

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4059 OF 2021

1. Godavari Marathwada Irrigation Development Corporation, Aurangabad through its Executive Director,
Sinchan Bhavan, Jalna Road, Aurangabad.
2. The Chief Engineer,
Irrigation Department,
Sinchan Bhavan, Jalna Road,
Aurangabad.
3. The Superintending Engineer
Beed Irrigation Project Circle
Near Civil Hospital
Beed, Dist. Beed.
4. The Executive Engineer
Beed Irrigation Division, Beed,
Near Civil Hospital,
Beed, Dist. Beed.

PETITIONERS

VERSUS

1. R.R. Zodge and R.M. Patil
Joint Venture Company, a registered
Partnership Firm Through its
Partner Mr. Rajendra Ramnath Zodge
Age- 61 years, Occ- Contractorship,
R/o. Swarajya Nagar, Barshi Road,
Beed, District-Beed.
2. The State of Maharashtra
Through its Secretary Water Resource
Department, Mantralaya,
Mumbai-400032.
3. The Irrigation Department
Govt. of Maharashtra
Through its Secretary

Mantralaya, Mumbai-400 032.

RESPONDENTS

.....
Mr. B.R. Suravase, Advocate for the petitioners.
Mr. J.N. Singh, Advocate for Respondent No. 1.
Mr. Y.G. Gujarathi, AGP for respondent - State .
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 29th JUNE, 2022
PRONOUNCED ON: 1st AUGUST, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard with the consent of learned advocate appearing for the parties.
2. This petition filed under Article 226 and 227 of Constitution of India takes exception to the order passed by the Commercial Court, Beed, below Exhibit-1 and 22 in Special Civil Suit No. 6/2012.
3. Special Civil Suit No. 6/2012 is filed by respondent No. 1/original plaintiff against the petitioners/defendants for recovery of Rs. 222.63 lakhs together with interest. During the pendency of suit the plaintiff filed application Exhibit-22 requesting to refer the matter to arbitration. Said application was opposed by learned advocate for the defendants by filing say on 16.2.2019 stating that, application is provision less,

hence it is fit to be rejected. The Trial Court by order dated 12.11.2020 directed the learned advocates for the parties to suggest the name of arbitrator and submit his/her willingness to act as arbitrator in the matter. Thereafter, on 04.12.2020 a joint purshis at Exhibit-28 is filed by both the learned advocates suggesting the name of Hon'ble Justice Shri. M.G. Gaikwad (retired) as arbitrator. By the impugned order, the Trial Court has appointed Hon'ble Justice Shri. M.G. Gaikwad (retired) as arbitrator and referred the suit to the arbitrator. The petitioners are aggrieved by this order.

4. Heard the learned advocate for petitioners, learned advocate for respondent No. 1 and learned Assistant Government Pleader for State.

5. The learned advocate for the petitioners submits that the suit is filed in the year 2012 and same is kept pending and was not prosecuted by the plaintiff for years together. On 27.09.2016, the suit was transferred to the Commercial Court and is registered as Special Civil Suit No. 8/2016. He further submits that there is no arbitration clause in the agreement and therefore, application filed by the plaintiff is not maintainable. The Trial Court by order dated 12.11.2020 directed the parties to

suggest the name of arbitrator. He therefore, submits that pursuant to this order name of arbitrator was suggested. When the arbitrator issued notice then the petitioners for the first time came to know about appointment of arbitrator. At no point of time, the petitioners gave consent for referring the matter to arbitration and for appointment of arbitrator. The Trial Court has failed to appreciate that there is no arbitration clause in the contract and there is no written consent by the petitioners for referring the matter for arbitration. The say filed by the learned advocate for the petitioners objecting for referring the matter to arbitration is ignored by the Trial Court. According to him, the Trial Court has exceeded his jurisdiction in passing the impugned order. Hence, he submits that the impugned order is liable to be quashed and set aside. In support of his submissions he relied on Director of Elementary Education, Odisha and Others Vs. Pramod Kumar Sahoo [(2019) 10 SCC 647].

6. Per contra, the learned advocate for respondent No. 1 supported the impugned order. He submits that in terms of Section 89 of Civil Procedure Code, 1908, the Trial Court is justified in referring the matter to arbitration. By referring to the communication dated 23.04.2018 which is filed along with

affidavit in reply he submits that the petitioner No. 1 has specifically informed that his office has no objection to the decision of appointment of arbitrator taken by the Trial Court in terms of the rulings. He further submits that pursuant to the order of appointment of arbitrator and on issuance of notice by him, the respondent No. 1 appeared before the arbitrator and preliminary meeting was held on 21.01.2012, but the petitioners failed to appear. By relying on **BSNL and Others Vs. Subash Chandra Kanchan and Another** [(2006) 8 SCC 279], he submits that the petitioners by consenting to appointment of arbitrator have waived their right and it is not open for them to subsequently contend that no consent was given by them. He further submits that the Trial Court has power under Order X Rule 1-A to refer the matter for arbitration. He therefore, submits that there is no substance in the petition and the petition is liable to be dismissed.

