

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO. 13 OF 2018

Borse Brothers Engineers & Contractors Pvt. Ltd.,
A Company Registered under the Companies Act
Having Registered Office at
Plot No. 23, Anand Nagar,
Near Indira Garden,
Deopur, Dhule,
Dist. Dhule
Through its Director
Shri. Jitendra Bhatu Sonawane,
Age : 44 years, Occu-Business,
R/o. Plot No. 8, Anand Nagar,
Near Indira Nagar, Deopur,
Dhule

.. Applicant

VERSUS

- 1] Tapi Irrigation Development Corporation,
Through Executive Director,
Akashwani Chowk,
Jalgaon – 425 001
- 2] The Chief Engineer,
Tapi Irrigation Development Corporation
Akashwani Chowk,
Jalgaon – 425 001
- 3] The Superintending Engineer
Jalgaon Irrigation Project Circle,
Having Office at
Girna Bhavan, Near Akashwani Chowk,
Jalgaon – 425 001
- 4] The Executive Engineer,
Wahur Dam Division,
Infront of Mayadevi Temple,
Hatnur Colony, Mahabal Colony Road,
Jalgaon – 424 002

5] M/s. Mulay Brothers Ltd.,
Through its Director,
Having Office at – 2nd Floor,
Adalat Road, Aurangabad

.. Respondents

...
Mr. Amol K. Gawali, Advocate for applicant
Mr. V.J. Dixit, Sr. Advocate h/f. Mr. Suresh D. Dhongde, Advocate
for respondent no. 4
Mr. Sushilkumar H. Tripathi, Advocate for respondent no. 5
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 09-08-2019

ORAL ORDER :

1. By this application, applicant is purporting to invoke section 11 of the Arbitration and Conciliation Act, 1996 (for short “**the Act**”), seeking appointment of a sole arbitrator pursuant to sub-sections 5 and 6 of section 11 in respect of a dispute raised.

2. Originally bid of respondent no. 5 had been accepted and contract had been entered into by respondent no. 5 for rehabilitation work of construction of earthwork and structures in KM. No. 15 to KM. no. 20 and Minor No. 6L, 7L, 9R of Bhadali Distributory of Waghur Left Bank Canal of Waghur Dam Division, Jalgaon.

Respondent no. 5 had sought permission to sublet the

work to present applicant. Said proposal was approved by the Executive Engineer, Wahur Dam Division – respondent no. 4 and the work was sublet to present applicant on the same terms and conditions as were applicable to respondent no. 5. Accordingly, an agreement subletting the work was executed between applicant and respondent no. 5 in 2009.

3. In August, 2010, Chief Engineer, Tapi Irrigation Development Corporation – respondent no. 2 granted first extension to applicant upto 31-05-2011 and upto 31-05-2013, second one.

4. The extensions, according to applicant occurred due to inability of making available land for execution of work. Consequently, men and machinery of applicant, it is claimed were kept idle and cause had arisen to be compensated.

5. It is applicant's case that for compensation, applicant had to invoke clause 30.1 of agreement by approaching Superintending Engineer. Superintending Engineer did not abide by said clause, constraining applicant to approach Chief Engineer under clause 30.2 for decision of claims. Chief Engineer as well defaulted and applicant had invoked clause 30.3 approaching the Executive Director, Tapi Irrigation Development Corporation –

respondent no. 1 herein, who was expected to refer the matter for adjudication to standing committee/executive committee of the Corporation for decision.

6. Under letter dated 04-10-2017, respondent no. 4 – Executive Engineer purportedly communicated to applicant that claims raised by applicant have been rejected.

7. According to applicant, Executive Director having failed to act in accordance with the procedure prescribed in clause 30.3 to refer the dispute for adjudication by standing / executive committee at corporation level, application has been filed invoking section 11 of the Act.

8. Respondents, in response to the application have filed affidavit-in-reply purporting to question maintainability of application, contending that there is no arbitration agreement entered into between applicant and the respondents.

9. It is contended that while the work was supposed to be completed within 12 months, respondent no. 5 had failed to mobilize men and machinery since the same had been engaged by him in some other work and, as such, had requested to allow subletting contract to present applicant.

10. It is also being referred to in the reply that since land acquisition for the project / work had been resisted, work under the contract could not commence and applicant had not been required to carry out any work and the same has been accepted by applicant itself.

11. It is being submitted that while applicant had approached respondent no. 1 after respondent no. 1 had taken a decision with reference to report dated 10-08-2017 and had accordingly communicated the same to Superintending Engineer on 28-09-2017.

12. It has been referred to in the reply that Executive Engineer had initiated procedure for cancellation of work order as per tender condition no. 15(1) and the notice had been issued on 11-08-2017 and since there is no termination of work, claims raised by applicant before such an event were untenable and could not be considered.

13. It is further being referred to in the reply that even otherwise claims raised by present applicant were rejected by Executive Director and no further adjudication is remaining. It is being further submitted that under clause 15(1), no compensation would be payable to contractor if termination of work takes place

under the same.

