

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

ARBITRATION PETITION NO. 16 OF 2022

SHRIKANT
SHRINIVAS
MALANI

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Date: 2023.04.01
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Prakash C. Paliwala

...Petitioner

Versus

The Senior Divisional Railway
Engineer, Mechanical Branch

...Respondent

* * *

- Adv. Tejas Kapre i/by Jayprakash Shridhar Kapre, for Petitioner.
- Adv. B.B. Sharma, for Respondent.

* * *

CORAM : MANISH PITALE, J

DATE : 28th MARCH, 2023.

P. C. :

1. By this petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, the Petitioner is praying for appointment of a neutral Arbitrator for resolution of disputes between the parties.

2. In the present case, the Petitioner was awarded a contract by the Respondents for “Repair of CNC Surface Lathe (Make HYT Model SWL-35) plant No. R3/29 at ROH Department Bhusawal”. The contract specifically recorded that the General Conditions of Contract of the Indian Railways as amended from time to time would apply. Accordingly, for the purpose of resolution of disputes, if any, between parties, the Arbitration Clause contained in the General Conditions of Contract of the Railways was applicable.

3. It appears that disputes arose between the parties, as a

consequence of which, by a notice dated 14th December, 2020, the Petitioner invoked the Arbitration Clause under the General Conditions of the Contracts and demanded a specific amount from the Respondent. Despite service of the said notice, it is an admitted position that the Respondent did not send any reply. Eventually the Petitioner was constrained to file the present petition.

4. In the prayer clause the Petitioner has specifically prayed for appointment of a neutral Arbitrator for conducting the Arbitration proceedings at Pune.

5. Upon service, the Respondent has appeared through Counsel. It is submitted that a proper appreciation of the General Conditions of Contract that apply in the present case would show that an Arbitral Tribunal of three members could be appointed and that the mechanism of appointment provided in the concerned clause was upheld by the Hon'ble Supreme Court in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC SMO-MCML (JV) A Joint Venture Company*¹.

6. In the light of the position of law laid down by the Hon'ble Supreme Court, the learned Counsel for the petitioner could not demonstrate as to how the facts in the present case could be distinguished.

¹ (2020) 14 SCC 712

7. Nonetheless, a specific issue does arise in the facts of the present case, which is that in the light of the Respondents having admittedly failed to send a reply or respond to the invocation notice sent by the Petitioner and the Petitioner being constrained to file the present petition under Section 11 of the said Act, the Respondents forfeited their right to insist upon the procedure for appointment of the Arbitral Tribunal as contained in the Arbitration Clause.

8. In the case of *Punj Lloyd Ltd. vs Petronet MHB Ltd.*², where the Hon'ble Supreme Court followed the earlier judgment in the case of *Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr.*³, which was further affirmed in the judgment in the case of *M/s. Deep Trading Company Vs. M/s. Indian Oil Corporation & Ors.*⁴, in the facts of the present case, the Respondents clearly forfeited their right to insist upon the procedure for appointment of Arbitral Tribunal as contained in the Arbitration clause.

9. The Respondents having forfeited their right, this Court can certainly consider a specific prayer made in the present petition for appointment of neutral Arbitrator for resolution of disputes between the parties. As noted hereinabove, apart from praying for

² (2006) 2 SCC 638

³ (2000) 8 SCC 151

⁴ (2013) 4 SCC 35

appointment of such a neutral and impartial Arbitrator, the Petitioner has also prayed for the Arbitral proceedings to take place at Pune.

10. In this context, the learned Counsel for the Respondent correctly points out that the Arbitration Clause specifically provides for the proceedings to either takes place at the headquarters which are at Mumbai or at Bhusawal. The learned Counsel appearing for the Petitioner took specific instructions from the Petitioner and submitted that this Court may direct the Arbitral proceedings to take place at Mumbai

11. In the light of the above, the present petition is allowed. Accordingly, Mr. Vikram A. Sathaye Advocate practicing in this Court, is appointed as the sole Arbitrator for resolution of disputes between the parties. The details of the learned Arbitrator are as follows :

Mr. Vikram A. Sathaye,
Cabin No. 5, 1st Floor, B Wing,
Fort Chambers, Hamam Street, Fort,
Mumbai - 400 001.
Mob. No. 9819943007
Email : vsathaye@gmail.com

12. The parties undertake to inform the learned Arbitrator about the order passed today.

13. The learned Arbitrator is requested to communicate his

consent and Disclosure Statement as per Section 11(8) r/w Section 12(1) of the said Act, within four weeks to the Registrar (Judicial) of this Court.

14. The fees of the Arbitrator shall be as per Schedule IV to the Aforesaid Act.

15. All questions are kept open.

16. The petition stands disposed of.

(MANISH PITALE, J.)