7. Before considering the rival submissions it would be apt to consider relevant provisions:

Section 89 of Code of Civil Procedure:

89. Settlement of disputes outside the Court.-
(1) Where it appears to the Court that there exist elements of a settlement which may be

acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for-

- (a) arbitration;*
- (b) conciliation*
- (c) judicial settlement including settlement through Lok Adalat;*
- or*
- (d) mediation*

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

- (b) -----*
- (c) -----*
- (d) -----*

Order X Rule 1-A

1-A. Direction of the Court to opt for any one mode of alternative dispute resolution- After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

8. Record reveals that application Exhibit-22 is filed by respondent/original plaintiff for appointment of arbitrator. Same was objected by the learned advocate for the petitioners by filing say on 16.02.2019. The Trial Court then on 10.11.2020 directed the parties to suggest the name of the arbitrator and to submit willingness of the arbitrator to act as a arbitrator. Pursuant to this order a joint purshis is filed by learned advocates representing plaintiff and defendants on 04.12.2020 stating that they have no objection for appointment of Hon'ble Justice Shri. M.G. Gaikwad (retired) as arbitrator. Pursuant to said purshis the Trial Court has passed the impugned order thereby appointing the arbitrator.

9. As per section 89, it should appear to the Court that there exists elements of settlement. If the Court is satisfied about existence of elements of settlement then the Court has to formulate an opinion and then it has to formulate terms of settlement and given them to the parties for their observations and after receiving observations of the parties, the Court may reformulate terms of possible settlement and refer the same for arbitration.

10. The impugned order does not disclose that the Court has applied its mind to the facts and it appeared to the Court that there exists elements of settlement. The exercise contemplated by section 89 is not carried out by the Trial Court before passing the impugned order. The impugned order does not reflect satisfaction of the Trial Court and as the procedure provided in section 89 is not followed, the impugned order is vitiated and the same cannot be sustained.

11. Provision of Order 10 Rule 1A is applicable after recording admissions and denials. It is not clear from the submissions of both the learned advocates and from the documents placed on record as to whether pleadings of the parties are complete, it is only after that, the Court has to direct the parties to the suit to opt either mode of settlement outside the Court, as specified under sub section 1 of section 89.

12. In *Director of Elementary Education* (supra), the Apex Court held “*generally admissions of fact made by counsel are binding upon their clients as long as they are unequivocal. Where, however, doubt exists as to purported admission, court should be wary to accept such admissions until and unless*

counsel authorised by client to make such admissions. Client not bound by statement or admission which he or his lawyer was not authorised to make. Lawyer has no implied or apparent authority to make admission or statement which would directly surrender or conclude substantial legal rights of client unless such admission or statement clearly proper step in accomplishing purpose for which lawyer was employed. Neither court nor client bound by lawyer's statements or admissions as to matters of law or legal conclusions."

In the present case since joint purshis is filed as per the directions of the Trial Court, same cannot be treated as consent given by the petitioners for referring the matter for arbitration.

13. In *BSNL and Others* (supra), the Apex Court was considering the case wherein arbitration clause was very much there. When the application was filed by the respondent under section 11 of the Act before High Court, appellants consented for appointment of one of the persons named by respondents as arbitrator, High Court appointed that person as arbitrator on consent. Appellants subsequently moved application under section 151 CPC for modification of the order on the ground that

no such consent had been given. The High Court refused to recall its order. The Apex Court held that "*appellant by consenting to appointment of arbitrator, waives their rights to make appointment and it was not open to them to subsequently contend that no consent was given by them*".

Considering the facts of the present case it cannot be said that the petitioners consented for referring the matter to arbitration merely because joint purshis was filed by the parties, as per the direction of the Trial Court. Fact remains that, there is no arbitration clause in the present matter.

14. For the aforestated reasons, impugned order cannot be sustained and same is liable to be quashed and set aside.

15. In the result, the writ petition is allowed.

16. The impugned order dated 15.12.2020 passed below Exhibit-1 and 22 in Special Civil Suit No. 8/2016 by Commercial Court and District Judge-2, Beed, is hereby quashed and set aside.

17. The matter is remanded back to the Trial Court for

decision of application Exhibit-22 on merits, in accordance with law.

18. The observations in this order are *prima facie* and shall not influence the Trial Court at the time of deciding application Exhibit-22. The Trial Court shall consider the record, pleadings of the parties, provisions of law and decide the application in accordance with law.

Rule is made absolute to the above extent.

[NITIN B. SURYAWANSHI, J.]