14. Learned counsel Mr. A.K. Gawali appearing for applicant submits that clauses 30.1, 30.2 and 30.3 clearly reveal that resolution of any dispute arising out of contract is to be initially before Superintending Engineer and, thereafter, in appeal before Chief Engineer and then a reference by Executive Director to executive committee/standing committee for suitable action, in further appeal.

15. It would be pertinent to refer to clauses 30.1, 30.2 and 30.3 concerning present application, reading thus,

“ **Clause 30.1** : Except where otherwise specified in contract and subject to the powers delegated to him by Corporation under the code, rules then in force the decision of Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties of the contract upon all questions relating to the meaning of the specification, design, drawing and instructions hereinbefore mentioned and as to the quality or workmanship or materials used on the work or as to any other question, claim, right matter or thing whatsoever if any way arising out of or relating to the contract, design, drawings, specification, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute same, whether arising during the progress of work or after the completion or abandonment thereof.

Clause 30.2 : The contractor may within 30 days of receipt by him of any order passed by the Superintending Engineer of the Circle as aforesaid appeal against it to the Chief Engineer concerned with the contract work or project provided that -

a) The accepted value of the contract exceeds Rs. 10 Lakhs (Rs. Ten Lakhs).

b) Amount of claim is not less than Rs. 1.00 Lakh (Rs. One Lakh).

Clause 30. 3 : If the contractor is not satisfied with the order passed by the Chief Engineer as aforesaid the contractor may within 30 days of receipt by him of any such order appeal against it to the Executive Director; Tapi Irrigation Development Corporation, Jalgaon who, if convinced that prima – facie the contractor's claim rejected by Superintending Engineer / Chief Engineer is not frivolous and that there is some substance in the claim of contractor as would merit detailed examination and decision by the Executive Engineer Committee / Standing Committee, shall put up to Executive Committee / Standing Committee at Corporation level for suitable decision. ”

16. He submits that bare perusal of said clauses would unequivocally reveal, as subsistence of said clauses under the terms of contract is not denied, that is in the nature of an agreement for arbitration. The extreme stand taken under the reply to arbitration application lies flat on the face and same is absolutely baseless.

Over and above this, learned counsel purports to point out that such clause being arbitration agreement, is not untreaded by the courts. There has been a decision of apex court over such an arbitration term. He buttresses his aforesaid submission, referring to decision of supreme court in the case of *Mallikarjun Vs. Gulbarga University* reported in (2004) 1 Supreme Court Cases 372 . Clause 30 under said agreement had been quoted by supreme court in paragraph 4 thereof, reading, thus,

“ The decision of the Superintending Engineer of Gulbarga Circle for the time being shall be final, conclusive and binding on all

parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract designs, drawings, specifications, estimates, instructions, orders or those conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof in case of dispute arising between the contractor and Gulbarga University. ”

He refers to paragraphs 17, 18 and 19 thereunder, reading thus,

“ 17. A clause which is inserted in a contract agreement for the purpose of prevention of dispute will not be an arbitration agreement. Such a provision has been made in the agreement itself by conferring power upon the Engineer-in-Charge to take a decision thereupon in relation to the matters envisaged under clauses 31 and 32 of the said agreement. Clauses 31 and 32 of the said agreement provide for a decision of the Engineer-in-Charge in relation to such matters are limited and they cannot be equated with an arbitration agreement. Despite such clauses meant for prevention of dispute arising out of a contract, significantly, clause 30 has been inserted in the contract agreement by the parties.

18. The very fact that clause 30 has been inserted by the parties despite the clauses for prevention of dispute is itself a pointer to the fact that the parties to the contract were ad idem that the dispute and differences arising out of or under the contract should be determined by a domestic tribunal chosen by them.

19. The said clause being a part of the contract agreement, it is beyond any cavil that the parties were ad idem in relation thereto.”

17. He submits that clause 30 of the agreement would show that the parties have concurred upon three tier system for resolution of dispute *inter-se*. In support of the submission, he

refers to and relies on a decision of supreme court in the case of *M/s. Centrotrade Minerals and Metal Inc V. Hindustan Copper Ltd. with Hindustan Copper Ltd. Vs. M/s. Centrotrade Minerals and Metal Inc* reported in AIR 2017 S.C. 185.

18. Learned counsel Mr. Gawali goes on to submit that while three tier arbitration provided under the agreement failed to discharge function according to the prescribed procedure thereunder, an application under section 11 would be legitimately available for the applicant for resolution of the claims raised by it with respondents. Learned counsel refers to section 11 of the Act and provisions thereunder. He submits that in the present case, the situation would be governed by sub-section 6 of section 11, putting particular emphasis on clause (c) thereunder, reading thus,

“ (6) Where, under an appointment procedure agreed upon by the parties, -

...
...

(c) a person, including an institution, fails to perform **any function entrusted** to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. ”

According to him as referred to under said provision, a party may request the court to take necessary measure. He submits that while Superintending Engineer, Chief Engineer and Executive Director have failed to discharge their functions in accordance with clauses 30.1, 30.2 and 30.3, clause (c) of sub-section (6) of section 11 of the Act would come into play and a request accordingly of the applicant would have to be considered by this court appointing arbitrator.

