

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO.6 OF 2019
WITH
ARBITRATION APPLICATION NO.7 OF 2019
(Manish Dharshibhai Parmar Vs. Godawari Maharashtra and
another)

Mr.A.K.Gawali, Advocate for the applicant.
Mr.S.W.Munde, Advocate for respondent No.1.
Mr.S.G.Bhalerao, Advocate for respondent No.2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 12/04/2019

PER COURT :

1. I have heard the learned Advocates for the applicant and on behalf of the respondents, at length.

2. Issue is as regards the appointment of an Arbitrator under Clause 53 of the Arbitration Agreement dated 25/09/1991 in both these cases. By clause 53 of the said Agreement, the Chief Engineer was to suggest 3 names of Officers of the rank of Superintending Engineer or a higher rank who have not been connected with the work under the contract. There is no dispute that time and again arbitrators were appointed and for some reason, either the Arbitrator declined to continue with the arbitration or has quit as an Arbitrator.

3. The details about the litigation between the parties is not required to be narrated in the body of this order for the reason that the authority representing the Godawari Marathwada Irrigation Development Corporation conveyed to the applicant vide communication dated 28/01/2019, suggesting 3 names as a choice for the applicant to select from. By communication dated 01/02/2019, instead of making a choice, the applicant informed the concerned authority that the new Arbitration and Conciliation Act, 2015 would permit any party to work as an Arbitrator, if he is not connected with either of such parties. The applicant informed the concerned authority that he was approaching the High Court for seeking an appointment of an Arbitrator and there is no necessity to select any person. Pursuant to the above, the respondent selected Mr.S.S.Pagar, Superintending Engineer, Osmanabad Irrigation Circle, Osmanabad to be the sole Arbitrator.

4. Clause 53, which is the arbitration clause, reads as under :-

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

Within thirty days of receipt of the notice from the contractor of his intention to refer the dispute to arbitration the Chief Engineer shall be sent 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 fifteen days of receipt of this list select and communicate to the Chief Engineer the name of the one officer from the list who shall then be appointed as the sole arbitrator. If the contractor fails to communicate his 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 thirty days as stipulated, the Contractor shall send a similar list to the Chief Engineer, within fifteen days. The Chief Engineer shall then select one officer from the list and appoint him as a sole arbitrator within fifteen 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 provisions of the Indian Arbitrator Act, 1940 or any statutory modification thereof. The decision of the sole arbitrator shall be final and binding on the parties thereto. The arbitrator shall determine the amount of cost of arbitration to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payment due to the contractor by the Department shall not be withheld, unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and in case of awards amounting to Rs.1.00 lakh and above, such awards shall state

reasons for the amounts awarded.

Neither party is entitled to bring a claim to arbitration if the Arbitrator has not been appointed before the expiration of thirty days after defect liability period.”

5. The contention of the applicant is that in the light of Section 85 and 86 of the Arbitration and Conciliation Act, 2015, the new Act would become applicable thereby overriding clause 53 of the arbitration clause. It is further submitted that in view of this position, sub sections 5 and 6 under Section 11 would prohibit the appointment of any Arbitrator who may even be remotely connected with any of the parties and the arbitration clause 53 would not have any applicability.

6. Learned Advocate for the respondents has entered an affidavit in reply and has relied upon a recent judgment of the Hon'ble Apex Court in the matter of S.P.Singla Constructions Pvt.Ltd., Vs. State of Himachal Pradesh and another [(2019)2 SCC 488] to support his contention that no provision under the 2015 Act would be available to the applicant.

7. I find from the judgment in the matter of S.P.Singla (supra) that when an Arbitrator is already appointed by one of the parties to

the agreement as per the terms of the arbitration clause, the 2015 Act would not be available. It was noted in the said case that the agreement between the parties was of 2006, whereas in the instant case, the work order is of 25/05/1991. Though in the case before the Apex Court, a vacancy arose enabling the Chief Engineer to appoint another person, who was the Superintending Engineer, Arbitration Circle, as an Arbitrator from the very arbitration circle, no interference was caused since it was held to be an appointment as per clause 65 of the contract between the parties.

