

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

APPEAL FROM ORDER NO. 9 OF 1999
WITH
CIVIL APPLICATION NO. 551 OF 1999
WITH
CIVIL APPLICATION NO. 13144 OF 2011
IN
CIVIL APPLICATION NO. 16821 OF 2010

Maharashtra Krishna Vally Development
Corporation (Incorporated under the
Maharashtra State Krishna Vally
Development Corporation Act, 1996)
through its Executive Engineer,
Kukadi Irrigation Project, Division No. VII,
Shrigonda, District Ahmednagar

**....Appellant.
(Ori. Respdt.)**

Versus

1. M/s. S.D. Shinde & Company
Engineers & Contractors,
'Parvati Niwas, 26 Yashwant
Colony, Ahmednagar.
2. Shri. B.S. Shinde,
Age 40 years, Occu. Business,
3. Shri. Ramdas S. Shinde,
Age 35 years, Occu. Business,
4. Shri. A.S. Shinde,
Dead L.Rs. R. Nos. 6 to 8.
5. Ravindra S. Shinde,
Age 24 years, Occu. Business,
6. Prasad s/o. Raosaheb Shinde,
Age 24 years, Occu. Education,
7. Sunny s/o. Raosaheb Shinde,
Age 22 years, Occu. Education,

8. Rohit s/o. Raosaheb Shinde,
Age 19 years, Occu. Education,

All R/o. 202, Sai-Kunj, Apartment,
Gulmohohal Road, Savedi,
Ahmednagar.

....Respondents.

Mr. G.B. Rajale, Advocate for appellant.

Mr. S.P. Shah, Advocate for respondent Nos. 2 and 3.

Mr. R.R. Imale, Advocate for respondent No. 5.

Mr. S.P. Brahme h/f. Mr. P.M. Nagargoje, Advocate for respondent
Nos. 6 to 8.

WITH
CIVIL REVISION APPLICATION NO. 125 OF 1999

Maharashtra Krishna Vally Development
Corporation (Incorporated under the
Maharashtra State Krishna Vally
Development Corporation Act, 1996)
through its Executive Engineer,
Kukadi Irrigation Project, Division No. VII,
Shrigonda, District Ahmednagar

**....Petitioner.
(Ori. applicant)**

Versus

1. M/s. S.D. Shinde & Company
Engineers & Contractors,
'Parvati Niwas, 26 Yashwant
Colony, Ahmednagar.
2. Shri. B.S. Shinde,
Age 40 years, Occu. Business,
3. Shri. Ramdas S. Shinde,
Age 35 years, Occu. Business,
4. Shri. S.S. Shinde,
Deleted as per Order dt.
28.10.2008.
5. Ravindra S. Shinde,

Age 24 years, Occu. Business,

Respondent No. 2 to 5 partners of
the respondent No. 1 and
R/o. Parvati Niwas, 26, Yashwant
Colony, Ahmednagar.

6. Prasad s/o. Sahebrao Shinde,
Age 13 years, Occu. Education,
7. Suni s/o. Sahebrao Shinde,
Age 12 years, Occu. Education,
8. Rohit s/o. Sahebrao Shinde,
Age 9 years, Occu. Education,

All through their guardian and
next friend Shri. Annasaheb s/o.
Shripatrao Shinde, Age 45 years,
Occu. Business, R/o. Savedi Road,
Near Zopadi Canteen Ahmednagar,
Taluka and Dist. Ahmednagar.

....Respondents.

Mr. G.B. Rajale, Advocate for appellant.

Mr. S.P. Shah, Advocate for respondent Nos. 2 and 3.

Mr. R.R. Imale, Advocate for respondent No. 5.

Mr. S.P. Brahme h/f. Mr. P.M. Nagargoje, Advocate for respondent
Nos. 6 to 8.

CORAM : T.V. NALAWADE, J.

DATED : 23rd November, 2015.