19. Learned counsel Mr. Gawali refers to and relies upon judgment of supreme court in the case of *TRF Limited Vs. ENERGO Engineering Projects Ltd.* Reported in (2017) 8 Supreme Court Cases 377 with a view to draw attention of this court to that in view of amendment of section 12 with the insertion of sub-section (5) thereunder, an arbitrator would be required to be appointed by this court and the matter would not be sent back to the arbitration pursuant to clauses 30.1, 30.2 and 30.3. He, in the circumstances, urges this court to invoke its powers under section 11 of the Act and grant the application.

20. Learned Senior Advocate Mr. Dixit holding for Mr. Dhongade, Advocate for respondent no. 4 purports to project a different perspective of the matter. He submits that in the first

place, there is no agreement for arbitration, as is sought to be submitted on behalf of the applicant. According to learned senior counsel, it cannot be said that clauses 30.1, 30.2 and 30.3 *per-se* would be an arbitration agreement. He submits that a facility made available to a contractor under said clauses would seldom be equated to arbitration. For an arbitration is possible only with the consent or concurrence and by agreement of parties and not otherwise. He contends that clauses 30.1, 30.2 and 30.3 would not depict a concurrent agreement between applicant and respondent no. 4 or stand of the parties, and the same could not be construed as an arbitration agreement, section 11 of the Act cannot be invoked and the application deserves to be thrown out at the threshold.

Alternatively, on instructions, he submits that if the court is of opinion that the provisions tantamount to arbitration term, in such a case, provision of Arbitration and Conciliation Act, 1996 invoked would govern the situation and procedure thereunder ought to be followed. Having regard to provisions of the Act, the only remedy available to applicant would be pursuant to section 34 and present application would not at all be maintainable.

He purports to refer to section 34 of the Act, putting particular emphasis on the word 'only' appearing in sub-section (1) of section 34 and submits that in such a case, recourse can be had against arbitral decision only by application for setting aside the same in accordance with sub-sections (2) and (3) thereunder and not otherwise. He, therefore, urges not to indulge into the request as is sought to be made under present application.

21. In present case, position emerges that applicant claims to have raised claims with Superintending Engineer who had not responded to within stipulated period under clause 30.1. As such, applicant had invoked clause 30.2 approaching Chief Engineer, who too did not act upon the approach. In the circumstances, had approached pursuant to clause 30.3 to the Executive Director.

22. The Executive Director had communicated to Superintending Engineer that, the claim of the applicant, having regard to the background as referred to herein-above earlier, is not acceptable and, accordingly, said decision had been communicated to the applicant.

23. In the circumstances, while according to applicant the arbitration clause had been invoked, it is being claimed by

respondents that the same has been decided having regard to decision by Executive Director – respondent no. 1 dated 28-09-2017.

24. Submissions purporting to interpret sub-section 6 clause (c) thereof under section 11 of the Act would have to be dispelled for the reason those would come into play in case there is failure to carry out function required under arbitration agreement for appointment of arbitrator. In present case, it emerges that clauses 30.1, 30.2 and 30.3 would amount to arbitration agreement and the same have been invoked accordingly. Failure to perform function as per the procedure prescribed thereunder by three tier system would not be a ground to invoke section 11 of the Act. Reliance placed on sub-section (6) of section 11 and clause (c) thereof would have to be read in the context that it is with reference to appointment procedure agreed upon by the parties and failure to function for appointment. In the present matter, applicant may not be said to have brought out a case to make it fall under clause (c). As a matter of fact, applicant's case is of arbitration clause had been invoked pursuant to the agreement. In the circumstances, it does not appear that clause (c) of sub-section (6) for appointment of arbitrator under section 11 which is meant for appointment of

arbitrator having regard to object underlying section 11 of the Act can possibly be invoked. Sub-section (6) and the clauses thereunder would have efficacy with respect to appointment of arbitrator and in case of failure to perform any function or procedure in appointment of arbitrator. Scope of section (6) clause (c) can not be expanded further than that. It is, therefore, difficult to put up a construction on said provision, as urged on behalf of the applicant.

25. It emerges that applicant had invoked the arbitral proceedings pursuant to the clauses therefor and a decision in respect of the same had been taken, giving indication of that arbitral proceedings initiated were decided.

26. Looking at the scheme of provisions under section 34 of the Act, it does not appear that any digression from the same as requested, could be indulged into.

27. It is being referred to on behalf of applicant that as yet the decision under three tier system pursuant to clause 30.3 is not received at the end of the applicant and it could not be said that there is any receipt of any decision in law and in fact.

28. The application therefore fails and is dismissed, leaving it open for the applicant to take recourse to the remedies as may be available in law.

29. Needless to refer that the period consumed in pendency of present proceedings before this court under present application would receive its due if it comes to consider the case of delay in making approach before the appropriate forum.

30. All points are kept open, to be taken by the parties before appropriate forum.

[SUNIL P. DESHMUKH]
JUDGE

arp/