

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

SECOND APPEAL NO. 1074 OF 2004

M/s. M.R. Mutha,
Engineers and contractors,
Partnership firm having its office,
At 1/7 Govardhan Aptment,
Dr. Ambedkar Road, Ahmednagar,
through its partner
Mr. Jawaharlal Mohanlal Mutha,
Age 48 years, Occu. Business,
R/o. Ahmednagar.

....Appellant.
(Ori. Resp.No.1)

Versus

1. The State of Maharashtra,
through the Executive Engineer,
Kukadi Irrigation Project,
Division No. 7, At/Po/Tal.Shrigonda,
District Ahmednagar.
2. Shri. A.K. Raje,
Age 65 years, Occu. Retired S.E.,
R/o. 17, Seetabag Colony,
Sinhagad Road, Pune -30.

....Respondents.
(Ori. Plff. & Ori. Deft. 2)

Mr. Ramesh R. Mantri, Advocate for appellant.

Mr. A.R. Borulkar, AGP for respondent No. 1.

Mr. G.B. Rajale, Advocate for respondent No. 2.

CORAM : T.V. NALAWADE, J.
DATED : 1st March, 2016.

JUDGMENT :

- 1) The appeal is filed against judgment and order of Regular Civil Appeal No. 113/1996, which was pending in the Court of Joint District Judge, Ahmednagar, District Ahmednagar

and also against the judgment and decree of Regular Civil Suit No. 296/1994, which was pending in the Court of Civil Judge, Senior Division, Ahmednagar. The suit was filed by present respondent, State Government against the appellant, contractor for relief of declaration that the Arbitrator appointed by present appellant had no jurisdiction to adjudicate the matter and relief of injunction was prayed to prevent the Arbitrator from adjudicating the matter. Both the sides are heard. The matter is governed by provisions of Indian Arbitration Act, 1940 (Old Act).

2) It is the case of Government, plaintiff that the work allotted to present appellant was completed on 7.11.1986 and the final bill was paid on 15.7.1988. It is contended that as per Clause Nos. 54 and 55 of terms and conditions of the contract, it was necessary for the contractor to settle the claims before expiry of 30 days after completion of defect liability period. It is contended that first time on 21.2.1994, by notice, the contractor informed that he had appointed Arbitrator and so, the appointment of Arbitrator is not as provided under the contract and the Arbitrator has no jurisdiction.

3) The defendant filed written statement to contest the matter. The defendant admitted that the final bill was accepted

by defendant on 15.7.1988. But, defendant contended that it was accepted under protest. It is contended that by letter dated 19.7.1988 the defendant had informed to the plaintiff that bill was accepted under protest and defendant had more claims with regard to extra items. It is the case of defendant that some correspondence was there between plaintiff and defendant, but no decision was taken in respect of claims made by defendant and only in December 1993, it was informed that the claims of the defendant were rejected. It is contended that the cause of action took place in December 1993 due to such information and then the steps were taken to appoint Arbitrator.

4) The Trial Court held that the Arbitrator appointed by the defendant has no jurisdiction in view of the terms and conditions of the contract. Similar observations are made by the first appellate Court. Though the Courts below have considered to some extent the claims of the defendant of extra items, in view of the some clauses, this point could have been considered only by the Arbitrator and so, this Court is avoiding to discuss the nature of claims, which the defendant is making in respect of the said contract.

5) While admitting the appeal, on 9.2.2010 this Court

formulated 2 substantial questions of law, which are as follows :-

(i) Whether the suit of the respondent was maintainable in view of the contract between the parties, making referral of the dispute between them to an arbitrator compulsory ?

(ii) Whether the appellant was entitled to refer the dispute to arbitrator ?

6) It is not disputed that final bill was accepted by the defendant on 15.7.1988 though defendant was contending that it was accepted under protest. It can be said that prior to that date, final measurements were jointly taken by the parties and on that basis, the final bill was prepared. When in respect of the present claims of the defendant, nothing was given in the final bill, it can be said that the cause of action was there for the defendant to take action like appointment of Arbitrator by following the procedure on 15.7.1988. After keeping these dates in the mind, the relevant provisions of the contract need to be seen. Clause Nos. 54 and 55 are as follows :-

"54. Settlement of Dispute (For SOB works)

If the contractor considers any work demanded of him to be outside the requirement of the contract, or considers any drawings, record or ruling of the Executive Engineer, K.I.P. Dn. No. 3

SIRUR on any matter in connection with or arising out of the contract or the carrying out of work to be unacceptable he shall promptly ask the Executive Engineer, in writing, for written instructions or decision. Thereupon, the Executive Engineer shall give his written instructions or decision within a period of 30 days of such request.

Upon receipt of the written instructions or decision the contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Executive Engineer fails to give his decision in writing within a period of 30 days after being requested, or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the contractor may within 30 days after receiving the instructions or decision appeal to upward authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal.

