



Gaikwad RD

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO. 30 OF 2022

M/s. S. K. Banerjee,

A registered Partnership Firm through its
Managing Partner, Shri. Subir Kumar S/o.
Late Shri. Sudhanshu Kumar Banerjee,
having its registered office at 6th Floor,
“Landmark”, Ramdaspath, Wardha Road,
Nagpur.

...PETITIONER

~ VERSUS ~

**The Maharashtra Industrial
Development Corporation,** through its
Chief Executive Officer, having its
registered office at “Udyog Sarathi”,
Mahakali Caves Road, Andheri (East),
Mumbai.

...RESPONDENTS

APPEARANCES

FOR THE PETITIONER

**Mr. Amit R. Prasad, with Mr. Brian
D’lima.**

FOR RESPONDENT NO.

**Mr. Akshay S. Karlekar, i/b Shreeyog
Law Associates.**

CORAM : Dr. Neela Gokhale, J.

RESERVED ON : 3rd October 2023

PRONOUNCED ON : 9th October 2023

JUDGMENT (Per Dr. Neela Gokhale, J):-

1. The Petitioner seeks appointment of a Sole Arbitrator to resolve disputes between the parties arising out of an Arbitration Agreement No. C-2 of 2002-2003 for construction of major bridges across the railway line and Indrayani River and the railway overbridge at Talegaon, Maharashtra Industrial Development Corporation (“MIDC”) Industrial Area, Pune.

2. The case of the Petitioner is that an agreement bearing No. C-2 of 2002-2003 for construction of a major bridge across the Indrayani River and other construction work was executed by and between the parties. According to the Petitioner, its firm had completed the construction to the satisfaction of Respondent and handed over the completed site to the Respondent on 30th June 2005. After some discussion, finally the final bill and the security deposit were released to the Petitioner on 27th July 2007.

3. It is also the Petitioner’s case that there was a huge loss incurred by its firm due to unprecedented rise in the price of steel and that the Petitioner sought additional consideration

towards the cost of escalation in the price of steel in conformity with Government Resolutions in that regard. Several representations were made by the Petitioner pertaining to the said escalation, but the Respondent did not consider its request for payment in lieu of the escalation of the price of steel. Thus, disputes arose between the parties and the Petitioner invoked Arbitration Clause No. 9 of the Arbitration Agreement by issuing a notice dated 19th August 2008. The Respondent received the notice of Arbitration on 21st August 2008, but failed to appoint an Arbitrator within the stipulated statutory time.

4. Clause 9 of the Arbitration Agreement reads thus:

“DISPUTE:

In case of disputes arising between the contractor and MIDC, the matter may be referred to the Chief Engineer, MIDC. The decision of the Chief Engineer, MIDC shall be final and binding on the contractor.”

5. The Petitioner filed an Arbitration Petition No. ARP/18/2009 before this Court seeking appointment of an Arbitrator and by order dated 21st January 2010, a Sole Arbitrator viz. the Chief Engineer of the MIDC was appointed to adjudicate the disputes between the parties. Accordingly, Shri. S. B. Patil, the Chief Engineer of MIDC, Pune Zone was appointed, in terms of the arbitration clause in the agreement. The sole arbitrator entered into reference and completed the

arbitral proceedings by passing an Award dated 19th December 2011. The Petitioner, aggrieved by the Award, made an application under Section 34 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) seeking to set aside the Award before the Principal District Judge, Pune. The District Judge by its order dated 7th September 2017 set aside the Award and remanded the matter to the Arbitrator for deciding the dispute afresh at the earliest.

6. The parties reverted to the learned Sole Arbitrator, Shri. Patil, the Chief Engineer, MIDC, Pune Zone, who commenced the arbitral proceedings afresh. The Petitioner filed a fresh statement of claim and the Respondent contested the same by submitting its written statement afresh. During the proceedings, Shri. Patil, the Chief Engineer, retired on 31st July 2018 from his service with MIDC. It thus became necessary to appoint an Arbitrator to continue the proceedings pending before Shri. Patil.

7. Mr. Amit Prasad, learned Counsel appearing for the Petitioner seeks appointment of a substitute Sole Arbitrator to resolve the dispute. He, however, contests the appointment of the present incumbent Chief Engineer of MIDC as an Arbitrator in terms of the Arbitration Agreement. He places reliance on Section 12(5) of the Arbitration and Conciliation

(Amendment) Act, 2015 (“**the Amendment Act**”), which reads as follows:

“Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

8. According to Mr. Prasad, the continuation of arbitration proceedings with the Chief Engineer of MIDC as a Sole Arbitrator is in contravention of the Seventh Schedule of the Amendment Act since the Chief Engineer falls under the disqualification specified in the Seventh Schedule, being an employee with one of the parties to the dispute. He thus contends that the current Chief Engineer of MIDC is ineligible to be an Arbitrator in lieu of the Amendment Act.

