

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

WRIT PETITION NO. 7502 OF 2014

Godavari Marathwada Irrigation
Development Corporation,
Through Executive Engineer,
Majalgaon Project Division,
Kesapuri Camp, Majalgaon,
Beed.

....Petitioner.

Versus

M/s. Ghai Construction Engineers
and Contractors, Plot No. 289, N-3,
CIDCO, Aurangabad.

....Respondent.

WITH
WRIT PETITION NO. 7503 OF 2014

Godavari Marathwada Irrigation
Development Corporation,
Through Executive Engineer,
Majalgaon Project Division,
Kesapuri Camp, Majalgaon,
Beed.

....Petitioner.

Versus

M/s. Ghai Construction Engineers
and Contractors, Plot No. 289, N-3,
CIDCO, Aurangabad.

....Respondent.

Mr. P.M. Shah, Senior Counsel i/b. Shri. S.G. Bhalerao, Advocate
for petitioner.

Mr. A.K. Gawali, Advocate for respondent.

CORAM : T.V. NALAWADE, J.

DATED : 15th December, 2016.

ORAL JUDGMENT :

1) Rule. Rule made returnable forthwith. By consent,

heard both the sides for final disposal.

2) The proceedings are filed to challenge the order of dismissal made by Ad-hoc District Judge, Beed in proceedings which were filed under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short).

3) The proceedings were filed by present petitioner to challenge the award given by Arbitrator in favour of the contractor. The award was given on 14.2.2002 and the proceedings under section 34 the Act were filed on 4.5.2002. Thus, the proceedings were filed within 90 days, as per the period mentioned in section 34 of the Act. It appears that office of the District Court had raised four objections during scrutiny and they were as under :-

"01. That, applicant not shown para of valuation for jurisdiction and court fees.

02. That, applicant not mentioned name as he Executive Engineer in capacity file this application.

03. Court fees affix Rs.50/- and application is setting aside order of award as application is in a monetary grain.

04. That, application filed beyond the limitation i.e. date of award 14.02.2002 and filed on

04.05.2002

The concern advocate be heard on above points as tenability"

After that, following orders were made

"ORDER DT. 25.06.2002

Advocate be heard as sought in office note, within two weeks."

"ORDER DT. 30.12.2003

The office objections are not removed by that time the proceeding shall dismissed for want of compliance."

Sd/-
IInd Ad-hoc Addl. Dist. Sessions Judge,
Beed."

4) The learned Senior Counsel for petitioner submitted that the objections were not valid objections. The learned Senior Counsel submitted that so far as objection No. 1 is concerned, there was no question of showing valuation for jurisdiction and Court fees as every award needs to be challenged under section 34 before the Court mentioned in section 34 of the Act and that jurisdiction is given irrespective of value of the award. The learned Senior Counsel submitted that there was no meaning in the second objection as the title of proceeding filed under section 34 shows that Executive Engineer of the concerned project had signed the proceedings and through him, the

petitioner had filed the said proceedings. The learned Senior Counsel submitted that there was no need to mention the name of Executive Engineer and this power is given to the persons by virtue of the post and the persons holding the post do change.

5) The learned Senior Counsel submitted that the third objection could not have been raised as the Court fees was not payable in such proceedings and first time, due to the amendment made in the year 2009 in the Court Fees Act, the Court fees became payable on the basis of valuation of the matter.

6) The learned Senior Counsel submitted that there was no room to take fourth objection as in section 34 itself, the period of 90 days is given for filing proceeding under section 34 of the Act and the proceeding was filed within this period.

7) This Court holds that all the aforesaid submissions made by the learned Senior Counsel need to be accepted. It is not disputed that prior to year 2009, the Court fees was not payable for such proceedings and so, objection at Sr. Nos. 1 and 3 could not have been raised. The Corporation like petitioner can authorize its officer by naming the post to file the proceeding

and so, there cannot be insistence of naming officer. Thus, all the four objections could not have been raised. It is unfortunate that the Court considered all the four objections as valid objections. When the Court passes order of dismissal for not removing office objections, the Court is expected to apply mind and even when the counsel for applicant or plaintiff is absent. The Court is expected to ascertain as to whether the objections are valid. The objections raised by the clerical staff are accepted as they are and aforesaid circumstances are not considered and so, it can be said that the Court did not apply judicial mind. In any case, the aforesaid objections could not have been raised and as the proceedings were filed within 90 days, the proceedings ought to have been registered.