If the contractor is dissatisfied with this decision, the contractor within a period of thirty days from receipt of the decision shall indicate his intention to refer the dispute to Arbitration, failing which the said decision shall be final and conclusive.

55. Arbitration (For works costing less than Rs. 50 lakh)

All the disputes or differences in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows.

Within 30 days of receipt of notice from the contractor or his intention to refer the dispute to arbitration the Chief Engineer (S.P.) IRRIGATION DEPARTMENT PUNE-6 shall send to the contractor a list of three officers of the rank of Superintending Engineers of higher, who have not been connected with the work under this contract. The contractor shall within 15 days of receipt of this list select and communicate to the Chief Engineer, the name of one officer from the list who shall then be appointed as the sole Arbitrator. In case contractor fails to communicate this selection of name within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within 30 days as stipulated the contractor shall send a similar list to the Chief Engineer within 15 days. The Chief Engineer shall then select one officer from the list and appoint him as the sole Arbitrator within 15 days. If the chief Engineer fails to do so, the contractor shall communicate to the Chief Engineer the name of one officer from the list who shall then be the sole Arbitrator.

The arbitration shall be conducted in accordance with the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof. The Arbitrator shall determine the amount of costs to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payments due to the contract shall not be withheld unless they are subject matter of the arbitration proceedings.

All awards shall be in writing and in case of award amounting to Rs. one lakh and above, such awards shall state the reason for the amount awarded. Neither party is entitled to bring a claim to arbitrator if the arbitrator has not been appointed before the expiration of 30 days after defects liability period."

Clause No. 54 shows that during execution of the work, it was necessary for the contractor to use this clause and take decision with regard to his claim of extra item which he was asked to execute if at all there was really order issued for execution of such work. Clause No. 55 can be used subject to conditions laid down in this clause like appointment of Arbitrator needs to be made before expiry of 30 days after defect liability period is

over. Defect liability period was over in the year 1989 itself. Prior to that the final bill was accepted by the defendant though the defendant has contended that it was accepted under protest. Thus, apparently the period fixed in clause No. 55 of the contract was over when defendant started process of appointment of Arbitrator like giving of the notice. This process was started in the year 1994 as per the case of defendant.

7) There is one more point in the present matter though it is not discussed or mentioned by both the Courts below. In clause No. 55, it is made clear that the list of three officers of the rank of Superintending Engineer or higher to this rank, who had no connection with the work under this contract was to be given. After following the procedure by the contractor, if the employer, State Government had not appointed Arbitrator from this list, it was open to the contractor to appoint one of these officers as Arbitrator. Admittedly, the Arbitrator appointed by the contractor in the present case was not sitting officer and he was retired officer on the date when the list was given and he was not in the employment of this department on the date of appointment. This single circumstance is sufficient to hold that the Arbitrator appointed was not competent and he had no jurisdiction to adjudicate the dispute of present nature.

8) This Court had occasion to deal with the aforesaid point, the competence of Arbitrator when the arbitration clause provides that only sitting officer can be appointed and a person who is not sitting officer is appointed as Arbitrator in **Appeal from Order No. 9/1999 [Maharashtra Krushna Vally Development Corporation Vs. S.D. Shinde] dt. 23.11.2015**. This Court has held that the person, who can be appointed as Arbitrator, need to fulfill the conditions given in Arbitration Agreement. For this single reason, the Court could have declared that the Arbitrator had no jurisdiction. Further, there are aforesaid more circumstances in the present matter like the period fixed for taking such action. On this point, the case reported as **(2009) 2 Supreme Court Cases 494 [P. Manohar Reddy & Bos. Vs. Maharashtra Krishna Valley Development Corporation and Ors.]** can be cited. In this case, the Apex Court has laid down that when the contractual clause is provided for limitation for the purpose of raising claim having regard to the provisions of section 28 of the Contract Act, the period of limitation as prescribed under Article 137 of Limitation Act would be applicable. It is settled that the clause providing for limitation was as to enable the party to allow its claim is not invalid. It is already observed that under clause 54

during continuation of work the contractor ought to have made claim. For the purpose of clause 55, the time started running as against the contractor one month after the defect liability period was over. In view of these circumstances also, this Court holds that the Arbitrator had no jurisdiction.

9) It was submitted by the learned counsel for appellant that when the Act provides that Civil Court shall not have jurisdiction in this regard (Section 32 of Act of 1940), the Civil Court ought not to have entertain the suit. This submission is not acceptable in the present matter in view of the peculiar circumstances. The person appointed as Arbitrator by the contractor was not competent for any purpose in the present matter. So, the suit was maintainable and the appellant was not entitled to refer the dispute to the aforesaid Arbitrator. Both the points are answered accordingly and appeal is dismissed.

[T.V. NALAWADE, J.]

ssc/