

**HON'BLE THE ACTING CHIEF JUSTICE DILIP B. BHOSALE
AND**

THE HON'BLE SRI JUSTICE S.V. BHATT

W.P.No.25505 OF 2002

ORDER: *(Per the Hon'ble Sri Justice S.V.Bhatt)*

Heard learned counsel appearing for the parties.

The petitioner prays for Mandamus declaring G.O.Ms.No.430, Irrigation (IPR.V) Department dated 24.10.1983, as amended by G.O.Ms.No.160, Irrigation and CAD (Projects) Department dated 01.06.1987, as illegal and unenforceable in view of scheme of constitution of Arbitral Tribunal under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the Act").

From a bare perusal of the prayer, it is clear that the petitioner challenges the legality and enforceability of the GO dated 24.10.1983 as contrary to Section 11 of the Act. The clause under challenge in the impugned G.O. reads thus:

“(ii) Settlement of all claims above Rs.50,000/- in value. All claims above Rs.50,000/- in value shall be decided by the Civil Court of competent jurisdiction by way of a regular suit and not by Arbitration.”

The facts relevant for disposal of the writ petition are stated thus:

On 18.04.1998, the petitioner and the 1st respondent entered into agreement for executing “the laying work of BT surface” from NH-7 to Rachala, Addakal Mandal, Mahabubnagar District. The agreement admittedly contains arbitration clause to resolve the disputes in the implementation or execution of agreement dated 18.04.1998. The clause reads as follows:

“3. ADJUDICATION OF DISPUTES:

Except as otherwise provided in the contract, any disputes and

differences arising out of relating to the contract shall be referred to adjudication as follows:

1. i) Settlement of all claims up to Rs.50,000/- in value and below by way of Arbitration to be referred as follows:
 - a) Claims up to Rs.10,000/-
Superintending Engineer of another circle in the same department in the panel of Arbitration.
 - b) Claims above Rs.10,000/- and up to Rs.50,000/- in value another Chief Engineer of the same department in the panel of Arbitration.
 - c) Claims above Rs.50,000/- Court of competent jurisdiction.

The arbitration proceedings will be conducted in accordance with provisions of the Arbitration Act, 1940 as amended from time to time. The arbitrator shall invariably give reasons in the award.

- ii) Settlement of all claims above Rs.50,000/- in value. All claims above Rs.50,000/- in value shall be decided by the civil court of competent jurisdiction by way of regular suit and not by arbitration.

2. A reference for adjudication under this clause shall be made by either party to the contract within six months from the date of intimating the contractor of the preparation of final bill or his having accepted payment”.

In the execution of instant agreement, disputes have arisen between the parties. The petitioner prefers resolution of disputes irrespective of value thereof. It is in this context the petitioner challenges the legality of the impugned GO on the ground that the resolution of dispute through arbitration cannot be restricted to a sum of Rs.50,000/- and resolution of the dispute arising over and above Rs.50,000/- is by way of a regular civil suit. The challenge is that the impugned GO is contrary to Section 11 of the Act and ignores the superior legal remedy available to a party under the Act and having regard to the adaptation of UNCITRAL in making the Act, the GO is liable to be set aside as the G.O. renders arbitrable dispute for a sum of Rs.50,000/- .

The 1st respondent filed counter affidavit and contends that the subject agreement was entered on 18.04.1998 and according to Section 7 of the Act, the arbitration agreement between the parties is governed by Clause 3 which restricts resolution of disputes up to Rs.50,000/- through arbitration and the disputes over and above the said Rs.50,000/- is only by way of a civil suit.

The respondents contend that the resolution of disputes through arbitration shall be in accordance with Section 7 of the Act. In the case on hand, even with the application of the Act, consensus between the parties on dispute resolution mechanism is covered by Clause 3 of the agreement. The restriction contained either in the impugned GO or the arbitration agreement cannot be treated as illegal and contrary to the scheme of the Act. The respondents pray for dismissal of the writ petition.

Now the short point for consideration is - whether the impugned GO is liable to be declared as illegal by operation of Section 11 of the Act.

The admitted circumstance is that through the agreement dated 18.04.1998, the petitioner and the 1st respondent agreed to resolve the disputes through arbitration up to the value of Rs.50,000/-. What are the disputes which can be referred to arbitration or the disputes which are adjudicated through common law remedy is well established. If a dispute is covered by the arbitration clause of agreement, then the jurisdiction available under common law remedy is excluded for resolution of such disputes. On the contrary, if the arbitration clause encompasses all the disputes that arise between the parties under the agreement, the parties can certainly refer all disputes to arbitration. The arbitrability of a dispute is dependant on the agreed terms in an agreement between the parties. In this context, reference to Section 7 of the Act is useful and reads as follows:

Arbitration agreement –

7. Arbitration agreement.-

- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in-
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Under Section 7 of the Act arbitration agreement can be either for all disputes or certain disputes which may arise between parties under the circumstances stated in the Section. Therefore, Section 7 which defines arbitration agreement does not compel that all disputes under agreement ought to be referred to arbitration alone. There is nothing in Section 7 of the Act to infer that there cannot be partial submission of disputes to arbitration and resolution of a few disputes either by the principal himself or in any other manner known to law. Section 11 of the Act is attracted only with the satisfaction of requirements of Section 7 of the Act and inaction of one of the contracting parties to nominate its arbitrator. Further the challenge to G.O. is academic inasmuch the dispute resolution mechanism in the instant case is governed by a written and binding clause. In our considered view, the challenge to impugned GO by reference to superior legal remedy under Section 11 of the Act or that the GO has become stale is referred only to be rejected as without merit. The superior legal remedy cannot be ascribed to the

procedure for appointment of arbitrators under Section 11 of the Act.

The challenge to superior legal remedy under Section 11 without reference to Section 7 of the Act is untenable. When Section 7 of the Act accepts reference of a few disputes to arbitration as an arbitration agreement and leaves choice to parties, it cannot be stated that G.O. is contrary to the scheme under Section 11 of the Act. The grounds of challenge laid against the impugned GO are untenable and misconceived, hence rejected.

The writ petition fails and is accordingly dismissed. No order as to costs.

Consequently, miscellaneous petitions, if any pending, also stand disposed of.

ACJ

DILIP B. BHOSALE,

S.V.BHATT,

J

Date: 09.07.2015

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