

Anand

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

ARBITRATION PETITION NO. 42 OF 2014

M/s. C.B. Gaidhani

.Petitioner

Vs.

The Executive Engineer,
Public Works Division (E) & Ors.

.Respondents

Mr. Mahindra Deshmukh, Advocate, for the Petitioner
Mr. A.R. Patil, A.G.P., for the State**CORAM : A.A. SAYED, J.****DATE : 5 MARCH, 2015****ORDER**

. This Arbitration Petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as '1996 Act') for appointment of an Arbitrator.

2. After a tender process, the work of construction of a major bridge across Mula-Mutha river on MDR-55 to Walki Sangam Road, Taluka-Daund, District Pune, was allotted by issuing a work order to the Petitioner-Contractor by Public Works Department, State of Maharashtra. Disputes and differences arose between the parties as the work of construction could not be completed in time and the work was withdrawn from the Petitioner

and was later awarded to another Contractor, pursuant to which the present Petition has been filed by the Petitioner for appointment of an Arbitrator.

3. On bare reading of clause 34 of the conditions of the contract, as contained in the 'Tender Documents in 'C' Form', I do not find that there is any agreement to refer the disputes to Arbitration as sought to be suggested by the Learned Counsel on behalf of the Petitioner. Learned Counsel for the Petitioner has relied upon the judgment of learned Single Judge of this Court in ***Harbhajan Sarabjeet & Associates v/s. Maharashtra Krishna Valley Development Corporation & Anr. 2011(1) Arb. LR 560 (Bombay)***, to contend that after considering the clause 30.1 of the contract in that case, the Court appointed an Arbitrator. I have perused the aforesaid judgment of the learned Single Judge and I find that clause 30.1 of the contract in that case is wholly different than the aforementioned clause 34 in the present case. The reliance placed on the aforesaid judgment of the Single Judge is wholly misplaced. Even otherwise, I find that the Petitioner himself in his letter dated 30.09.2011 to the Executive Engineer (Exh "Z") admits that there is no clause in the tender document for

reference of the dispute to arbitration.

4. It is then contended by the learned Counsel for the Petitioner that on a reading of the communications of the Executive Engineer, Superintendent Engineer and the Chief Engineer of Public Works Department, it would be evident that the said officers were agreeable to refer the disputes and differences between the parties to arbitration and as a matter of fact the Executive Engineer even agreed to the name of an Arbitrator suggested by the Petitioner. Alluding to Section 2(1)(b) and Section 7 of the 1996 Act, learned Counsel for the Petitioner submitted that the aforesaid correspondence would constitute an arbitration agreement within the meaning of Section 7 of the 1996 Act. Learned Counsel further submitted that considering the nature of transaction, it would only be appropriate that an expert in the field be appointed as an Arbitrator as has been agreed between the parties. He has placed reliance on the judgment of learned Single Judge of the Madras High Court in B.G. Shirke Construction Technology Ltd. vs. ETL Infrastructure Services Ltd. 2009 (Suppl. 2) Arb. LR 154 (Madras), wherein it has been held that the decision of the Arbitrator who is expert in the field would

be preferred rather than relegating the parties to the Civil Court to adjudicate on Civil matters which are highly technical in nature.

5. Learned A.G.P. on the other hand submitted that no arbitration agreement can be culled out from the letters annexed to the Petition. He submitted that most of the letters are internal documents and in the form of recommendation and seeking approval for appointment of Arbitrator and the said letters are not binding on the Government. The Government has ultimately rejected the proposal for appointment of an Arbitrator as the Tender Document did not contain any provision for appointment of an Arbitrator. He invited my attention to the Affidavit-in-Reply filed by the Executive Engineer, Public Works Division (E), Pune, and the Exhibits annexed thereto, which show that the Government is not agreeable to the appointment of an Arbitrator. He placed reliance upon the judgments in ***VISHNU (DEAD) BY LRS. V/S. STATE OF MAHARASHTRA AND OTHERS, (2014) 1 Supreme Court Cases 516, ASHOKA BUILDCON LTD., NASHIK V/S. MAHARASHTRA STATE ROAD DEVELOPMENT CORPORATION LTD., MUMBAI, 2008(5) Mh.L.J.67*** and ***NILESH C. SANGHANI and others vs. RAKESH V. ZANGDA, 2007(6)***

Mh.L.J. 242.

6. I have perused the correspondence including the communications of the Executive Engineer, Superintendent Engineer and Chief Engineer of the Public Works Department of State of Maharashtra annexed to the Petition. In my view, the same does not spell out any arbitration agreement as contemplated under Section 7(4)(b) of the 1996 Act. The communications of the aforesaid officers which are relied upon by the Petitioner, are internal Departmental communications seeking approval for reference to arbitration. Even if it is taken that the said officers were agreeable to the reference while seeking approval, unless the proposal was ultimately approved by the Government, it cannot be said that there was any agreement in these internal departmental communications to refer the matter for arbitration. Section 7(4)(b) mandates that there should be an 'exchange' of letters, telex telegrams or other means of telecommunications which provide a record of the agreement to refer the matter to arbitration. The internal departmental communications cannot constitute such 'exchange'. There is no letter written by the aforesaid officers to the Petitioner agreeing to refer the matter to

arbitration. On the contrary, the letter/s written to the Petitioner categorically state that the Petitioner's request for reference to Arbitration cannot be accepted. There is no dispute that the Government has ultimately rejected the proposal of the Public Works Department to refer this dispute to arbitration on the ground that there was no such arbitration clause in the 'C' Form Tender Documents.

7. In these circumstances, it is not possible to accede to the prayer of the Petitioner for appointment of Arbitrator. The Arbitration Petition is accordingly dismissed. No order as to costs.

(A. A. SAYED, J.)