

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
LETTERS PATENT APPEAL NO. 35 OF 2008
IN
WRIT PETITION NO. 4849 OF 2007

M/s. Radhey Shyam Associates
 (Engineers and Contractors)
 through Radheshyam S/o
 Ayodhyaprasad Tripathi, Age : 56 Years,
 Occ. Contractorship,
 R/o. " Tripathi Sadan", Shiveneri
 Colony, Juna Pedgaon Road,
 Parbhani, Dist. Parbhani (M.S.)

..APPELLANT
 (Org. Petitioner)

VERSUS

1. The State of Maharashtra,
 Public Works Department,
 Through Executive Engineer,
 Public Works Division, Hingoli
 District : Parbhani (M.S.)
2. The Chief Engineer,
 Public Works Department,
 Bandhkam Bhavan Behind
 District & Sessions Court,
 Aurangabad (M.S.)
3. The Superintending Engineer,
 Public Works Department,
 Bandhkam Bhavan, Behind
 District & Sessions Court,
 Aurangabad (M.S.)

..RESPONDENTS

...
 Mr. J. N. Singh, Advocate for the Appellant
 Mr. A.V. Deshpande, A.G.P for Respondents

...
CORAM :T.V. NALWADE AND
SUNIL K. KOTWAL ,JJ.

JUDGMENT RESERVED ON : 25.01.2019
JUDGMENT PRONOUNCED ON : 01.02.2019

JUDGMENT(PER T.V. NALWADE, J] :-

1. The appeal is filed to challenge the Judgment and order of the learned Single Judge of this Court delivered in Writ Petition No. 4849 of 2007 dated 11.02.2008. By this decision, the petition, which was filed by the appellant, is dismissed. Writ Petition was filed to challenge the order of the Principal District Judge, Parbhani, dated 13.06.2007, passed in Misc. Application (Regular Darkhast, execution proceeding) No. 98 of 2004. The order below Exh. 34 is made by the Principal District Judge to show that the award, which was put for execution, cannot be enforced.

2. Both the sides are heard.

3. Misc. Application No. 98/2004 was filed by the appellant under the provisions of the Arbitration Act, 1996. The District Court, the principal Civil Court of the District has held that the arbitration could have been under the provisions of the Arbitration Act, 1940 and it could not have been under the provisions of the Arbitration Act, 1996. It is held that the award under the Act of 1940 ought to have been filed in the Court for making it rule/executable. The other circumstances like refusal of the respondent-employer to make the provisions of new Act applicable are also considered.

4. In the present proceeding, the learned counsel for the respondent-employer submitted that interference in the decision of the learned Single Judge is not possible for the following reasons :-

- (i) That the Letters Patent Appeal itself is not tenable,
- (ii) That there was no agreement to conduct or to continue the arbitral proceeding under the Arbitration Act, 1996.
- (iii) The Arbitrator was not competent and retired Superintending Engineer could not have acted as Arbitrator as per the agreement and so no executable award is in existence.

5. If the entire record including general conditions of the contract is perused, it can be said that there is force in all the three aforesaid grounds taken by the respondents. Under the provisions of the Arbitration Act, 1996, the orders of the Arbitrator can be challenged before the Principal Civil Court of the District. The proceeding for execution was filed in that Court by the present appellant and in that proceeding, the executability of the award was under challenge. Thus, the order made by the "Court" was challenged before the learned Single Judge of this Court by the present appellant. Though in the petition, the appellant has mentioned that the petition was filed by the appellant-contractor under the provision of Articles 226 and 227 of the Constitution of India, in view of the circumstance that in the petition the order of "Court" was under challenge, it is necessary to presume that said petition was filed under the provision of Article 227 of the Constitution of India. The High Court has the appellate and supervisory jurisdiction over the Principal Civil Court of the District. The position of law on this point is clear and the position is reiterated in the recent case

reported at (2015) 9 SCC page 1 (Jogendrasinghi Vijay Singhji Vs. State of Gujarat and Others)

6. In the case of Jogendrasinghi cited (supra) the law laid down on the aforesaid point is quoted by the Apex Court and it is as under :-

" The order passed by the civil court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution. Once it is exclusively assailable under Article 227 of the Constitution of India, no intra-Court appeal is maintainable. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution and, therefore, a letters patent appeal or an intra-court appeal in respect of an order passed by the Single Judge dealing with an order arising out of a proceeding from a civil Court would not lie before the Division Bench. No writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.

