

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1689 OF 2012

Godawari Marathwada Irrigation Development
Corporation, Aurangabad.
Through it's Executive Engineer,
Majalgaon Canal Division No.7,
Gangakhed, Tal.Gangakhed,
District Parbhani.

...PETITIONER

-VERSUS-

M/s Shinde and Sons,
A/4, Shanti Niwas, Ambikanagar,
Ahmednagar-414005.

...RESPONDENT

...

Advocate for Petitioner : Shri Thombre S.S.

Advocate for Respondents : Shri Thigale Girish K. (Naik).

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 05th January, 2016

Oral Judgment:

1 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2 The Petitioner is aggrieved by the order dated 04.07.2011
passed by the learned Principal District Judge, Parbhani in MA(RJE)

No.44/2003.

3 Shri Thombre, learned Advocate for the Petitioner, submits that in an earlier round before this Court in Writ Petition No.3490/2010 which was filed by the Petitioner herein, both the litigating sides had filed an undertaking dated 25.06.2010 indicating to this Court that the parties have no objection if MA(RJE) No.44/2003 and MA(RJE) No.62/2006 (wrongly written as 2007) pending before the learned Principal District Judge, Parbhani are decided within six months. In the light of the said undertaking, this Court by its order dated 25.06.2010 disposed of Writ Petition No.3490/2010 by observing in paragraphs 3 and 4 as under:-

- “3. *Shri Thigale, learned counsel for the respondent, on the contrary submits that the impugned order has been passed inasmuch as, on account of the proceedings in MARJI No.44/2003, the proceedings in MARJI No.62/2006 were unnecessarily prolonged and that the respondent was deprived of the benefits of the award.*
4. *However, the parties have now filed the consent terms. The same are taken on record and marked “X” for identification. The petition, therefore, stands disposed of in terms of the consent terms, which are duly signed by the parties. Rule is, therefore, made absolute in accordance with the consent terms.”*

4 He submits that both the litigating sides were once again before this Court in Writ Petition No.810/2011. The said petition preferred by the present Petitioner was disposed of vide order dated

24.02.2011. Relevant observations of this Court in paragraphs 4, 5, 5, 6 and 7 read as under:-

- “4. Advocate Shri.Thigle, on the other hand, has urged that both the proceedings were already separated and he has for said purpose invited attention to the order dated 20th February 2010 passed by learned Principal District Judge. He further contends that consent terms do not take away the right of present respondent to point out non maintainability of proceedings and the learned Principal District Judge has accordingly applied the mind and there is no jurisdictional error or perversity.
5. After hearing both counsel, I find that case No.44/03 is basically raising challenge to the appointment of Arbitrator on various grounds. When that challenge was still under consideration, in 2006 final award came to be passed and that award forms subject matter of challenge in proceedings under section 34 of the Arbitration and Conciliation Act, 1996, instituted by present petitioner vide case No.62/06.
5. Application at Exh.61 was moved by petitioner in the light of orders dated 7.3.2009 and perusal of impugned order nowhere shows consideration of various orders passed by this Court in various matters either clubbing or then the orders passed separating those matters. The only reason given in paragraph 8 is, a separate proceeding for challenging the award is filed by the petitioner; the issue regarding validity can be heard and decided in those proceedings and therefore, indirectly observing that challenge under section 14 already pending is rendered redundant. As various orders passed from time to time and holding the field are not looked into, for the first time, I am not inclined to consider those orders or effect thereof in the present case. The Court of Principal District Judge ought to have given opportunity of hearing to petitioner in this connection. The impugned order passed below Exhs.61 and 63 on 21.8.2010 by Principal District Judge is accordingly quashed and set aside. Both the applications are restored to file for

- taking fresh decision in accordance with law after giving an opportunity of hearing to parties.*
6. *In view of grievance made by Advocate Thigle that because of all these proceedings, the other proceedings namely 62/06 are also being unnecessarily adjourned, the consideration in the case No.44/03 are expedited and the learned Principal District Judge shall decide the matter at the earliest and in any case within three months from the date of communication of order to it either together with 62/06 or independently as per his own prudence.*
7. *Rule is made absolute accordingly.”*

5 By the impugned order dated 04.07.2011 MA(RJE) No.44/2003 has been disposed of by the learned Principal District Judge, Parbhani, without any decision on its merits. Strenuous contention of Shri Thombre is that MA(RJE) No.44/2003 should have been decided separately on its own merits and should not have been coupled with MA(RJE) No.62/2006. His grievance is that when an Arbitrator is not empowered to function as an Arbitrator and his appointment itself is challenged in MA(RJE) No.44/2003, it would be a wasteful exercise to decide all the issues together, meaning thereby, to decide MA(RJE) No.62/2006 wherein the award delivered by the said Arbitrator is under challenge.

6 He, therefore, submits that the impugned order deserves to be set aside and the learned Principal District Judge, Parbhani needs to be

directed to decide the issue of the competency of the Arbitrator challenged in MA(RJE) No.44/2003 before deciding MA(RJE) No.62/2006.

7 Shri Thigale, learned Advocate for the Respondent, submits that the earlier orders passed by this Court reproduced above and the conclusions of the learned Principal District Judge in paragraph 19 of the impugned order dated 04.07.2011, safeguard the interest of the Petitioner. There is no dispute that the Petitioner has challenged the competency of the Arbitrator and his very appointment as an Arbitrator in MA(RJE) No.44/2003 as well as in MA(RJE) No.62/2006. Instead of deciding every issue raised by the Petitioner in bits and pieces and in isolation, this Court by its order dated 24.02.2011 has already concluded that both the proceedings could be decided together depending upon the prudence of the learned Court. He, therefore, submits that this petition could be disposed of as the Petitioner has already agitated the said issue in MA(RJE) No.62/2006 which is subjudice and pending adjudication.

8 I have considered the submissions of the learned Advocates for the respective sides. With their assistance I have gone through the earlier orders passed by this Court dated 25.06.2010 and 24.02.2011.

9 It is not in dispute that the appointment of the Arbitrator and

his competency to officiate as an Arbitrator has been challenged in MA(RJE) No.62/2006 as like in MA(RJE) No.44/2003. Both the proceedings were practically running parallel. The Court below has disposed of MA(RJE) No.44/2003 on the ground that the challenge to the appointment of the Arbitrator and the claim of the Petitioner that the Arbitrator's appointment is illegal is set out in MA(RJE) No.62/2006 and the said challenge would be dealt with while deciding the said proceedings.

10 The observations of the Court below in paragraph 19 of the impugned order read as under:-

“19. *The petitioner has admittedly challenged the award passed by the Arbitrator under Section 34 of the Act. In that petition also the petitioner has contended that Arbitrator's appointment is illegal. Even if, present petition is dismissed for want of jurisdiction that order will not operate as Res-judicata in petition under Section 34 of the Act because no issue is heard and finally decided in the present petition. Since the petition itself is not maintainable, there is no propriety in granting permission to the petitioner to adduce evidence in support of its contention in the petition.*”

11 As such, I do not find that this Writ Petition deserves to be entertained or kept pending in the light of the observations of the Court below as reproduced in paragraph 19 above. The Petitioner is not

precluded from questioning the Arbitrator's appointment on the ground that it is illegal, in MA(RJE) No.62/2006. The Court below shall, therefore, deal with the said issue on its own merits and in accordance with law.

12 This petition is, therefore, disposed of with the above observations. Rule is discharged accordingly.

13 No costs.

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(RAVINDRA V. GHUGE, J.)