

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.14314 OF 2018

The State of Maharashtra,
Public Works Department
through Executive Engineer,
Division Beed

Petitioner

Versus

Morya Infrastructure Pvt Ltd
through it's Director
Shri Bhaskar S/o Tukaram Waghmare
Beed

Respondent

Mr. S.R. Yadav advocate for the petitioner
Mr. A.S. Kulkarni h/f Mr. J.N.Singh advocate for respondent

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CORAM : **RAVINDRA V. GHUGE, JUDGE**

(Date : 12th MARCH, 2019)

PER COURT :-

1 On 11.1.2019 and 15.1.2019, I had passed the following orders:-

(Order dated: 11.1.2019)

“ 1 A praecipe motion for speaking to the minutes of the order dictated in Court on 09/01/2019, is moved on behalf of the State.

2. Learned advocate appearing on behalf of the

respondent/firm requests for keeping the matter on 15th January, 2019.

3. As such, list this motion for passing orders on 15th January, 2019. ”

(Order dated: 15.1.2019)

“1 This Court had heard the learned Advocates for the respective sides and had passed an order on 09.01.2009. Before the said order could be signed, the learned AGP moved the motion on 11.01.2019 with a copy to the learned Advocate for the Respondent. The motion was intended at indicating that the learned AGP desires to make some submissions in this matter and he felt that the additional submissions were necessary, though on 09.01.2019 this Court had passed an order after the learned Advocates had completed their submissions.

2 The learned Advocate for the Respondent submits that if the learned AGP desires to file any additional affidavit or documents, the compilation of the same may be delivered to him on or before 18.01.2019 so that he would prepare his affidavit in reply and file it in the Court before 30.01.2019. He prays that the matter may be kept on 01.02.2019 under the caption of “passing orders” and the parties could be heard.

3 Considering the above, stand over to 01.02.2019 in the category of “passing orders”.

4 The affidavit with documents shall be entered by the learned AGP on or before 24.01.2019 and the learned Advocate for the Respondent would enter his counter affidavit on or before 30.01.2019.

5 *The unsigned copy of the order dated 0-9.01.2019 is kept on record as it was dictated in open Court. “*

2 Pursuant to the above, the petitioner has entered a specific affidavit along with certain documents and it is submitted by consent of the parties that, the submissions of the petitioner may be incorporated in the draft order, that was dictated on 9.1.2019 and which is on record, as a motion was moved by the learned AGP for a re-hearing before the dictated order could be signed.

3 It is, in the above backdrop that, I have considered the submissions of the learned AGP so as to enable the District Court to decide the proceedings afresh, in view of the contentions put forth by both the sides.

4 The petitioner department has put forth its contentions in its additional affidavit filed on 22.1.2019. The material aspects which the learned AGP prays for being recorded in this order are as under:-

“ 4. *I say and submit that, thereafter the present respondent approached this Hon'ble Court to invoke arbitration clause in the agreement by way of filing Arbitration Application No. 2/2015 on 27/01/2015 and prayed for appointment of arbitrators to resolve alleged dispute. In the said matter, notice was issued to the present respondent and the then Ld. AGP has waived the service of notice. Accordingly,*

*instructions were called from the petitioner Department. The then Executive Engineer of the Petitioner Department sent a communication dated 18/02/2015, which was addressed to the then Ld. AGP. In the said communication, it was stated that as per the clause 3.4.17 (iii) (a) of the agreement, there is a provision for appointment of arbitrators by mutual consent [when in fact, there was no such provision] and by mutual consent of both the parties, it has been decided to appoint Shri. C.D.Fakir, Retired Chief Engineer, as an arbitrator. In the said communication, at the last, it was mentioned that Shri. C.D.Fakir, Retired Chief Engineer, may kindly be appointed as arbitrator. It is pertinent to note that, the said communication was specifically addressed to the then Ld. AGP and not to the Hon'ble Court. The copy of the said communication dated 18/02/2015 is annexed here with and marked as **EXHIBIT-F**.*

