

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

ARBITRATION PETITION NO. 61 OF 2022

Kalpana Struct-Con Pvt. Ltd.	...Petitioner
Vs.	
Union of India, represented by Executive Engineer	...Respondent

Mr. Rushabh Sheth a/w. Mr. Pratik Poojary i/b. Mr. Pratik P. Amin, for the Petitioner.
Mr. Yashodeep Deshmukh a/w. Mr. Ajinkya Jaibhave, for the Respondent – Union of India.

**CORAM : MANISH PITALE, J.
DATE : 6 APRIL 2023**

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. By this petition, filed under Section 11 of the Arbitration and Conciliation Act, 1996, the petitioner is seeking appointment of an arbitrator in the light of the disputes that have arisen between the petitioner and the respondent.

2. The petitioner was engaged by the respondent for carrying out certain works as per tender floated by the respondent. An agreement was executed and work order came to be issued on 6/7/2017. There is no dispute about the fact that the agreement / contract between the parties was governed by the general conditions of contract, which contains an arbitration clause.

3. The arbitration clause being clause No.25 provided for resolution of disputes through arbitration. An elaborate procedure was specified, whereby the petitioner was required to approach various authorities of the respondent for redressal of its grievance and despite approaching such authorities, if the grievance was not satisfied then it was to be resolved through arbitration. It was the case of the petitioner that by communication dated 15/12/2021, it was constrained to call upon the respondent to appoint an arbitrator for resolution of the disputes. The parties could not come to a consensus regarding appointment of arbitrator.

4. It is significant that the arbitration clause specifically provided for appointment of sole arbitrator who shall be chief engineer of the respondent Central Public Works Department, thereby indicating that the appointment of the arbitrator was to be done unilaterally by the respondent. The said clause was hit by Section 12(5) of the aforesaid Act, which prohibits appointment of an arbitrator rendered ineligible by operation of Section 12(5) read with Seventh Schedule of the said Act. It is significant that by communication dated 11/1/2022, the petitioner subsequently informed the respondent that the arbitrator proposed to be appointed by respondent was rendered ineligible due to operation of Section 12(5) of the said Act. It is specifically stated that the petitioner was not waiving applicability

of Section 12(5) of the said Act.

5. It is in this backdrop that the present petition came to be filed in which the respondent has appeared through counsel. The learned counsel for the petitioner has relied upon judgment of the Supreme Court in the case of *TRF Ltd. Vs. Energo Engineering Projects Ltd.*¹, *Bharat Broadband Network Ltd. Vs. United Telecom Ltd.*², *Perkins Eastman Architects DPC and Anr. Vs. HSCC India Ltd.*³, to contend that the above clause in the present case was hit by Section 12(5) of the said Act. It was emphasized that the petitioner had specifically refused to waive applicability of Section 12(5) of the said Act and that the proviso thereto would not come to the rescue of the respondent. On this basis, it was submitted that this Court may appoint a neutral sole arbitrator for resolution of the disputes between the parties.

6. The learned counsel appearing for the respondent submitted that perusal of communication exchanged between the parties would show that the respondent had offered a wide range of names of former / retired employees from amongst whom the petitioner could appoint the arbitrator and that therefore, the said appointment could not be said to be in the teeth of Section 12(5) of the said Act. The learned counsel appearing for the respondent submitted that as per communication dated

¹2017 8 SCC 377

²2019 5 SCC 755

³2020 20 SCC 760

11/1/2022, the petitioner had indeed refused to waive the applicability of Section 12(5) of the said Act in the present case.

7. This Court has perused the material on record. Section 12(5) of the said Act reads as follows:

Section 12(5) – Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

8. A perusal of the proviso to the above quoted provision shows that the effect of the said provision can be waived only by an express agreement in writing between the parties. In the present case, a bare perusal of the arbitration clause shows that it was hit by Section 12(5) of the said Act. Therefore, the position of law clarified by the petitioner in the case of *TRF Ltd. Vs. Energo Engineering Projects Ltd., Bharat Broadband Network Ltd. Vs. United Telecom Ltd., Perkins Eastman Architects DPC and Anr. Vs. HSCC India Ltd.*, clearly indicates that the arbitration clause stood hit by Section 12(5) of the said Act and that therefore, the appointment of the arbitrator could not take

place as per procedure prescribed in the arbitration clause. The communication dated 11/1/2022, addressed by the petitioner to the respondent also sufficiently demonstrates that it refused to agree in writing for waiver of Section 12(5) of the said Act. Therefore, the petitioner is justified in insisting upon appointment of a sole arbitrator for resolution of disputes between the parties.

9. In view of the above, Mr. Amit Jamsandekar, learned counsel practicing in this Court is appointed as the sole Arbitrator, for resolving the disputes between the parties. The details of the learned Arbitrator are as follows.

Mr. Amit Jamsandekar

Addres : 11 D, Examiner Press Building,

Dalal Street, Fort, Mumbai – 400 001.

amitjam@gmail.com

Mobile No.9821096838

10. The petitioner to inform the learned arbitrator immediately about the order passed today.

11. The learned arbitrator is requested to communicate his consent and disclosure statement as per Section 11(8) and 12(1) of the aforesaid Act, within four weeks to the Registrar (Judicial) of this Court. The fees of the learned arbitrator shall be as per schedule IV to the said Act.

12. All contentions of the parties are kept open.
13. The petition stands disposed of, in aforesaid terms.

MANISH PITALE, J.