

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.140 OF 2021

M/s K.R.Traders
through its partner Anand Nath
Jogindernath.Petitioner.

Versus

Union of India & Anr. ...Respondents.

Mr.Sureshkumar R. Firodiya a/w Adv. Rishabh A. Gugale for petitioner.

Mr.B.B. Sharma, Advocate a/w Priyanka Chavan for respondents.

CORAM : MANISH PITALE, J

DATE : 11th OCTOBER, 2022.

P. C. :

1. This is a petition filed u/s 11 r/w 15 of the Arbitration and Conciliation Act, whereby the petitioner is seeking appointment of a fit and proper person to adjudicate the dispute that has arisen between the petitioner and the respondent.

2. Brief facts leading to filing of present petition are that, the petitioner had entered into an agreement with the respondent for execution of specific works pertaining to providing and laying down sewage lines and pumping stations at Ahmednagar. An agreement was executed on 26/04/1993 and

work order was issued on 17.5.1993. During the course of execution of the said works certain disputes arose between the parties, as a consequence of which arbitration clause 70 of the General Condition of Contract of Central Government was invoked. In pursuance of such invoking of arbitration proceeding under the said clause, an interim award dated 22.9.2012, came to be passed on the basis of specific amount admitted by respondents as payable to the petitioner. Proceedings before the Arbitrator continued thereafter and eventually final award was passed on 30.4.2013 with corrigendum issued on 30.5.2013. Under the award, the petitioner was found entitled to payment of Rs.82,12,051.63/- from the respondents. This was much less than the claim made by the petitioner, which was to the tune of Rs.9,41,45,618/-. It is an admitted position that respondents disbursed the amount of Rs.82,12,051.63/- awarded by the Arbitrator.

3. Thereafter, the petitioner challenged the award by initiating proceeding before the Court of District Judge, Pune claiming that the mandate of arbitrator had expired at the time of publication of award, apart from raising other grounds on merits.

4. By judgment and order dated on 9.3.2021 the Court of District Judge, Pune, allowed the application, only on the ground that mandate of the arbitrator had terminated and accordingly, the award was set aside.

5. In this situation, the petitioner sent a notice on 27.3.2021 to respondent no.2, invoking condition no.70 i.e. arbitration clause executed between the parties and sought arbitration afresh, suggesting two names from amongst whom an arbitrator could be appointed.

6. On 29.6.2021 the respondents sent a counter notice to the petitioner seeking refund of amount paid as per award of the Arbitrator, which was later set aside alongwith interest at the rate of 10% p.a. It is an admitted position that the petitioner has already initiated proceeding u/s 9 of the aforesaid Act before the competent Court at Pune, in the context of the aforesaid counter notice issued by the respondents praying for restraining the respondents from recovering the amount from the petitioner in pursuance of letter dated 29.6.2021, which proceeding is pending before the competent Court.

7. Since the respondents did not respond in a positive manner to the aforesaid notice dated 27.3.2021, the petitioner approached this Court.

8. Mr. Firodiya, the learned Counsel for the petitioner referred to Clause 70 of the General Condition of Contract i.e. the arbitration clause and submitted that when earlier award was set aside, fresh arbitration proceedings could certainly be initiated as per the mandate of clause 70 of

the General Condition of Contract. Learned Counsel specifically referred to Section 15(2) of the aforesaid Act to contend that when the mandate of the arbitrator had terminated, a substitute arbitrator could certainly be appointed in accordance with Clause 70 of the Arbitration Clause. Learned Counsel relied upon judgments of the Supreme Court in the cases of i) **McDermott International Inc. Vs. Burn Standard Co. Ltd. (2006) 11 SCC 181** ii) **Dakshin Haryana Buli Vitran Nigam Limited Vs. Navigant Technologies Private Ltd. (2021) 7 SCC 657** iii) **National Highways Authority of India Vs. M. Hakeem & Anr (2021) 9 SCC 1**, to contend that there was no prohibition in law for a fresh round of arbitration between the parties when the arbitration award was set aside on any ground. The law laid down by the Supreme Court, in the said judgments really indicated that the Court u/s 34 of the Act can either reject objections raised against the arbitration award or upon accepting the same, set aside the award, leaving the parties for fresh round of arbitration, if so advised.

9. On the basis of said position of law, learned Counsel for the petitioner submitted that in the present case, since the respondents had refused to respond in a positive manner to the notice dated 27.3.2021, issued on behalf of the petitioner invoking clause 70 of the General Condition of Contract for fresh round of arbitration, there was no alternative left for the petitioner but to approach this Court.

10. On the other hand, Mr.Sharma, learned counsel for the respondents submitted that the Court ought to take into account the conduct of the petitioner. It is submitted that the petitioner was enjoying the fruits of award which the petitioner itself proceeded to challenge on the ground that mandate of arbitrator had terminated. If, at all, the petitioner desired to initiate a fresh round of arbitration, he ought to refund the amount already disbursed to him in pursuance of the award passed by the Arbitrator, which was eventually set aside on the challenge raised by the petitioner itself.

