

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

31 ARBITRATION APPLICATION NO.10 OF 2020

M/s. JILB (Engineers & Contractors)
through its partner,
Mr. Jagjit Singh S/o. Lakhmir Singh Rehal,
Age : 52 years, Occu: Contractor ship,
Office at Plot No.51, Jai Cottage,
Vedant Nagar, Station Road, Aurangabad,
R/o. Aurangabad, Tq. and Dist. Aurangabad ... **APPLICANT**

VERSUS

1. The Principal Secretary,
Water Resources Department,
Mantralaya Mumbai – 32.
2. The Executive Director,
Godawari Marathwada Irrigation
Development Corporation,
Sinchan Bhavan, Jalna Road,
Aurangabad, Dist. Aurangabad.
3. The Chief Engineer and Chief Administrator,
Command Area Development Authority,
Garkheda Parisar, Aurangabad,
District Aurangabad.
4. The Executive Engineer,
Majalgaon Canal Division No.7,
Gangakhed, District Parbhani ... **RESPONDENTS**

AND

32 ARBITRATION APPLICATION NO.12 OF 2020

M/s. JILB (Engineers & Contractors)
through its partner,
Mr. Jagjit Singh S/o. Lakhmir Singh Rehal,
Age : 52 years, Occu: Contractor ship,
Office at Plot No.51, Jai Cottage,
Vedant Nagar, Station Road, Aurangabad,
R/o. Aurangabad, Tq. and Dist. Aurangabad ... **APPLICANT**

VERSUS

1. The Principal Secretary,
Water Resources Department,
Mantralaya Mumbai – 32.
2. The Executive Director,
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Development Corporation,
Sinchan Bhavan, Jalna Road,
Aurangabad, Dist. Aurangabad.
3. The Chief Engineer and Chief Administrator,
Command Area Development Authority,
Garkheda Parisar, Aurangabad,
District Aurangabad.
4. The Executive Engineer,
Majalgaon Canal Division No.7,
Gangakhed, District Parbhani ... **RESPONDENTS**

AND

33 ARBITRATION APPLICATION NO.13 OF 2020

M/s. JILB (Engineers & Contractors)
through its partner,
Mr. Jagjit Singh S/o. Lakhmir Singh Rehal,
Age : 52 years, Occu: Contractor ship,
Office at Plot No.51, Jai Cottage,
Vedant Nagar, Station Road, Aurangabad,
R/o. Aurangabad, Tq. and Dist. Aurangabad ... **APPLICANT**

VERSUS

1. The Principal Secretary,
Water Resources Department,
Mantralaya Mumbai – 32.
2. The Executive Director,
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3. The Chief Engineer and Chief Administrator,
Command Area Development Authority,
Garkheda Parisar, Aurangabad,
District Aurangabad.

4. The Executive Engineer,
Majalgaon Canal Division No.7,
Gangakhed, District Parbhani

... **RESPONDENTS**

...

Advocate for Applicant : Mr. J.N. Singh
AGP for respondent No. 1 : Mr. S.W. Mundhe
Advocate for Respondent Nos.2 to 4 : Mr. B.R. Surwase

...

CORAM : MANGESH S. PATIL, J.

DATE : 17.08.2021

PER COURT :

Heard both the sides finally with consent.

2. These three separate applications are styled as filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter the Arbitration Act). The parties are same and since a similar relief is being claimed in respect of all the three arbitration proceedings, these applications are being disposed of by this common order.

3. The applicant was allotted a civil work under agreements dated 23.01.1980. The works which were initially expected to be completed within 18 English calendar months were completed after extension of time limit. A dispute arose between the applicant and the respondents and pursuant to Clause 31 of the agreements an Arbitral Tribunal consisting of three members was constituted. As laid down therein one of them was appointed by the applicant, the respondents appointed one and the third Arbitrator was appointed by Central Water Commission. Thus the Tribunal

commenced its journey in the year 2009. A member appointed by the respondents however, died in the year 2013 and was replaced by one Shri S.K. Ghanekar on 03.10.2013.

4. The applicant is seeking to replace Mr. S.K. Ghanekar on following grounds:

- i) Mr. Ghanekar and the Tribunal have not been able to resolve the dispute within a reasonable time and 12 years have lapsed.
- ii) Mr. Ghanekar has become disqualified by virtue of Section 12 (5) since he has now become The Secretary of the (Command Area Development Authority) under the Water Resource Department and therefore by virtue of the 7th Scheduled has become ineligible.
- iii) In view of his such appointment there exists circumstances which give rise to justifiable doubts in the mind of applicant as to his independence or impartiality.
- iv) Though the dispute is awaiting decision for years together, the Tribunal has unilaterally enhanced its fees and expenses.
- v) Though it has been agreed between the parties to share the expenses equally, the respondents are not making any reimbursement to the expenses borne by the applicant.

5. The applicant therefore prays that Mr. Ghanekar may be replaced as a member of the Arbitral Tribunal. In the alternative, the applicant requests for appointing a Retired Judge of this Court as the Sole Arbitrator.

6. The learned advocate for the applicant would vehemently submit that the whole purpose and the legislative intention is lost since the Tribunal has not been able to resolve the dispute for last more than 12 years and for this reason alone, the Arbitral Tribunal needs to be substituted by replacing it by a Retired High Court Judge which would expedite the resolution. He would submit that irrespective of the agreement between the parties this Court has ample powers under Section 11(6), 14(1) and 15(2) to appoint Arbitrators in supersession of any such agreement and procedure. He would refer to the decision in the case of **North Eastern Railway and Ors. Vs. Tripple Engineering Works; (2014) 9 SCC 288** and **Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.; (2017) 4 SCC 665**.