5. *I say and submit that, the said communication was placed on record by the then Ld. AGP. The said communication and its contents were misinterpreted and presuming that Shri. C.D.Fakir has already been appointed as an arbitrator, this Hon'ble Court disposed of the Arbitration Application No. 2/2015 by its order dated 02/03/2015. It is pertinent to note that, there was no specific order appointing Shri. C.D.Fakir as an arbitrator, neither from the Petitioner Department nor from this Hon'ble Court. It was not at all pointed out to the Hon'ble Court that, as per the agreement, a panel of 3 Arbitrators is to be appointed. Further, the present respondent/original applicant has suppressed that prior to filing of the Arbitration Application No. 2/2015, they themselves, by letter dated 13/12/2014 has requested Shri. C.D.Fakir to act as an arbitrator from their side and in response to that Shri. C.D.Fakir, by his letter dated 14/12/2014 has consented to act as an arbitrator for the present respondent. The present respondent ought to have pointed out this fact to the Hon'ble Court and ought to have requested for directions to the present petitioner to appoint an arbitrator from their side. Thereafter, the 2 arbitrators would have appointed the 3rd arbitrator. The copy of the order dated 02/03/2015 passed by this*

Hon'ble Court in Arbitration Application No. 2/2015 and the copy of letter dated 14/12/2014 issued by Shri. C.D.Fakir are annexed here with and marked as **EXHIBIT - G**. Collectively.

6. I say and submit that, the then Executive Engineer, by giving some wrong references and by misinterpreting the order of this Hon'ble Court passed in Arbitration Application No. 2/2015, wrote a letter dated 20/04/2015 to Shri. C.D.Fakir, stating that he has been appointed as an Arbitrator by the Hon'ble Court. He has also given reference of the letter dated 14/12/2014 referred in the above paragraph. In response, Shri. C.D.Fakir issued a communication/letter dated 25/04/2015 to the then Executive Engineer. In that letter he has specifically stated that as per the clause 3.4.17 (iii) (c) of the General Conditions of Contract, the arbitration shall take place before a panel of 3 arbitrators. He has further stated that as the company/present respondent has already appointed him as an arbitrator from their side, the present petitioner is now required to appoint an arbitrator from their side and both the arbitrators will then appoint the 3rd arbitrator, who will act as the presiding arbitrator. From this, it is crystal clear that in spite of the communication dated 18/02/2015 and the order dated 02/03/2015 passed by this Hon'ble Court passed in Arbitration Application No. 2/2015, Shri. C.D.Fakir was well aware that neither he has been appointed as a sole arbitrator by the mutual consent of the parties nor by the order of this Hon'ble Court. The copies of the letter dated 20/04/2015 and letter dated 25/04/2015 are annexed here with and marked as **Exhibit - H - Collectively**.

7. I say and submit that, thereafter, the present respondent also issued a letter dated 24/08/2015 and 5.10.2015 to the then Executive Engineer, stating that Shri. C.D.Fakir, by his letter dated 14/12/2014 has consented to act as an arbitrator on their behalf, but, in spite of this, no steps has been taken from the side of the Department to appoint an arbitrator on their behalf. Therefore, the present respondent requested the Department to appoint an arbitrator from their side so as to proceed further in the

matter. From all these facts, it is crystal clear that Shri. C.D.Fakir as well as the present respondent were well aware that it was never agreed between the parties that the Arbitral Proceedings will take place before a sole arbitrator nor there are any specific orders appointing Shri. C.D.Fakir as an sole arbitrator. The copies of the letters dated 24/08/2015 and 5.10.2015 are annexed herewith and marked as EXHIBIT - I.