7. In view of the facts and circumstances of the present matter and aforesaid position of the law, this Court holds that present Letters Patent Appeal is not tenable. Though the present appeal can be disposed of by giving finding on the first point, this Court is touching the other points also as they are also basic points.

8. It is case of the employer-respondent that Contractor had abandoned the work. The provision relating to reference of the dispute to the Arbitrator in the agreement is in Clause 55 of the General Conditions of Contract and it is as under :-

55. ARBITRATION.

" 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, Public Works Region, Aurangabad, shall send to the contractor a list of three officers of the rank of Superintending Engineer, or 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 the officer from the list who shall then be appointed as the sole Arbitrator. In case contractor fails 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 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."

9. The aforesaid clause of contract shows that in any case, only "officer" of the rank of Superintending Engineer or higher rank could have been appointed as Arbitrator. When the word "officer" is mentioned, the Court needs to go with the presumption that the officer who was working in the department could have worked as arbitrator and not retired employee. The record shows that objection was raised by the employer before the Arbitrator that Arbitrator had no jurisdiction and there was no agreement to appoint him as Arbitrator. There was also specific objection of the employer that it was not open to the Arbitrator to start or continue the proceeding under the Act of 1996 as there was no agreement for that between the parties. It is not disputed that the appellant-contractor had appointed retired Superintending Engineer, in the year 1991, well before the coming into force of the Act, 1996.

10. The learned counsel for the appellant placed reliance on following decisions given by the learned Single Judge of this Court

(i) Arbitration Appeal No. 16 of 2009

(M/s S. D. Shinde and Company Vs. The State of Maharashtra dated 16.12.2009)

(ii) Writ Petition No. 11704 of 2010

(Godawari Marathwada Irrigation Development Corporation Vs. S.D. Shinde & Company) order dt 11.11.2014

11. In the aforesaid first case, retired Superintending Engineer was appointed when the agreement was to appoint officer of the rank of Superintending Engineer or of superior rank. The learned Single Judge held that even retired Superintending-Engineer could have been appointed as Arbitrator as there was no provision to appoint retired Superintending-Engineer. In the second case, the Superintending-Engineer, officer was appointed as Arbitrator and during the pendency of the arbitral proceeding he retired. As on the date of the appointment, he was officer, the learned Single Judge held that the Arbitrator was competent when he continued the arbitral proceeding after the retirement.

12. On the other hand, the learned counsel for the respondent-employer placed reliance on the following two cases decided by the learned Single Judge of this Court/Bench.

- (i) **Mh.L.J. 2017(5)** 660 Bombay (*Executive Engineer Godawari Marathwada Irrigation Development Corporation Vs. Y.R. Reddy Engineers and Builders*)
- (ii) **AIR 1991** (Maharashtra Krishna Valley Development Corporation Versus M/s S.D. Shinde and Company and others).

13. In the first case, the power to appoint one of the three Arbitrators was given to the Chairman, Central Water Commission. Two Arbitrators

were to be appointed by the two parties by appointing one by each. If either party to the agreement had failed to appoint Arbitrator within the prescribed period, the Chairman of the Central Water Commission was to appoint an Arbitrator. The Contractor had refused to appoint Arbitrator and he applied under Section 11 of the Act, 1996, to High Court for appointment of Arbitrator. In view of these circumstances, this Court held that even the Court cannot interfere in the agreement of Arbitration and the Arbitral Tribunal ought to have been constituted as per the agreement. In the second case, when there was agreement similar to the present agreement and retired officer was appointed by the Contractor, this Court held that retired Superintending Engineer was not competent and so he had no jurisdiction to decide the dispute. It was submitted that decision given in the aforesaid first case by this Court is stayed by the Hon'ble Apex Court.

