

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

937 WRIT PETITION NO. 4090 OF 2015

M/S SHINDE AND SONS, AHMEDNAGAR
VERSUS
DEPUTY CHIEF ENGINEER CONSTRUCTION, CENTRAL RAILWAY,
PUNE AND OTHERS

...
Advocate for Petitioners : Thigale Girish K. (Naik)
Advocate for Respondents 1 to 5 : M.n. Navandar
...

CORAM : T.V. NALAWADE, J.
DATED : 23rd August, 2016.

ORDER :

1. The petition is filed under Article 226 of Constitution of India to challenge the order made by the learned Civil Judge, Senior Division, Ahmednagar on Exh. 20 of Regular Civil Suit No. 178/2013. The suit is filed by present petitioner for relief of declaration and injunction against present respondents, Central Railway. Both the sides are heard.

2. The plaintiff was given some work by the respondents Railway and the work was to be completed prior to 20.9.2012. The value of the work was around Rs. 18 Crores. As the work was not completed within the time fixed by contract and also during the extended period, notice dated 11.3.2013 was given by respondents to ask the petitioner to take steps for completion of work. He had stopped the execution of work and

as per the Railway, he had started disbanding of the plant and machinery, technical staff and labour. According to petitioner, plaintiff, he received notice on 18.3.2013. In the suit he has prayed for following three reliefs :-

"b. The order of termination of contract purporting to be under Clause-62 of Agreement issued by defendant No. 1, issued vide letter No.R/7/ANG-Beed-PARLI VAIJNATH/E/Work/Sect-1, dated 11.03.2013 (received on 18.3.2013) may kindly be declared as illegal, void;

c. The defendant, its agents, servants or any other person claiming through defendant be permanently restrained from resorting to Clause -62 of the contract entered for the work of Section -1-Earthwork in embankment and cutting from chainage 15000m to 26500m = 11.50 K.M. in the section between Narayandoh to Loni yard (including) on Ahmednagar-Beed-Parli Vaijinath, new B.G. Line project against the plaintiff and no fresh tender process be allowed to be commenced by the defendant, its agents, servants or any other person claiming through defendants.

d. Consequently, the decision dated 11.03.2013 of the defendant be declared to be null, void and be quashed and set-aside accordingly."

3. The Railway filed application at Exh. 20 and contended that the terms and conditions of the contract provided for referring such dispute to arbitrator under Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short) and so, the matter needs to be referred to arbitrator in view of section 8 of the Act. This application was opposed by petitioner, plaintiff. After hearing both the sides, the Trial Court has allowed the application of Railway and has referred the suit to arbitrator mentioning arbitration clause of the agreement.

4. The learned counsel for petitioner has challenged the order on following two grounds :-

(i) That, the delay was caused in passing the order on application, Exh. 20 of around 153 days and so, the order needs to be set aside.

(ii) That, the matter involved in the suit cannot be referred to arbitrator in view of other clauses of general terms and conditions of the contract.

5. In support of the first contention, the learned counsel for petitioner placed reliance on some reported cases like **(2001) 7 Supreme Court Cases 318 [Anil Rai Vs. State of Bihar], 2007 (Supp.) Bom.C.R. 544 [Pradeep K.R.**

Sangodker Vs. State of Maharashtra & Anr.] (PANJI BENCH) and (2003) 1 Supreme Court Cases 430 [Kanhaiyalal and Ors. Vs. Anupkumar and Ors.]. In view of the facts of those cases, the orders which were made after long period after hearing were set aside. The facts and circumstances of the present matter are such that the application at Exh. 20 can be decided only on the basis of nature of pleading in the plaint and the terms and conditions of contract executed between the parties. While deciding the application filed under section 8 of the Act, the Court is expected to consider two things like existence of arbitration agreement and whether arbitration agreement covers the dispute mentioned in the pleading and the relief claimed in the plaint. In view of these circumstances, it can be said that though some delay was caused, such delay could not have made any difference. Further, the extensive order made by the learned Judge of the Trial Court which runs into 12 pages shows that each and every contention made by the plaintiff and also by defendants is considered by the Civil Judge, Senior Division. In view of these circumstances, this Court holds that only on the ground of delay caused in deciding the matter after hearing the arguments, the order cannot be set aside.

6. For considering the other ground, this Court has

carefully gone through the terms and conditions of the contract. Clause 63 provides for referring the dispute to arbitrator and it is as follows :-

"63. Matters finally determined by the Railway - All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall within 120 days after receipt of the contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8, 18, 22(5), 39, 43 (2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 61(1) to (xii) (B) of General Conditions of contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause."

The relevant facts already quoted show that the Railway had asked the contractor, petitioner to expedite the things and time was given to him to take necessary steps. The Railway had

expressed that the Railway was likely to take steps like terminating the existing contract. In view of the wording of the aforesaid clause, clause No. 63, it can be said that contract was not actually terminated and there was dispute that contractor had caused delay in execution of work and he was abandoning the work when the work was not completed. In view of these circumstances and the wording of clause 63 of the contract, this Court has no hesitation to hold that the dispute of the nature is covered by the arbitration clause. The case of the contractor that he had executed most part of the work can be considered by arbitrator himself. If there is grievance of the contractor against the Railway that the Railway is at fault for causing delay, then the said grievance can also be heard by the arbitrator and relief, if any, sought on the basis of that contention can be given by the arbitrator. Under the contract, admittedly, right is given to Railway to terminate the contract under various circumstances and the circumstance mentioned in the notice is also covered by the contract. If the exercise which is required to be done for consideration of prayer clause 'b' from the plaint already quoted is to be undertaken, all the aforesaid aspects will have to be considered and they can be considered by the arbitrator and not by Civil Court. It can be said that the rights of Railway and the rights of the contractor need to be decided and

there was no question of declaring anything as null and void by the Civil Court. In view of these circumstances, this Court holds that the learned Civil Judge, Senior Division has not committed any error in making the order to refer the suit to arbitrator. It appears that the contractor has stopped the execution of work and some bills are already prepared. It appears that due to pendency of the present proceeding, the work which was allotted to the contractor is not completed by Railway. It needs to be mentioned that Railway ought to have taken steps for getting the work completed as such rights are given to Railway under G.C.C. It can be said that due to pendency of the present proceeding since 6.4.2015, the things are stalled. The contention of the learned counsel for contractor that the matter is covered by 'excepted matters' as mentioned in clause 61 and 62 of G.C.C. is not acceptable in view of the aforesaid facts and nature of relief claimed by the contractor. The relief claimed cannot be segregated from the other relief which can be claimed by contractor or Railway in respect of the aforesaid work allotted to the present petitioner.

7. The learned counsel for petitioner submitted that the learned Judge of the Trial Court ought to have discussed the other clauses and finding ought to have given on the points like

whether the arbitrator has jurisdiction to decide the matter which is excepted. The learned Judge of the Trial Court has considered the position of law by referring many reported cases. This Court holds that reference to those cases is unnecessary in view of the relevant facts quoted in this order. Thus, there are no merits in the petition.

8. The learned counsel for petitioner also made one submission like he would have like to challenge the order by filing revision. This submission is not acceptable in view of the aforesaid circumstances and the things cannot be kept idle for more period. Though it can be said that revision could have been filed, there are aforesaid circumstances and so, this Court has considered the rival contentions. In the result, petition stands dismissed.

[T.V. NALAWADE, J.]

ssc/