11. By placing reliance on the judgment of this Court, in the case of **Teltech Instrumentation Private Limited, Mumbai, Vs. Bharat Petroleum Corporation Limited, 2012(4) Mh.L.J.355**, learned counsel for the respondents submitted that there since there was a specific time limit prescribed in clause 70 for completion of arbitration proceedings, any substitute arbitrator appointed, would have to complete the arbitration proceeding within the said time line. In such a situation, there was no question of appointment of an arbitrator because the time limit provided in Clause 70 was already over.

12. Heard learned Counsel for the plaintiff and learned Counsel for the defendant.

13. Before adverting to the rival contentions, it would be proper to refer to the position of law for deciding the present petition. Sections 11 and 15 of the said Act are relevant. Section 11 of the said Act pertains to appointment of arbitrators, particularly, in the backdrop when the parties to the arbitration agreement fail to agree upon appointment of an arbitrator. In the present situation, there is no dispute about the fact that while the petitioner sent notice dated 27.3.2021 to the respondent proposing names of arbitrators to be appointed, in terms of arbitration clause, the respondent did not agree with such proposal, leading to the present petition being filed on behalf of the petitioner.

14. Section 15 of the said Act, pertains to termination of mandate and substitution of arbitrator. The said section reads thus;

15. Termination of mandate and substitution of arbitrator-

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

- (a) where he withdraws from office for any reason; or*
- (b) by or pursuant to agreement of the parties.*

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings

previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

15. A perusal of Section 15(2) of the Act quoted above shows that when a mandate of arbitrator terminates, a substitute arbitrator is to be appointed only in accordance with the rules that were applicable to the appointment of arbitrator. It is this provision, which is the bone of contention between the parties, because the respondents appear to interpret the same to mean that once the time line as specified in the arbitration clause i.e. clause 70, referred to hereinabove, is not adhered to, no arbitration proceeding can ever be initiated. This Court is not in agreement that the said interpretation sought to be put on clause 70 r/w 15(2) of the aforesaid Act.

16. The petitioner is justified in relying upon abovementioned judgments of the Supreme Court cited supra wherein, it has been categorically laid down that even when arbitration award is set aside by the Court, the only course of action available to the parties for resolving the existing dispute is to initiate arbitration proceeding afresh. The only condition that can be

read under such a situation is that such arbitration proceeding would necessarily proceed strictly in terms of the arbitration agreement between the parties. If that be so, the petitioner was clearly entitled to issue notice dated 27.3.2021 to the respondents invoking clause 70 of the General Condition of Contract for a fresh round of arbitration. This Court is convinced that there is indeed a dispute between the parties and in the face of aforesaid arbitration agreement, it can not be said that the petitioner was not entitled to issue notice dated 27.3.2021 or that it could not have filed the present petition for appointment of arbitrator.

17. The respondents, in their counter notice dated 29.6.2021, have proceeded on the basis that there can not be a fresh round of arbitration and on the other hand, they have insisted upon liability of petitioner to refund the amount already disbursed by the respondents. In fact, even before this Court, much emphasis was placed by the respondents on the conduct of the petitioner about the money taken from respondents and then turning around to insist upon a fresh round of arbitration.

18. This Court is of the opinion that in the present petition, the only concern is the question of appointment of arbitrator. Conduct of the petitioner sought to be highlighted by the respondents is not relevant. The same can be agitated in the pending petition filed by the petitioner u/s 9 of

the said Act before the competent Court at Pune. The respondents can also make a grievance regarding the same before the arbitrator once fresh arbitration proceedings commence.

19. At this stage, the learned counsel for the respondents handed over a list of proposed arbitrators to this Court and also to the learned Counsel appearing for the petitioner. From amongst the list of proposed arbitrators, the learned Counsel for the petitioner, upon instructions of one of the partners of the petitioner firm, agreed to the name of Mr Raghunath Prasad Tripathi, Retired ADG, MES as Arbitrator.

20. In view of the above, present petition is allowed.

21. Mr.Raghunath Prasad Tripathi, upon agreement between the parties before this Court, is appointed as the sole arbitrator for adjudicating upon the dispute between the parties.

22. The learned Arbitrator shall communicate his consent and disclosure statement under Section 11(8) and 12(1) of the Act to the Registrar (Judicial) of this Court within 2 weeks from today.

23. The parties are at liberty to place this order before the learned

Arbitrator at the earliest.

24. The parties shall appear before learned Arbitrator on 14/11/2022. Statement of claim shall be filed within 2 weeks of appearance before the learned Arbitrator.

25. The learned arbitrator shall stick to the time limits specified in clause 70 i.e. the arbitration agreement between the parties.

26. The petition is disposed of accordingly.

(MANISH PITALE, J.)