8. *I say and submit that, no steps were taken by the present petitioner for appointment of an arbitrator on their behalf. So also, the present petitioner has never consented or issued any specific order to Shri. C.D.Fakir to work as an sole arbitrator. After a lapse of more than 1 year, Shri. C.D.Fakir Sue Moto started the arbitral proceedings. The 1st Preliminary Arbitral Meeting was conducted by Shri. C.D.Fakir on 19/02/2017. Meanwhile, the earlier Executive Engineer was replaced by a new Executive Engineer. He attended the said meeting not being fully aware about the earlier proceedings. The minutes of the 1st Preliminary Arbitral Meeting were prepared. In that, it has been observed that " As per clause 3.4.17 (iii) (c) of the General Conditions of Contract, the arbitration proceeding was required to be dealt with a panel of 3 arbitrators. But both the parties agreed to conduct the arbitration proceedings by sole arbitrator and accordingly, in view of letter dated 18/02/2015 addressed to the Government Pleader High Court Bombay, bench at Aurangabad by the respondent Executive Engineer, the Hon'ble High Court in Arbitration Application No. 2/2015 by order dated 2/3/2015 disposed of the said application in view of consent for acting this tribunal on its behalf. As both the parties consented for acting this tribunal as sole arbitrator and in view of the provisions of Arbitration and Conciliation Act, 1996, such recourse is permissible and in the light of above, I have decided to act as Sole Arbitrator. As such, Sole Arbitral Tribunal is constituted in accordance with clause 3.4.17 (iii) (b) of the General Conditions of Contract read with the provisions of Arbitration and Conciliation Act, 1996".*

*It is pertinent to note that, while making the above referred observation, Shri. C.D.Fakir lost sight or rather to say, has deliberately curtailed the fact that even after the letter issued by the present petitioner Department to the then AGP dated 18/02/2015 and the order dated 02/03/2015 passed by this Hon'ble Court in Arbitration Application No. 2/2015, he himself by his letter dated 25/04/2015 and the present respondent by its letter dated 24/08/2015 and 5.10.2015 has informed the present petitioner that Shri. C.D.Fakir has been appointed as an arbitrator on behalf of the present respondent and the present petitioner was requested to appoint a separate arbitrator on their behalf. It means that, he was well aware that neither he has been appointed as a sole arbitrator by the mutual consent of the parties nor by the order of this Hon'ble Court. As mentioned above, it was never agreed between the parties that the Arbitral Proceedings will take place before a sole arbitrator nor there are any specific orders appointing Shri. C.D.Fakir as an sole arbitrator. In spite of his own communication dated 25/04/2015 informing the present petitioner to appoint an arbitrator separately from their side, Shri. C.D.Fakir deliberately misused the contents of the letter dated 18/02/2015 and the order dated 02/03/2015 and got himself declared as a sole arbitrator. When he himself has informed the present petitioner by his letter dated 25/04/2015 regarding appointment of separate arbitrator on behalf of the Department and in absence of any specific order appointing him as a sole arbitrator or by mutual consent, there was no occasion for him to refer back to the earlier letter dated 18/02/2015 and order dated 02/03/2015, while making the above referred observations. This was done deliberately for the best reasons known to him. The present respondent was also aware about all the facts but he stood as a consenting party to the deeds of Shri. C.D.Fakir, as he has started to act for their benefit. A copy of the minutes of the 1st Preliminary Arbitral Meeting dated 19/02/17 and a copy of the relevant extract of the Agreement/Contract are annexed here with and marked as **EXHIBIT- J** - Collectively.*

9. *I say and submit that, thereafter the 1st and the 2nd*

*meeting was held on 29/04/2017 and 14/05/2017 respectively. The present petitioner has not attended the said meetings. Thereafter, the 3rd meeting was scheduled on 11/06/2017. It was attended by the then Executive Engineer. He filed an application seeking 2 month's time for pointing an Advocate and for submitting the statement of defence. Instead of granting the time as prayed for, only 4 week's time was granted and the next meeting was scheduled on 08/07/2017 [Page No. 27 of the Writ Petition]. Thereafter, on 08/07/2017, the 4th meeting was conducted. The then Executive Engineer appeared in the said meeting along with their advocate and filed the statement of defence. Thereafter, the 5th meeting was scheduled on 22/07/2017. Before the 5th meeting dated 22/07/2017, the Superintendent Engineer of the petitioner Department issued a communication dated 12/07/2017 to the arbitrator Shri. C. D. Fakir stating that the order dated 02/03/2015 in Arbitral Application No. 2/2015 is passed on the basis of incorrect information given by the then executive engineer and without having any authority to do so. Further, it was specifically pointed out that the process for appointing an arbitrator on behalf of the petitioner Department has already been initiated and a proposal is being sent for proper approval. Till the proposal is approved and arbitrator on behalf of the petitioner Department is appointed, the hearing and proceedings of the arbitration may be kept in abeyance or be adjourned. A copy of the communication/letter dated 12/07/2017 is annexed here with and marked as **EXHIBIT – K.**"*

