are served, however, they are not represented. It needs to be noted that the despite sufficient service and even after the time of two years have been lapsed, no reply affidavit has been placed on record.

8. Being old petition and considering the directions of the Supreme Court in “M/s.Shree Vishnu Constructions Vs. The Engineer in Chief, Military Engineering Service & Ors.” (Special Leave Petition (c) No.5306 of 2022, dated 19 May 2022) this petition cannot be kept pending. It would be required to be decided.

9. Accordingly, I have heard the learned Counsel for the petitioner. As noted above, it is clear that there is an arbitration agreement between the parties. Considering the settled principles of law as laid down by the Supreme Court in **Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.**, (2019 SCC Online SC 1517), **Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.** [(2017) 4 SCC 665] and **TRF Limited vs. Energo Engineering Projects Ltd.** [(2017) 8 SCC 377] as also followed as held by this Court in **ITD Cementation India Ltd. Vs. Konkan Railway Corporation Ltd. (Commercial Arbitration Petition No. 1106 OF 2018 decided on 12 December 2019)**, a unilateral appointment of the arbitrator cannot be made by the respondents. There is also lawful invocation of the arbitration agreement wherein a notice invoking the arbitration agreement was issued to the respondent. There is sufficient correspondence on record which not only supports the invocation but the repeated request of the petitioner to refer the disputes to arbitration.

10. Thus, the requirements for this Court to exercise its jurisdiction under the provisions of Section 11(6) are imminently present. The petition is accordingly, required to be allowed. The petition is disposed of by the following order:-

ORDER

(i) Mr. Jamsheed K. Master, Advocate of this Court, is appointed as a sole Arbitrator to adjudicate the the disputes and differences between the parties under the the agreement executed in May, 2012, for the work of construction of new fire station and modification works at ATC building in aerodrome area, under Tender dated 10 July 2012;

(ii) The learned sole 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 Registrar (Judicial) of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

(iii) 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;

(iv) All contentions of the parties on merits of the matter are expressly kept open;

(v) The Petition is disposed of in the above terms. No costs.

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

“C/o. Chamber of Mr. D. D. Madon Sr. Advocate,
2nd Floor, Jeroo Building, 137 M. G. Road,
Fort, Mumbai – 400 001.
Tel.: 22651102/22694012,
Mobile : 9820840010,
Email : masterjamsheed@gmail.com”

[G.S. KULKARNI, J.]