

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 125 OF 2002
WITH
CIVIL APPLICATION NO. 888 OF 2006

1. The State of Maharashtra
Through the Secretary,
P.W.D. Government of Maharashtra
Mantralaya, Bombay
 2. Chief Engineer,
P.W.D. Aurangabad
- ...Appellants

versus

Shri Tilakaraj Malhotra,
Age 45 years, Occ. Contractor
R/o. Dadarao Plots, Parbhani
District Parbhani
(Through his General Power of
Attorney Holder,
Shri Bhagwantrao Gabaji Nawale,
Age 75 years, Occ. Pensioner
R/o. Padampura, Aurangabad

...Respondents

.....
AGP for the appellants: Mr. B.V. Virdhe
Advocate for respondent: Mr. S.S. Choudhari
.....

CORAM : V. K. JADHAV, J.
DATED : 25th APRIL, 2017

ORAL JUDGMENT:-

1. Being aggrieved by the order dated 3.12.2001, passed by the learned IInd Joint, Civil Judge, Senior Division, Aurangabad in arbitration application No. 58 of 1992, the original respondents preferred this appeal.

2. Brief facts giving rise to the present appeal are as follows:-

a) The respondent/plaintiff had filed an arbitration application No.58 of 1992 under Section 20(4) of the Arbitration Act 1940 against the appellants/original defendants. According to the respondent/ plaintiff, he is registered contractor and in the year 1987-88, the Public Works Department of the Government of Maharashtra, wanted to construct one R.C.C. Box culvert 6v of 2M X 2M at Km 3.3 on Malsona Thora Road in Parbhani district. Accordingly, the Executive Engineer, Command Roads Division, Parbhani had invited tenders by issuing public notice to that effect. The respondent/plaintiff had submitted his tender and the same was accepted being lowest one. After completion of formalities, the respondent/plaintiff started the work as per the instructions of the Engineer in charge of the work and as per the directions given by the department. However, during the course of execution of work, the respondent/plaintiff had to incur the expenditure for extra work done on de-watering of foundation beyond tender provision and also on some other works. Furthermore, he had also suffered loss due to washing away of his stacked material on work site due to unexpected rains and floods of Nala water. Moreover, some amount also came to be deducted from his bills by carrying out wrong calculations. On all these counts, the respondent/plaintiff has suffered financial loss of Rs.54,400/- and accordingly he requested the appellant-defendant to pay the

amount. However, his request was not considered, by the Executive Engineer, who was in-charge of the work. The respondent plaintiff then requested the next higher authority i.e. Superintending Engineer, World Bank Project, Circle Aurangabad to consider and grant his claims. In view of arbitration clause 53, the respondent/plaintiff being dissatisfied with the decision taken by the Superintending Engineer, filed an application bearing Arbitration application No. 58 of 1992 for various prayers made therein.

b) The appellants/State and Chief Engineer have strongly resisted the said application by filing their say. It has been contended that the respondent/plaintiff did not prefer any appeal before the Chief Engineer against rejection order of Superintending Engineer to consider his claim as provided in clause 53 of the contract. It has also been contended that as per clause 53 of the contract, if the contractor fails to prefer an appeal before the Chief Engineer within 30 days, then the decision taken earlier shall be final and binding on the contractor. It has also been contended that the respondent/plaintiff within 30 days period from the date on which he received the decision, shall offer his intention to refer the matter for arbitration and failing therein, his application itself is not maintainable.

c) After hearing both the parties, learned C.J.S.D., Aurangabad by impugned order dated 3.12.2001, has observed that the dispute is

related to Government work carried out by applicant and not about defect liability and further directed to the applicant to appear before the sole arbitrator for settlement of dispute. Being aggrieved by the same, the respondents have preferred this appeal.

3. Learned A.G.P. for the appellants submits that in terms of clause 53 of the tender documents, if the contractor is not satisfied with the decision of the Executive Engineer, the contractor may within 15 days after receiving the decision, prefer an appeal to the Chief Engineer, who shall afford an opportunity to the contractor to be heard and also permit him to adduce the evidence in support of his appeal. The Chief Engineer shall give a decision within stipulated period of 60 days and decide the matter. If the contractor, is not satisfied with the decision of the Chief Engineer, within a period of 30 days, after receipt of the decision of the Chief Engineer, the contractor shall indicate his decision to refer the dispute to arbitration, failing which the said decision shall be final and conclusive.