JUDGMENT :

1) The appeal and revision are filed to challenge the
judgment and order of learned Civil Judge, Senior Division,
Ahmednagar in Arbitration Application No. 1/1997 and Regular
Civil Suit No. 5/1997. Both the proceedings are decided at the

same time by the learned Civil Judge, Senior Division. In the suit, decision is given, by which decree is given on the basis of award of Arbitral Tribunal. The application filed by employer, present appellant for setting aside the award is dismissed. Both the sides are heard. It appears that some of the partners of the contractor got separated and so, different advocates appeared for the partners in the present proceedings and all of them were allowed to argue the matter. However, they argued in support of the decision of the Civil Court and in support of the award delivered by so called arbitrator.

2) Krishna Vally Development Corporation is a State Corporation and it had given the work of construction of canal to respondent M/s. S.D. Shinde and Company. The value of the work was Rs. 55.77 lakh. The time of the work was fixed as 18 months and penalty was stipulated in the contract if delay was caused in respect of completion of work. On 15.1.1994 the contractor requested to withdraw the work on the basis of terms and conditions of the contract and the work was actually withdrawn. Final bill was prepared in the month of March 1995 and the amount under the final bill was paid to the contractor which was accepted under protest.

3) The contractor issued notice to the Corporation and informed that contractor had appointed one Shri. S.V. Mahurkar, retired Superintending Engineer of Government of Maharashtra as arbitrator. The Corporation appeared before the arbitrator and took objection to the authority, jurisdiction of the arbitrator. The Corporation contended that there was no agreement for referring the dispute to the arbitrator.

4) A proceeding was filed in the year 1996 under section 33 of Arbitration Act, 1940 (hereinafter referred to as 'the Act' for short) in the Court by the Corporation (1/1996). This application was dismissed by holding that the application under section 33 of the Act was not tenable. Reasons were given that the Corporation had appeared before the arbitrator and it can be said that it had submitted to the jurisdiction of the arbitrator. The submissions made by the learned counsel for the contractor were accepted that all the objections can be taken after the award is made and as arbitration proceeding was already started, it needs to be concluded.

5) Arbitrator passed award on 30.11.1996 and copy of the award was delivered to the Corporation and also to the Contractor on 21.12.1996. The arbitrator filed the award in the

Court on 9.1.1997. On 6.1.1997 the Corporation, employer filed Arbitration Application No. 1/1997 under sections 33 of the Act. In Regular Civil Suit No. 5/1997 which was registered on the basis of award filed by the arbitrator, exparte decree was given by the Court and this decision was challenged by filing application for setting aside the exparte decree along with application for condonation of delay. In Civil Revision Application No. 69/1998 which was allowed, this Court directed the trial Court to decide the R.C.S. No. 5/1997 and Arbitration Application No. 1/1997 together and the decision given by the trial court in the past was set aside. After making such order by this Court, written statement was filed in the suit also by the employer, Corporation and objection to the jurisdiction, authority of the arbitrator was taken.

6) The Civil Court has rejected the application filed under section 33 of the Act by observing that the previous order made by the Court, in the year 1996 comes in the way of employer to challenge the jurisdiction of the arbitrator again. It is held that the objection taken by the employer, Corporation is not within limitation. It is also held that the objection to the jurisdiction cannot be considered in a proceeding filed under section 30 of the Act.

7) The Court below has considered the following clauses of the main contract as arbitration clauses :-

"Clause 29 - All works to be executed under the contract shall be executed under the direction and subject to the approval in all aspects of the Superintending Engineer of the Circle, for the time being, who shall be entitled to direct at what point or points and in what manner they are to be commenced and from time to time carried on.

Clause 30 (1) - Except where otherwise specified in the contract and subject to the powers delegated to him by Government under the Code, rules then in force the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings, and instructions, hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, if any way arising, out of, or relating to or the contracts designs, drawings, specifications, estimates, instructions, orders, or these conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising, during the progress of the work, or after the

completion or abandonment thereof.

(2) The contractor may within thirty days of receipt by him of any order passed by the Superintending Engineer of the Circle as aforesaid appeal against it to the Chief Engineer concerned with the contract, Work or Project provided that --

(a) The accepted Value of the Contract exceeds Rs. 10 Lakhs (Rs. Ten Lakhs).