5 The Learned AGP then indicates from a document dated 14.12.2014, which is a letter issued by the Arbitrator Shri C.D. Fakir to the respondent Company, stating that, he is consenting for being appointed as an Arbitrator on behalf of the respondent – Morya Infrastructure Private Limited. This indicates that Shri Fakir had privately consented to the respondent that he had

agreed to be an Arbitrator as the choice of the respondent. Learned AGP then pointed out another letter issued by Shri Fakir on 25.4.2015 addressed to the petitioner, stating that he would be the arbitrator representative of Morya Infrastructure and the Government is at liberty to appoint its own Arbitrator as a part of arbitrator panel. Another letter pointed out is dated 24.8.2015 issued by Morya Infrastructure to the petitioner, stating that Shri Fakir has been appointed on behalf of Morya Infrastructure as an Arbitrator and he would be the nominee of the said Company.

6 The learned AGP then pointed out a mischief played by the Executive Engineer of the petitioner at Beed, vide his letter dated 18.2.2015 addressed to the learned Government Pleader of this bench, in Arbitration Application No.2/2015, that the Government may appoint Shri Fakir as the sole Arbitrator.

7 The grievance of the petitioner is that, these facts were not brought to the notice of this Court (Coram: M.T.Joshi, J) when he passed an order on 2.3.2015 in Arbitration Application No.2/2015. Learned AGP indicated to this Court that Shri Fakair was appointed as an Arbitrator by the petitioner establishment. This is against the record and these material aspects were suppressed from this Court. This resulted in the Court, making its observation in paragraph No.3 of the order dated 2.3.2015.

8 I find that there has been a serious lapse in the proceedings in Arbitration Application No.2/2015. Certain aspects, which should have been brought to the notice of this Court, were suppressed. The factors recorded herein above, in the light of the submissions of the learned AGP Mr. S.R. Yadav Lonikar were available to be cited before this Court even in 2015. These factors are likely to have a serious impact on the outcome of the proceedings.

9 On 9.1.2019, I had recorded the submissions of the learned AGP and the learned Advocate appearing on behalf of the respondent Company and the developments that unfolded in the hearing on 9.1.2019 were recorded in the said order which I had dictated in open Court in paragraph Nos.1 to 11, which read as under:-

“ PER COURT :

1. I have heard the contentions of the learned AGP and the learned Advocate appearing on behalf of the respondent at length. Prima-facie, having formed an opinion that the impugned order deserves to be set aside since material aspects, which would have a direct impact on the arbitration proceedings, were not considered by the learned Court which has passed the impugned order, I called upon the learned AGP to state as to whether the State would consent to deposit Rs. 1 (one) Crore before the District Court as a condition for a re-hearing of Exh.11 in Misc. Civil Application (ARB) No.87/2018.

2. *Learned AGP has taken instructions from Mr. H. N. Sanap, Executive Engineer, P.W.D., Beed present in the Court that a specific sanction will have to be taken from the State Government to make such a statement.*

3. *Mr. Singh submits that the respondent has sold his personal properties and has invested an amount of more than 4 crores for the completion of laying the road of about 33 kms. on the Manjarsumba - Patoda road in 2003-2004. Though the road was laid on the principle of Build, Operate and Transfer (BOT), the collection of toll was abruptly halted by the State Government within 6 years when the period for such collection was 13 years and 6 months. He, therefore, submits that the State be directed to deposit at least 3 (three) crores before the District Court.*

4. *After the above order was dictated, the learned AGP as well as the learned Advocate for the respondent sought time to take instructions and make further submissions after the lunch recess.*

5. *When the matter was called out after lunch recess, the learned AGP submits that the Executive Engineer cannot make any statement before this Court that the State will deposit an amount of Rs.1 (one) crore. Instead, he submits, this Court may consider the petition on its own merits.*

6. *The learned Advocate for the respondent submits, on instructions, that if the direction to the petitioner to deposit 50 % of the arbitral award amount within four weeks, is passed, the respondent is agreeable to concede to the same on the condition that he would seek liberty to withdraw the said amount in view of he having suffered an irreparable harm and grave prejudice in view of*

his personal investment as recorded in paragraph 3 of this order.