8) The learned counsel for respondent, contractor raised objection to the tenability of the present proceedings. The learned counsel submitted that the order dated 30.12.2003 made by the District Court was one under provision of Order 7, Rule 11 of Civil Procedure Code. He submitted that in view of the definition of 'decree' given in section 2 (ii) of Code of Civil Procedure, such order needs to be treated as 'decree' and so, the appeal ought to have been filed. On this point, the learned Senior Counsel for petitioner drew the attention of this Court to

provision of section 37 of the Act and submitted that appeal is not tenable. The provision of section 37 is as under :-

"37. Appealable orders.- (1) An appeal shall lie from the following orders and from no others to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

When there is Special Legislation, the provisions made for particular purpose in Special Legislation need to be used and the general law made available in Civil Procedure Code cannot be used. The provision of section 37 of the Act shows that no appeal

is provided under this section, under Special Law to challenge the present order of Ad-hoc District Judge. On this point, the learned Senior Counsel for petitioner placed reliance on the observations made by the Division Bench of this Court in case reported as **2006 (6) Mh.L.J. 678 [State of Maharashtra and Anr. Vs. Ramdas Construction Co. and Anr.]**. In that case, the order of rejection of delay condonation application made by the District Court was challenged by filing appeal under section 37 of the Act. This Court held that under section 37, no appeal is provided to challenge the order made on delay condonation application. The learned Senior Counsel submitted that these observations can be used for the present purpose also in view of the nature of order made and the specific provision of section 37 of the Act. This submission need to be accepted. Thus, the petition is tenable.

9) The learned counsel for respondent submitted that in the past, only filing of proceeding under section 34 was sufficient for employer or contractor as the fact of filing proceeding itself was making the award unenforcable and the filing of proceeding was giving automatic stay to the execution of the award. The learned counsel for respondent submitted that there is possibility that the petitioner intentionally did not take steps before the

District Court. The learned counsel for respondent submitted that the present proceeding came to be filed after about 11 years and due to laches, the petitioner is not entitled to any relief.

10) The learned Senior Counsel submitted that the petitioner Corporation first time realized that the aforesaid order was made in matter filed by it, when order of attachment came to be made in execution proceeding filed by the contractor in the year and when show cause notice was issued for attachment of Bank account. The learned Senior Counsel submitted that the Corporation then deposited the amount of Rs. one Crore in each matter to show bonafides. The learned Senior Counsel submitted that this circumstance also needs to be taken in to consideration in the present proceeding.

11) The aforesaid circumstances of the present matters show that it is a peculiar case. Though the present proceedings came to be filed after about 11 years to challenge the order, the fact remains that the order under challenge could not have been made by the learned Ad-hoc District Judge. In view of these circumstances and as the public money is involved in the matter, this Court holds that the order needs to be set aside. No loss will

be caused to contractor as interest meter will continue to run.

12) The learned counsel for respondent placed reliance on some observations made by the Apex Court in the case reported as **2013 ALL SCR 3236 [Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Ors.]**. The Apex Court has quoted the considerations which are required to be kept in mind while dealing with the application filed for delay condonation. There cannot be dispute over the proposition made by the Apex Court in the case cited supra. The facts and circumstances of each and every case are always different. Peculiar facts of the present case are already quoted by this Court.

12) In the result, the petitions are allowed. The orders made by the learned Ad-hoc District Judge by which the proceedings filed under section 34 of the Act by the present petitioner were dismissed are hereby set aside. The proceedings are to be treated as proceeding filed under section 34 of the Act on 4.5.2002 and registration date is to be shown as 4.5.2002. As the proceedings were filed in the year 2004 itself, the law which was prevailing in the year 2004 will be applicable. The amount deposited by petitioner as per the order made by this Court is

allowed to be withdrawn by petitioner.

Rule is made absolute in aforesaid terms.

Time of four weeks is given to the other side to challenge the order made by this Court.

[T.V. NALAWADE, J.]

ssc/