(b) Amount of claim is not less than Rs. 1.00 lakh (Rupees One Lakh)

(3) If the contractor is not satisfied with the order passed by the Chief Engineer as aforesaid, the contractor may, within thirty days of receipt by him of any such order, appeal against it to the concerned Secretary, Public Works Department/Irrigation Department who if convinced that prima-facie the contractor's claim rejected by Superintending Engineer/Chief Engineer is not frivolous and that there is some substance in the claim of the contractor as would merit a detailed examination and decision by the Standing Committee, shall put up to the Standing Committee at Government level for suitable decision (Vide P.W. circular No. CAT-1086/CR-110/Bidg-2 dt.7.5.86)."

There was one more agreement between the parties like Deed of

Pledge and at clause 13 of the Deed of Pledge there is specific reference of referring some dispute to arbitrator though it is only in respect of the contract made in the Deed of Pledge and it runs as under :-

"13. In the event of any conflict between the provisions of these presents and the said Agreement, the provisions of the said Agreement shall prevail and in the event of any dispute or difference arising over the constructions effect of these presents the settlement of which has not hereinbefore provided for the same shall be referred to the arbitration of two persons one to be nominated by the Government and the other by the Contractors, and failing agreement between these two arbitrators to an umpire appointed by them before entering upon the reference whose decision thereon shall be final and the provisions of the Arbitration Act, 1940 (X of 1940) or any notification thereof for the time being in force shall apply to any such reference."

The contractor did not dispute that this clause is not arbitration clause in respect of work executed and this clause is not used to refer the dispute to Shri. Mahurkar, Retired Superintending Engineer.

8) In Chapter 4 of the main contract, Special Conditions

of Contract, condition No. 53 is there and it is also relevant and it runs as under :-

"53.0 In case of any disputes between Contractor and the Government in the matter, whatsoever those shall be resolved as per provision of Clause-30 of tender and in no circumstances the reference to Arbitration Act will be entertained."

Thus, there was specific prohibition to refer dispute to Arbitrator.

9) "Arbitration agreement" is defined in the Act in section 2 (a) as under :-

"(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not"

Whether particular agreement amount to arbitration or not depends upon the intention of the parties to make submission to arbitration. In view of the definition of the "arbitration agreement", the agreement must be in writing and it must be accepted by the parties. In the cases reported as **AIR 1981 Supreme Court 479 [Rukminibai Vs. Collector] and**

(2014) 1 SCC 516 [Vishnu Vs. State of Maharashtra & Ors.], the Apex Court has referred **Russell on Arbitration, 21st Edition** in which distinction between expert determination and arbitration has been spelt out. It is laid down by the Apex Court that :-

"If it appears from terms of the agreement by which matter is submitted to a person's decision that the intention of the parties was that he should hold inquiry in the nature of judicial inquiry and here the respective cases of the parties and decided upon the evidence read before him, then the case is one of a arbitration." In the case of Vishnu cited supra, the Apex Court considered the relevant clauses of the agreement and the agreement was between Irrigation Department of the State Government and the contractor and the clauses are quoted in para No. 15 of the judgment as under :-

"15. We have considered the respective arguments. Clauses 29 and 30 of the B-1 Agreement entered into between the parties read as under :

Clause 29.- All works to be executed under the contract shall be executed under the direction and subject to the approval in all respects of the Superintending Engineer of the Circle for the time being, who shall be entitled to direct at what point

or points and in what manner they are to be commenced, and from time to time carried on.

Clause 30- Except where otherwise specified in the contract and subject to the powers delegated to him by Government under the Code rules then in force the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings, and instructions, hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, if any way arising, out of, or relating to or the contracts designs, drawings, specifications, estimates, instructions, orders, or these conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising, during the progress of the work, or after the completion or abandonment thereof."