7. *I find that if this petition is required to be entertained, it is likely to take some time considering the pendency before this Court. The proceedings before the District Court would then linger and the rigors suffered by the respondent would continue until this petition is finally decided.*

8. *It is well settled law that this Court should be extremely cautious in causing an interference in matters involving interlocutory order. Shri Singh relies upon two orders passed by the Honourable Apex Court in **M/s Shinde and Sons Vs. Executive Director in Petition (s) for Special Leave to Appeal (c) No(s). 3702/2018, dated 02/04/2018** and **Manish Vs. Godawari Marathwada Irrigation Development Corporation in Petition (s) for Special Leave to Appeal (c) No(s). 11761/2018, dated 26/09/2018**, in which the Honourable Apex Court has directed that hundred percent amount should be deposited in such matters if any relief is to be granted to the State instrumentality. Despite this aspect, he agrees to a deposit of 50 % of the arbitral award amount and is also agreeable if the proceedings before the Trial Court are expedited.*

9. *It is in the peculiar fact situation as recorded hereinabove, that I am partly allowing this petition only to the extent of reducing the deposit amount from 60 % to 50 % as was directed by the District Court vide the impugned order dated 11/09/2018 below Exhibit 11.*

10. *The learned AGP submits that if sufficient time is granted, the State would make an endeavor to implement the directions of this Court. He, however, prays that the order dated 20/08/2018 passed by the Executing Court below application Exhibit 11 in Civil Misc.*

Application (ARB) No. 87/2018 may be vacated as the current account of the Executive Engineer, P.W.D., Beed with State Bank of India, Main Branch Beed bearing No. 1096945703, has been attached under Order XXI Rule 52 of the Code of Civil Procedure.

11. As such, the petitioner shall deposit 50 % amount of the arbitral award on or before 15/03/2019 before the Trial Court. On the condition of making such a deposit, the order dated 20/08/2018 shall be kept in abeyance and the said current account would be released from attachment. If the amount as directed is not deposited by 15/03/2019, the order dated 20/08/2018 shall stand restored and the said account of the PWD shall stand attached in Civil Misc. Application (ARB) No. 87/2018. Any grievance with regard to the same shall then be an independent cause of action.

12. Since I have issued the directions as above, Civil Misc. Application (ARB) No. 87/2018 shall be adjudicated upon by the concerned court and the said proceedings shall be decided expeditiously and in any case, on or before 31/01/2020.

13. In view of the above, if the respondent makes an application for withdrawal of the amount, the District Court shall consider the said application in view of the hardships suffered by the respondent and would pass an appropriate order as regards withdrawal of a particular portion of the deposited amount on such conditions as the court may think fit and proper.”

10 In view of the above, this petition is disposed off by modifying the earlier directions in paragraph No.11, as under:-

(a) The petitioner shall, now deposit 50% amount of the arbitral award before the Trial Court on or before 31.5.2019.

(b) The impugned order dated 20.8.2018 shall be kept in abeyance and the current account of the petitioner would be released from attachment so as to enable them to deposit the said amount before the Trial Court.

(c) Civil Miscellaneous Application (Arbitration) No.87/2018 shall be adjudicated upon by the Trial Court, afresh and shall be decided as expeditiously as possible and in any case on or before 31.3.2020.

(d) If the respondent Company makes an application for withdrawal of the amount, the District court shall consider the said application in view of the hardships suffered by the respondent and would pass an appropriate order, as regards withdrawal of a particular portion of the deposited amount on such conditions as the Court may find fit and proper.

(e) Since, I am permitting the District Court to consider the material brought on record by the AGP, which is reflected in this order, all the contentions of the respondent claimant are kept open.

(f) The petitioner department would be at liberty to carry out amendment in the memo of the appeal, so as to bring all the above factors on record. After such amendment is carried out, the Trial Court would permit the claimant Company to file an additional written statement to meet the new factors placed on record.

(g) The order dated 20.8.2018 passed by the Executing Court shall loose its efficacy after the District Court decides Civil Misc. Application (ARB) No.87/2018.

**(RAVINDRA V. GHUGE),
JUDGE**