7. The learned advocate Mr. Singh would further submit that since Mr. Ghanekar has now become the Secretary of the Department under which the work in question was carried out, by virtue of the provision of Section 12(5) read with VII Scheduled he becomes disqualified. There exists a reasonable doubt about his impartiality and even for this reason, Mr. Ghanekar needs to be replaced.

8. The learned advocate Mr. Singh would, lastly, submit that even at earlier point of time couple of other officers appointed by the respondents

had themselves resigned after they were promoted. However, Mr. Ghanekar is not ready to quit and ought to be replaced.

9. The learned advocate for the respondent Nos. 2 to 4 would oppose the applications. He would submit that an issue regarding limitation was raised before the Arbitral Tribunal. Though the other two members held that the claim was within limitation. Mr. Ghanekar had taken a contrary view and had concluded that it was time barred. It is only because of his such stand that the applicant is now making a request to replace him. The request is not *bona fide*.

10. The learned advocate would then submit that the provisions of Section 12(5) has been brought into effect by way of an amendment dated 23.10.2015 whereas the Tribunal was constituted much prior thereto and by virtue of the decision in case of **S.P. Singla Constructions Pvt. Ltd. Vs. State of Himachal Pradesh and Anr.; (2019) 2 SCC 488**, such amended provision cannot have retrospective operation.

11. The learned advocate then submits that the applicant had failed to raise any objection to the appointment of Mr. Ghanekar at any earlier point of time and consequently must be held to have waived their right to object it as laid down under Section 4 of the Arbitration Act.

12. The learned advocate would then submit that the work in question was not undertaken by the Department to which Mr. Ghanekar has now been shifted and made the Secretary. There are no reasonable grounds to justify the apprehension being entertained by the applicant. A specific

application submitted by the applicant to the respondents has already been rejected. The order of the Tribunal holding that the claim of the applicant is within limitation has been challenged by the respondents before the Court. There is no merit in the applications and those be rejected.

13. I have carefully gone through the rival submissions, the papers and the decisions cited at the bar. There is no dispute about the fact that as per the mandate of the agreement, a Tribunal comprising of three members is to be constituted, one to be appointed by the parties each and the third one to be appointed by the Central Water Commission. It is accordingly that the Tribunal has come into being.

14. There cannot be dispute as regards the observations and the conclusions of the Supreme Court in the cases of **North Eastern Railway** and **Voestalpine Schienen GMBH** (supra). This Court has ample powers to constitute a Tribunal even superseding the agreement between the parties with a view to expedite a resolution. The point here is as to if in the facts and circumstances as obtaining in the matter in hand this Court should indulge in and reconstitute the Arbitral Tribunal on the request being made by the applicant.

15. Though the applicant has styled these applications as filed under Section 11(6) of the Arbitration Act, conspicuously, simultaneously he is challenging the appointment of Mr. Ghanekar under Section 12 and also simultaneously taking recourse to the provisions of Section 13, Section 14 and even Section 15. This very conduct of the applicant is eloquent enough

and demonstrates as to how, it is bent upon to question the appointment of Mr. Ghanekar. He was appointed in the year 2013. It is being challenged in the year 2020. Right in the teeth of Section 4 of the Arbitration Act, it is not open for the applicant to raise any such issue now.

16. Apart from the above state of affairs, as far as the delay is concerned which is being much harped upon by the applicant's advocate, there is nothing on record to demonstrate that it is pursuant to some conduct of Mr. Ghanekar that the delay has occasioned. There is absolutely no whisper in the applications attributing any specific conduct on the part of Mr. Ghanekar which can be said to have triggered the delay. As is mentioned earlier, admittedly, not only the member appointed by the applicant but even there is a third member of an independent agency. However, nothing is being averred in the applications as to how Mr. Ghanekar alone can be said to be causing hindrance, which is not even the case of the applicant. Therefore I do not find that the applicant has been able to make out a ground under Section 11(6) to replace Mr. Ghanekar.

17. As far as the challenge to the appointment of Mr. Ghanekar under Section 12(5) of the Arbitration Act suffice for the purpose to observe that admittedly the Arbitral Tribunal has come into existence prior to insertion of Sub Section 5 of Section 12 with effect from 23.10.2015 and consequently in view of the decision in the case of **S.P. Singla Constructions** (supra), the amendment having no retrospective operation, the applicant cannot press it into service.

18. So far as objections being raised for continuation of Mr. Ghanekar as member of the Tribunal, his appointment in the year 2013 was never challenged by the applicant as is required under Section 13. As far as the capacity of Mr. Ghanekar who according to the applicant has become *de jure or de facto* unable to perform his functions, in view of the provisions of Section 14 the remedy would lie elsewhere.

19. Again, when Mr. Ghanekar has not withdrawn from the office and even the parties have not agreed, the mandate does not terminate and he cannot be replaced even by resorting to Section 15.

20. Considering all the aforementioned facts and circumstances, in my considered view, the applicant has miserably failed to make out any of the grounds which would justify reconstitution of the Arbitral Tribunal. The Applications are rejected.

21. At this stage, the learned advocate Mr. Singh submits that pursuant to the order dated 16.07.2021 the applicant has deposited costs of Rs.20,000/- in each of these three proceedings and the money may be directed to be paid to a State Government run Covid Center. His request is accepted.

(MANGESH S. PATIL, J.)