The learned A.G.P. in order to substantiate his contentions placed reliance on the judgment in the case of ***State of Goa vs. Praveen Enterprises, reported in 2011 AIR (SC) 3814.***

4. Learned counsel for the respondent/plaintiff submits that the respondent plaintiff has taken all steps correctly as per clauses 53 and

54 of the tender document. The respondent/plaintiff has referred his claim to the Executive Engineer and Executive Engineer has refused his claim on 24.6.1989. Thereafter, in terms of provisions of clause 53, the respondent/plaintiff appealed to the higher authority i.e. Superintending Engineer and the Superintending Engineer refused the claim of the respondent/plaintiff as per letter dated 2.12.1989. Learned counsel submits that there is no whisper in clause 53 of the tender document that the contractor has to prefer an appeal to the Chief Engineer after rejecting his claim by the Superintending Engineer. After rejecting his claim by the Superintending Engineer, the respondent/plaintiff has communicated his intention to refer the dispute for arbitration and as such his application is rightly considered by the Court below. The learned counsel submits that in terms of provisions of Section 39 of the Arbitration Act 1940, this appeal itself is not maintainable. Learned counsel submits that even otherwise also, the question whether the claim was barred under certain clauses of tender documents, are not required to be decided by the court before making reference and it is for the arbitrator to take appropriate decision on it.

Learned counsel for the respondent-plaintiff in order to substantiate his contentions, placed reliance on the judgment in the case of ***Jai Chand Bhasin vs. Union of India and another, reported in AIR 1983 Delhi 508.***

5. I have heard learned counsel for both the parties. With their able assistance, I have perused the pleadings, grounds taken in the appeal, order of the lower court and reply filed by the respondent.
6. Clause 53 of the tender document is reproduced herein below:-

"53. SETTLEMENT OF DISPUTES

If the contractor considers any work demanded of him to be outside the requirements of the contract, or consider any drawings, record or fulling of the Executive Engineer on any matter in connection with or arising out of the contract or the carrying out of the work to be in acceptable, he shall promptly ask the Executive Engineer in writing or written instructions or decision. Thereupon the Executive Engineer shall give his written instructions or decision within a period of 15 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 instructions or decision in writing within a period of 15 days after being requested or if the contractor is dissatisfied with the instruction or decision of the Executive Engineer the contractor may within 15 days after receipt the instruction or decision appeal to higher authority of Department who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. This officer, shall give a decision within a period of 60 days after the contractor has given the said 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.”

7. It appears that the respondent/plaintiff has made demand of the money for carrying out the extra work, to the Executive Engineer. The Executive Engineer is supposed to give written instructions or decision within a period of 15 days on such request. It is a part of record that the Executive Engineer has refused his request on 24.6.1989 and as such, the respondent/plaintiff approached the Superintending Engineer by filing an appeal, as contemplated in clause 53 of tender document. On perusal of aforementioned clause 53, it appears that the appeal is contemplated to the higher authority of the department and name and designation of such higher authority is not mentioned in clause 53. However, it is a part of the record that the Superintending Engineer has entertained the said appeal and by letter dated 2.12.1989 in terms of provisions of clause 53 of the tender documents, as mentioned above, rejected the claim of respondent/plaintiff. Thus, the respondent/ plaintiff dissatisfied with the said decision, indicated his intention to refer the dispute to the arbitration and accordingly approached the court below seeking appropriate orders in his application for appointment of arbitrator, since the appellants have failed to comply with the provisions of clause 54 of tender documents.

8. Section 39 of Arbitration Act 1940 prescribed the appeal against certain orders. Section 39 of the said Act is reproduced herein below:-

“39. Appealable orders.- (1) An appeal shall lie from the following orders passed under this Act to the Court authorized by law to hear appeals from original decrees of the Court passing the order:-

An order-

- (I) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by Small Cause Court.

(2) 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.”

9. In terms of the provisions of Section 39 of the Arbitration Act 1940, no appeal is provided against the non compliance of the provisions of clause 54 of the tender documents.

10. It appears that the court below has correctly interpreted clauses 53 and 54 of the tender documents and accordingly passed the

impugned order. It is open for the parties to raise all points, including the compliance or non-compliance of the provisions of clauses 53 and 54 of the tender documents before the arbitrator and the arbitrator can deal with those questions in accordance with law.

11. In view of above, I do not find any merit in this appeal. The appeal is liable to be dismissed. The appeal is accordingly dismissed. In the circumstances, there shall be no order as to costs.

12. In view of dismissal of first appeal, pending civil application is also disposed of.

(V. K. JADHAV, J.)

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