At para 26 of the judgment, the Apex Court has observed that when the Superintending Engineer of the Circle was invested with the authority to approve all work to be executed under the contract, the Superintending Engineer was to supervise execution of all works. The power conferred upon him to take

decision on the matter enumerated in Clause 30 did not involve adjudication of any dispute or lis between the State Government and the contractor. It is observed that when the Superintending Engineer was to supervise the work and he was to take decision about the work, he cannot be expected to pass award by acting as arbitrator. It is observed that such a man could not be expected to adjudicate the matter with unbiased mind. More observations are made in para No. 28, the underline portion therein is as under :-

"A clause which is inserted in a contract agreement for the purpose of prevention of dispute will not be an arbitration agreement. Such a provision has been made in the agreement itself by conferring power upon the Engineer-in-Charge to take a decision thereupon in relation to the matters envisaged under clauses 31 and 32 of the said agreement. Clauses 31 and 32 of the said agreement provide for a decision of the Engineer-in-Charge in relation to the matters specified therein. The jurisdiction of the Engineer-in-Charge in relation to such matters are limited and they cannot be equated with an arbitration agreement. Despite such clauses meant for prevention of dispute arising out of a contract, significantly. Clause 30 has been inserted in the contract agreement by the parties."

After making these observations, the Apex Court held that the Superintending Engineer mentioned in Clause 30 of the agreement already quoted was not there as arbitrator named and there was no arbitration and that clause was not arbitration clause.

10) In the present matter, there is one more important circumstance. In Clause 30 (1), the officer mentioned is Superintending Engineer of the Circle (underline added). Thus, the Superintending Engineer who was actually working, could have been appointed under Clause 30 for giving his decision if at all this clause was arbitration clause. Admittedly, the contractor of the present case appointed a retired Superintending Engineer. This single circumstance shows that even if Clause 30 is taken as arbitration clause, the retired Superintending Engineer appointed by the contractor could not have acted as arbitrator. For this reason, it can be said that there was no authority or jurisdiction to Shri. Mahurkar to decide the dispute as Arbitral Tribunal.

11) The learned counsel for contractor placed reliance on some cases of this Court like **Misc. Civil Application Nos. 1480 and 1481 of 2008 decide on 2.7.2010** and

Arbitration Application No. 41/2007 decided on 6.10.2010. Both the proceedings were filed for appointment of arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 and while considering the prayer made by the contractor to appoint arbitrator, this Court referred agreement between the parties and held that the clause of the present nature can be treated as an arbitration clause. In view of the recent case of **Vishnu** cited supra of the Apex Court, the clause considered by the Apex Court and the observations made by the Apex Court in **Rukminibai's** case and **Vishnu's** case cited supra, which are already quoted, this Court holds that the two cases of this Court are of no help to the present contractor.

12) Clause 53 of the present contract already quoted shows that arbitration itself is prevented under the present contract. In the case reported as **(1994) 4 Supreme Court Cases 135 [K. Sasidharan Vs. Kerala State Film Development Corporation]**, the Apex Court has laid down that when the parties have specifically excluded the arbitration clause in the contract, the Court cannot make contract between the parties.

13) The Civil Court has held that the objection to the

award is not taken in time. On this point, it can be said that the provisions of Limitation Act need to be read with section 14 (2) of the Act. This provision runs as under :-

"14. Award to be signed and filed :- (1)

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

Article 119 (b) of Limitation Act runs as under :-

Description of suit	Period of limitation	Time from which period begins to run
119.Under the Arbitration Act, 1940,-		
(a)		
(b) for setting aside an award or getting an award remitted for reconsideration	Thirty days	The date of service of the notice of the filing of the award

14) In the case reported as **(2005) 10 Supreme Court**

Cases 575 [Gurbax Singh Vs. Punjab Mandi Board], the Apex Court has discussed the provision of section 14 (2) and has discussed the point of commencement of limitation for filing objections. It is specifically laid down that the limitation period under Article 119 (b) for filing objection commences from the date of the notice mentioned in section 14 (2) of the Act. The relevant facts are already quoted by this Court and they show that within 30 days even from the date of supply of copy of the award, the objection, Arbitration Application No. 1/1997 was filed by the employer under section 33 of the Act. There are other circumstances also like making of the award *ex parte* by the Civil Court and then setting aside the same by this Court and remanding the matter and then filing written statement in that matter by the employer. In any case, for the proceeding under section 33, Article 119 (b) is not applicable and that can be seen from section 33 itself.

