

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO.214 OF 2021
ALONGWITH
COMMERCIAL ARBITRATION PETITION (L) NO.35783 OF 2022

M/s.Deepak and Sahil Engcon Pvt. Ltd.] .. Applicant

vs.

M/s.D.P. Build Homes LLP & Anr.] .. Respondents

Mr.Chirag Mody a/w J.P. Ranawat i/b Janu Gulati for Applicant in Section 11 Application and for Respondent in Section 9 Petition.

Ms.Richa Singh i/b Shweta Singh for the Petitioner in Section 9 Petition and for Respondent in Section 11 Application.

CORAM : BHARATI DANGRE, J

DATE : 16th JANUARY, 2023.

P.C.

1] Two proceedings, Arbitration Petition filed under Section 9 and Arbitration Application filed under Section 11 arise out of the 'work order' allotted to the Petitioner for carrying out civil and RCC work for the Respondent.

Under the said work order, the Petitioner was allotted the work of carrying out sub structure and super structure work-RCC, Brick work/Block work, internal plaster(wet areas) and external plaster, water proofing works. The scope of work was specifically highlighted in the work order.

The work order contemplated clause for 'Disputes and Arbitration' in form of Clause 16, which specified that the disputes shall be, as far as possible, settled amicably, failing which the disputes shall be referred to a panel of three arbitrators, one arbitrator shall be appointed by each party and the third arbitrator, who shall designate the presiding arbitrator, shall be appointed by the arbitrators appointed by each party. The decision and award of the Arbitration was to be given a final and binding effect.

2] The disputes arose between the parties, as it can be seen that the work order was terminated by order dated 25.01.2021 on account of the alleged poor quality of civil and RCC work. The correspondence was exchanged between them and ultimately on 27.03.2021 the Respondent communicated to the Petitioner that despite giving ample opportunities to comply with the obligations, there was utter failure which resulted in termination of the LOA on 25.01.2021 and it also called upon the contractor to pay sum of Rs.8,19,18,016/- alongwith interest at the rate of 18% p.a. towards damages, refund, penalty etc.

Relying to clause 16 in the LOA, the name of Arbitrator was suggested. This notice was replied by the Respondent with no denial about existence of arbitration clause in the Agreement, but name of other Arbitrator was suggested.

Since the parties could not agree as to the name of the Arbitrator to be appointed to adjudicate their differences, Application is filed by the Respondent seeking appointment of Arbitrator.

3] Petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 seek following relief :

(a) This Hon'ble court be pleased to declare that the

Letter of Award dated 10.12.2016 be declare valid and subsisting.

(b) By permanent order and injunction of this Hon'ble Court be please to restrain Respondent, their servants and agents, from developing or starting construction activity on the suit property viz. Project situated at Datta Mandir Road, off Village Road, Bhandup(W), Mumbai-400 078 by letter of Award dated 10.12.2016.

(c) By Permanent order and injunction of this Hon'ble court be please to direct the respondent to deposit to the tune of Rs.9,00,00,000/- (Rupees Nine Crores) or for security to be given with respect to the same.

4] When the learned counsel for the Petitioner is asked to justify prayer clause (c) by inviting her attention to the pleadings contained in the Petition and as to whether case has been made out under Order 38 Rule 5 of the Code of Civil Procedure by at least pleading the same in the Petition, prior to the Court being called to exercise the powers, she is unable to point out any pleadings to that effect.

However, since the appointment of the Arbitrator is sought for, she request that the Petition filed by her under Section 9 be considered as Application under Section 17, before the Arbitral tribunal to seek interim measures as would be necessary.

5] I am convinced to grant said relief, since it is noticed by me that the Petitioner has been filed under Section 9 of the Arbitration and Conciliation Act, after the Respondent has invoked arbitration clause on 27.03.2021. It is, therefore, appropriate that the parties are relegated to the arbitral tribunal which is the form chosen by them in the Agreement for referring their disputes.

6] In the wake of above, with the liberty being reserved with the parties to take out appropriate applications before the Arbitrator under

Section 17, I pass the following order :

ORDER

TERMS OF APPOINTMENT

(a) Appointment of Arbitrator :

Mr. Atul Daga, Advocate, Chamber of Senior Counsel Mr. Madan, is hereby appointed as a Sole Arbitrator to decide the disputes and differences between the parties under the documents referred to above.

(b) Communication to Arbitrator of this order :-

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the applicant/petitioner within one week from the date this order is uploaded.

(c) Disclosure : The learned Arbitrator, within a period of 15 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 & Senior Master of this Court, to be placed on record of this application, with a copy to be forwarded to both the parties.

(d) Appearance before the Arbitrator : The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the learned Arbitrator shall fix up a first date of hearing in the week commencing from 06/02/2023. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

(e) Contact and communication information of the parties : Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. This information shall include a valid and functional E-mail address

as well as mobile numbers of the parties, participating in the process as well as of the Advocates.

(f) Section 16 application : The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) Fees : The Sole Arbitrator shall be entitled for the fees as per the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

(h) Venue and seat of Arbitration : Parties agree that the venue and seat of the arbitration will be in Mumbai.

(i) Procedure : These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

(j) All the rights and contentions of the parties are kept open.

Arbitration Application and Arbitration Petition are disposed off in the aforesaid terms.

[BHARATI DANGRE, J]