

AP-COM/916/2024

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
(Commercial Division)

PBA INFRASTRUTURE LIMITED.

-VERSUS-

SOLAPUR TOLLWAY (P) LTD.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 13th November, 2024

Appearance:

Mr. Shaunak Mukhopadhyay, Adv.

Mr. Paritosh Sinha, Adv.

Ms. Shreyashee Das, Adv.

Mr. Rohan Kumar Thakur, Adv.

Mr. Tribesh Das, Adv.

...for the Petitioner.

Mr. Rohit Das, Adv.

Ms. Kishwar Rahman, Adv.

Mr. Indradip Rahman, Adv.

Ms. Sristi Roy, Adv.

...for the respondent.

The Court: Affidavit of service filed in Court today, is taken on record.

This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act, 1996'). The petitioner prays for appointment of an Arbitral Tribunal.

It is submitted that the petitioner has already suggested its nominee, but the respondent had failed to suggest its own nominee.

Clause 22.4 of the contract, provides for settlement of disputes through arbitration. The clause provides that if the dispute is not amicably settled as per clause 22.3, the dispute shall be decided by reference to arbitration in accordance with the provisions of the said Act of 1996. The petitioner has also drawn the attention of the Court to the notice invoking arbitration.

Mr. Das, learned Advocate appearing for the respondent opposes the prayer and raises three objections. First, that the dispute resolution clause at 22.3 had not been exhausted. Secondly, the claims were not made within the period of 28 days from the date when such additional claim became due. No notice, as per the aforementioned clauses, had been served upon the respondent. Clause 22.4 was subject to compliance of clauses 22.2 and 22.3. Lastly, that the bank guarantee was invoked by the respondent sometime in 2017, and as such, the dispute with regard to the invocation of bank guarantee was also barred by limitation.

Admittedly, there is an arbitration clause and the notice inviting arbitration was served upon the respondent and the respondent replied to the same.

Mr. Shaunak Mukhopadhyay, learned Advocate for the petitioner, on the other hand, has referred to several correspondence in support of his claim that in the understanding of the petitioner, compliance of clauses 22.2 and 22.3 were complete. The disputes, according to the petitioner, were under various heads. The invocation of

bank guarantee, non-payment of regular Running Account (RA) Bills, non-payment of additional bills which were raised during the execution of the contract, were some of them. It is submitted that although the bank guarantee was invoked in 2017, the contract was extended till 2021. Moreover, the arbitration clause was invoked within the period of limitation, inasmuch as, the petitioner was entitled to the exemption of the covid period as per the order of the Hon'ble Apex Court, by which the time to initiate proceedings even under the said Act of 1996, had been extended.

A letter dated February 5, 2022 has been referred to as the first of a series of correspondence. By the said letter, the petitioner had raised its claims before the respondent. Further prayer was made for extension and payment of the dues. The next letter written by the petitioner is dated November 29, 2022, by which payment was claimed once again. These two letters, according to the petitioner, were issued in compliance of clause 22.2. Thereafter, by a letter dated June 16, 2023, the petitioner elaborated the claims and invoked clause 22.3. The petitioner called for a meeting as a step towards conciliation and/or amicable settlement. The respondent replied to the said letter by its letter dated July 25, 2023. It was the specific case of the respondent that the contractor had jumped the mechanism for amicable resolution as envisaged in clause 22.3. That the representatives of each of the parties were to meditate for settlement and upon failure of the process of mediation, the dispute was to be

referred to arbitration. By a letter dated August 10, 2023, the petitioner invoked the mediation clause and nominated the mediator. The request was reiterated by learned Advocate for the petitioner. By a letter dated August 16, 2023, the respondent disputed the alleged compliance of clauses 22.2 and 22.3 by the petitioner. Correspondence continued between the respective Advocates for the parties. Finally, by a letter dated January 10, 2024, the petitioner invoked the arbitration clause and nominated its arbitrator. In the said letter, reference to the discussion meetings held between the CEO and another officer of the respondent and the representative of the petitioner, have been made. It appears that at least three discussion meetings had been held between the parties. The petitioner, by a letter dated August 12, 2024, named the nominee arbitrator from its side. By letter dated September 27, 2024, the respondent denied the invocation of the arbitration clause and informed the petitioner that the proposal for settlement was outrightly denied.

The facts narrated as hereinabove, indicate that the petitioner had made attempts to comply with the provisions of clauses 22.2 and 22.3 and the respondent had written to the petitioner, outrightly rejecting the request for settlement. Here, the issue of limitation is a mixed question. Moreover, it is for the learned Arbitral Tribunal to decide whether the claims were time barred or not. Apart from invocation of the bank guarantee, there were other claims too. This court is not required to delve deeper into the aspect of limitation. The respondents failed to nominate an

arbitrator. There is an arbitration clause. The arbitration clause is quoted below:-

“Any dispute, which is not resolved amicably as provided in Sub-Clause 22.3 shall be finally decided by reference to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (or any modifications to or any re-enactments thereof as in force at the time). The Arbitration Tribunal shall consist three arbitrators; one each to be appointed by the Employer and the Contractor and the third to be appointed by the two arbitrators appointed by the Employer and the Contractor. The Arbitration Tribunal shall issue a reasoned Award. The place of arbitration shall be Kolkata or such other place in India as the Parties may agree.”

The petitioner had nominated Shri Arun Vithalrao Deodhar (Retd. Secretary PWD, Govt. of Maharashtra) as its nominee. The respondents failed to supply the name of a nominee. This Court deems it fit to refer the dispute to an Arbitral Tribunal, consisting of three members. Hon'ble Justice Jyotirmay Bhattacharya, former Chief Justice of the Calcutta High Court, Justice Siddhartha Roychowdhury, former Judge of the Calcutta High Court and Shri Arun Vithalrao Deodhar (Retd. Secretary PWD, Govt. of Maharashtra) having his address at 33/334, Sankalp Sidhi Apartment, Flat No.8 Lane No.5 Prabhat Road, Near Sahyadri Hospital, Pune 411 004, will constitute the tribunal. Hon'ble Justice Jyotirmay Bhattacharya will act as the Presiding Arbitrator. The seat of arbitration will be Kolkata.

The appointment is subject to compliance of Section 12 of the said Act of 1996, by all the learned Arbitrators.

All the learned Arbitrators shall fix their remuneration as per the Schedule of the Act of 1996.

The issues of limitation, admissibility of the claims, the non-compliance of the preceding dispute resolution clause and whether the request for reference to arbitration was premature, can be urged before the learned Arbitrators.

Accordingly, AP-COM/916/2024 is disposed of.

All parties are to act on the basis of server copy of this order.

(SHAMPA SARKAR, J.)

A/s.