9. He also relies upon the decision of the Supreme Court in the matter of *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited and Others v. Ajay Sales and Suppliers*¹. In this case, the Supreme Court quoting its previous decision in the case of *Bharat Broad Band Network Limited v. United Telecom*

1. 2021 SCC OnLine SC 730.

Limited² observed that Section 12(5) of the Amendment Act read with the Seventh Schedule made it clear that if the Arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes ineligible to act as an Arbitrator and he becomes *de jure* unable to perform his function inasmuch as in law, he is regarded ineligible.

10. Mr. Prasad also relies upon a decision of the Apex Court in the matter of *Ellora Paper Mills Limited v. State of Madhya Pradesh³*, in which the Apex Court observed that Section 12(5) of the Amendment Act is a new provision and relates to the *de jure* inability of an Arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the *non-obstante* clause in Section 12(5) of the Amendment Act, at the moment any person whose relationship with the parties or the Counsel falls under the Seventh Schedule. He also places reliance on two decisions of this Court on similar lines.

11. *Per contra*, Mr. Akshay Karlekar, learned Counsel for the Respondent contends that the provision of Section 12(5) of the Amendment Act read with the Seventh Schedule has come into effect on 23rd October 2015 by the Amendment Act and is thus not applicable to the subject arbitral proceedings. The

2. (2019)5 SCC 755.

3. (2022)3 SCC 1.

subject arbitral proceedings commenced on 21st August 2008 when the Respondent received the notice invoking arbitration and thus, as per Section 87 of the Arbitration and Conciliation (Amendment) Act, 2021, the amended provisions will not apply to arbitral proceedings commenced before the commencement of the Amendment Act, 2015. He thus contends that the present Chief Engineer of MIDC is eligible and qualified to continue as Arbitrator. He further points out that the Petitioner has already filed his statement of claim afresh before Shri. Patil, the earlier Chief Engineer of MIDC pursuant to the setting aside of the arbitral Award by the District Judge, Pune by his order dated 7th September 2017. Thus, Mr. Karlekar states that having participated in the arbitral proceedings before the Chief Engineer of MIDC, even after the Amendment Act, without raising a single objection to the continuance of proceedings before Shri. Patil, the Petitioner is now estopped from raising the objection at this late stage. He also places reliance on the decisions of the Supreme Court in the matter of *S.P. Singla Constructions Private Limited v. State of Himachal Pradesh and Another*⁴ and *Rajasthan Small Industries Corporation Limited v. Ganesh Containers Movers Syndicate*⁵. In both these decisions, the Apex Court has held that the provisions of the Amendment Act, 2015 shall not apply to arbitral proceedings commenced

4. (2019)2 SCC 488.

5. (2019)3 SCC 282.

in accordance with the provisions of Section 21 of the principle Act before the commencement of the Amendment Act unless the parties otherwise agreed. He thus contends that the decisions cited by the Petitioner are not applicable to the present case and are relevant to arbitral proceedings having commenced after coming into force of the Amendment Act.

12. I have heard both the Counsels and also perused the documents on record with their assistance.

13. After advancing arguments for sometime, as noted above, the Counsels, on instructions, agree that in the interest of expediency and effectiveness, an independent Arbitrator may be appointed by the Court to resolve the dispute between the parties. Thus, without going into merits of the respective submissions made by the Counsels as noted above, as there is a consent between the parties for appointment of a Sole Arbitrator, the Petition is disposed of by the following order:

ORDER

1. Shri Chandrakant Prabhakar Joshi, Former Secretary PWD Maharashtra is appointed as a Sole Arbitrator to enter reference and adjudicate the dispute between the parties out of the Arbitration Agreement. The seat of the arbitration shall be at Pune.
2. The learned Sole Arbitrator shall forward a statement of disclosure as per the requirement of Section 12(1) of the

Arbitration and Conciliation Act, 1996 to the Prothonotary and Senior Master of this Court to be placed on record of this Petition with a copy forwarded to both the parties.

3. At the first instance the parties shall appear before the learned Arbitrator within a period of ten days from the date of uploading of this order or on such date that may be fixed by the Sole Arbitrator.

4. All contentions of the parties on merits of the dispute, are expressly left open.

5. The fees payable to the Arbitral Tribunal shall be in accordance with the Bombay High Court (Fee payable to the Arbitrator) Rules, 2018 which shall be borne by the parties in equal proportion.

6. The Petition is disposed of in the above terms. There will be no order as to costs.

7. Office to forward a copy of this order to the learned Sole Arbitrator on the following address:

**“Shri Chandrakant Prabhakar Joshi,
Former Secretary PWD Maharashtra,
402, Tejowalay Apartments,
CTS 1187/19, Vasantrao Deshmukh Path,
Off Ghole Road, Shivajinagar, Pune 411005,
Cell No. 9970945444,
Mail id: joshicp1962@gmail.com”**

(Neela Gokhale, J)