14. It cannot be disputed that appointment of the Arbitrator can be only as per the agreement between the parties. If there is dispute over the appointment, then parties can approach the Court. While considering the proceeding by the Court, the Court needs to first ascertain as to whether it is possible to appoint Arbitrator as per the agreement and if the Court finds that it is possible to appoint the Arbitrator as per the agreement, the Court must refuse to exercise its power to appoint Arbitrator. If the appointment cannot be made as per

the agreement, then only the Court can step in. This is because, the competency and the jurisdiction of the Arbitrator is required to be as per the agreement on arbitration. For all these reasons, this Court holds that on the second point i.e. competency of the Arbitrator, the Contractor cannot succeed.

15. The submissions made and the record shows that the Arbitrator was appointed in the year 1991 and the arbitral proceeding was pending when the Act of 1996 came into force. In that matter, the respondent-employer did not give consent to continue the proceeding as per the provisions of the Act, of 1996. It appears that the Arbitrator issued notice to inform his decision that he was continuing the arbitral proceeding as per the provisions of the Act, 1996. This Court holds that the Arbitrator had no such jurisdiction. The competency and jurisdiction could have been given only by further agreement as mentioned in Section 85 of the Act, 1996. The provision reads as under :-

Section 85 of the Arbitration And Conciliation Act, 1996

" Repeal and savings -

(1) The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby replaced

(2) Notwithstanding such repeal, enactments

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force.

(b) All rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act. "

16. The aforesaid provision shows that only if there is an agreement between the parties to continue arbitral proceeding under new Act, i.e. the Act of 1996, it was possible for the Arbitrator to continue the arbitral proceeding and say that it was then under the Act of 1996. Only after that, the Arbitrator could have passed the award under the Act of 1996. When there was no consent of the respondent-employer as mentioned in Section 85, the award is shown to be passed under the Act of 1996. It was virtually ex-parte award as the employer had stayed away for raising/ taking objection to the jurisdiction and the competency of the Arbitrator. In any case, Clause 55 of General Conditions of the Contract quoted above shows that Arbitrator was not competent as his appointment was not as per the agreement. Further Clause 55 shows that the provisions of old Act of 1940 were to apply and as amended for

the purpose of Clause 55.

17. Learned counsel for the appellant placed reliance on some observations made by the Apex Court in the case reported at **2018 SCC on line page No. 232 (Board of Control for Cricket in India Vs. Kochi Cricket Private Limited)**. The Apex Court has considered the provisions of Arbitration Act as amended in the year 2015, section 6 of the General Clauses Act and Section 26 of the Amendment Act of Arbitration. The facts of the reported case show that arbitral proceeding was started in the year 2012 and there was arbitration agreement of the year 2011. Thus, the arbitral proceeding was started as per the provisions of the Act of 1996 and the award passed under that Act was already challenged under Section 34 of the Act of 1996. Execution proceeding was filed for enforcement of the award passed and submission was made that the provision of Section 34 of the Act 1996 was applicable as the proceeding was pending and there was automatic stay to the execution proceeding. The Apex Court held that the amendment to Section 36 was applicable only to the arbitral proceeding and it was not applicable to the Court proceeding. The Apex Court further held that the manner of execution of award is only a procedural aspect and there was no benefit of Section 34 left of automatic stay due to amendment of 2015. The prayer to Court that execution proceeding cannot go on was rejected by the High Court. This Court holds that the observations

made by the Apex Court in this recently decided case can be of no help to the appellant in view of the peculiar facts of the present matter. Thus, all the three points are decided against the appellant-contractor and the appeal stands dismissed.

[SUNIL K. KOTWAL]
JUDGE

YSK/

[T.V. NALAWADE]
JUDGE