8. The relevant observations of the Hon'ble Apex Court in paragraph No.10 to 12 read as under :-

“10. A perusal of clause (65) makes it apparently clear that it was permissible to appoint a person by designation and this will be evident from clause (65), in particular the sentence “the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Chief Engineer is to appoint another person....”. If appointments were only to be made by name and not by designation there could be no question of further appointment on the Arbitrator vacating his office. It is only when an Arbitrator is appointed by designation that the question of a vacancy upon the incumbent vacating office could arise thereby enabling the Chief Engineer to appoint another person to act as arbitrator.

The Superintendent Engineer, Arbitration Circle appointed as the Arbitrator is from the very arbitration circle, HPPWD and such appointment is only as per clause (65) of the contract and we find no merit in the objection raised by the appellant.

11. Likewise, there is no merit in the contention of the appellant contractor that the appointed arbitrator is an employee in service of the HPPWD which the provision of Section 12(5) of the 1996 Act (as amended w.e.f. 23.10.2015) bars at the threshold itself. In a catena of judgments, the Supreme Court held that arbitration clauses in government contracts providing that an employee of the department will be the sole arbitrator are neither void nor unenforceable. [Indian Oil Corporation Limited and others v. Raja Transport Private Limited (2009) 8 SCC 520, Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Limited (2007) 5 SCC 304, Union of India and another v. M.P. Gupta (2004) 10 SCC 504] The fact that a named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or lack of independence on his part. The arbitration agreements in government contracts providing that an employee of the department or a higher official unconnected with the work or the contract will be the arbitrator are neither void nor unenforceable.

12. Observing that, in government contracts before appointing arbitrators, the appointing authority should be more vigilant and 8 more responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner without comprising with the other duties, in Union of India v. Uttar

Pradesh State Bridge Corporation Limited (2015) 2 SCC 52, it was held as under:-

"17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be

taken or not. What we emphasis is that Court is not powerless in this regard."

9. Finally, the Hon'ble Apex Court ruled by observing in paragraph No.25 that, "*we are conscious that after the amendment act, 2015, there cannot be a departmental arbitrator. As discussed earlier, in this case, the arbitration agreement between the parties is dated 19/12/2006 and the relationship between the parties are governed by the general conditions of the contract dated 19/12/2006, the provisions of the amendment Act, 2015 cannot be invoked.*"

10. In view of the above, I do not find any merit in this application.

11. Nevertheless, the learned Advocate for the applicant pointed out that Mr.S.S.Pagar, who is now appointed as the sole Arbitrator, after being chosen from the list of 3 persons by the respondents, was earlier appointed as an Arbitrator by the communication dated 05/05/2017. He is said to have declined to perform the functions of an Arbitrator. Thereafter, Mr.S.D.Giri, Retired Chief Engineer was appointed as an Arbitrator on 11/01/2019 and he is also said to have declined to undertake the said assignment. It was then that 3 names were suggested to the applicant by communication dated

28/01/2019.

12. Since the applicant pointed out that Mr.S.S.Pagar was earlier appointed as an Arbitrator and he declined the assignment, the learned Advocate for the applicant submitted that Mr.Pagar should not be appointed as a sole Arbitrator. Both the parties sought a pass over to take instructions. After the matter was called out at 5.00 p.m., the learned Advocate for the respondents suggested that Mr.Pagar could be discontinued provided the applicant selects any name from the list containing the two other Superintending Engineers. Learned Advocate for the applicant submits on instructions from the applicant that he is not agreeable to any options and this Court may pass an order.

13. In view of the above and considering the law laid down by the Hon'ble Apex Court in S.P.Singla (supra), this application stands rejected. Consequentially, Arbitration Application No.7/2019 pertaining to another contract of an identical nature, also stands rejected.

(Ravindra V.Ghuge, J.)