14) The Civil Court has referred the order made on previous application filed under section 33 of the Act and has observed that the point of jurisdiction, authority is already decided. This finding is not tenable. The previous order shows that the objection to the jurisdiction was taken before the Arbitral Tribunal and then during pendency of arbitration

proceeding, application was moved under section 33. The Court held that there was some agreement and the employer has submitted jurisdiction to the arbitrator and so application under section 33 was not tenable. The submissions made by the contractor that this objection can be considered after passing of the award was accepted by the Civil Court at that time. Thus, it can be said that the point was not decided. There is one more angle to this point. While deciding proceeding No. 1/1996, the Civil Court had referred the so called agreement which was mentioned as Pledge Deed and the Court had observed that the claims were probably in respect of machinery only mentioned in the Pledge Deed when the claims were in respect of the work executed and now the award is given in respect of the work. Thus, the Civil Court has not properly appreciated the previous objection, the stand taken by the contractor and the order made by the Civil Court in the previous proceeding. When there was no agreement at all to refer the present dispute to Arbitral Tribunal, the so called award prepared by him cannot be recognized in law. For this reason also, the reasoning given by the Civil Court on this point is not tenable.

15) The other observations of the Civil Court that the objection of jurisdiction cannot be considered in a proceeding

filed to get decree on the award cannot be considered, is also not tenable. In that matter also written statement was filed and objection to jurisdiction was taken. When there is such objection, the Civil Court is expected to give decision on this objection also. Further, separate proceeding under section 33 of the Act was there and so, while deciding to give decree on the basis of award, it was necessary for the Civil Court to decide as to whether Arbitral Tribunal had jurisdiction, authority. Only after deciding such objection, the Court can pronounce the judgment in terms of award. Other observations of the Civil Court that the participation of the employer in the arbitral proceeding amounts to acquiescence is also not tenable. When there is initial want of jurisdiction, the things cannot be cured by acquiescence and the party who appeared before the arbitrator, but took objection to its jurisdiction is not established from questing the validity of the award on the ground of jurisdiction.

16) In view of the aforesaid discussion, this Court holds that the Civil Court has committed error in giving decree on the basis of award and it has committed error in rejecting the objection application filed by the employer. Shri. Mahurkar could not have been appointed as arbitrator and there was no such arbitration agreement. Thus, award is liable to be set aside.

17) It appears that as per the order made by this Court amount of award is deposited by the employer and that is withdrawn by the contractor. In view of the present decision, the employer is entitled to recover that amount. From the terms and conditions of the contract, it can be said that the contractor had agreed to give interest at the rate of 18% p.a. on the loan advanced to it. In view of this clause of the contract, in ordinary course right could have been given to the employer to recover interest at the rate of 18% p.a. However, considering the rates of nationalized banks and also the aforesaid circumstances and the order made by this Court, this Court holds that the employer is entitled to recover interest at the rate of 12% p.a. if there is no undertaking in that regard for withdrawal of amount. In the result, the following order.

O R D E R

(I) Both the proceedings are allowed. The decision of the Court below of preparing decree on the basis of the award is hereby set aside. The decision of the Court below of dismissal of the objection filed by the employer is also set aside. Arbitration Application No. 1/1997 is allowed. The award of the arbitrator is set aside. Other civil applications are disposed of.

(II) The entire amount already collected will be

recoverable along with interest at the rate of 12% p.a. and the interest will be chargable from the date of withdrawal of the amount by the contractor from the Court till the date of realization of entire amount. If there is undertaking, the interest would be payable as per undertaking.

(III) The learned counsel for the contractor requested for stay to the order of recovery. Stay of four weeks is granted.

[T.V. NALAWADE, J.]

ssc/