

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 28 OF 2022
WITH
INTERIM APPLICATION NO. 17756 OF 2022
WITH
INTERIM APPLICATION (STAMP) NO. 24978 OF 2021
IN
ARBITRATION PETITION NO. 28 OF 2022
WITH
ARBITRATION APPEAL (STAMP) NO. 24348 OF 2021
WITH
INTERIM APPLICATION NO. 2503 OF 2022
WITH
INTERIM APPLICATION NO. 2501 OF 2022
IN
ARBITRATION APPEAL (STAMP) NO. 24348 OF 2021

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Supreme Ahmednagar Kermala
Tembhurni Toll Ways Pvt. Ltd.
Through Its Mr. Govardhan
Lakhaney

...Petitioner/Appellant

Versus

State of Maharashtra
Through The Secretary & Ors.

...Respondents

* * *

- Dr. Virendra Tuljapurkar a/w Mr. Onkar Chandurkar, Mr. Rajesh Devgharkar, Ms. Neha Patil and Mr. Sanket Naik i/by Akshay Vijay Kamble for Petitioner/Appellant.
- Mr. Dipak Merchant, Senior Advocate a/w A.R. Patil, Additional G.P., for Respondent Nos. 1 to 4 – State.
- Ms. Payal Upadhyay i/by ANP Chambers, for Respondent No. 5.
- Ms. Vaishali Choudhari, for Respondent No. 6 – Union of India.

* * *

CORAM : MANISH PITALE, J

DATE : 17th APRIL, 2023

P. C. :

1. This order shall dispose of an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 and a petition filed

under Section 11 of the said Act.

2. By the appeal, the Appellant has challenged order dated 08th February, 2021, passed by the Court of District Judge-1, Solapur, whereby an application filed under Section 9 of the said Act for interim measures was rejected. The petition under Section 11 of the said Act is filed for appointment of an Arbitrator in the context of an Arbitration clause contained in an agreement executed between the parties.

3. The parties entered into a Concession Agreement on 14th December, 2011, and the Substitution Agreement dated 22nd December, 2011. This was in the context of construction of a road.

4. It is not seriously disputed that the arbitration clause contained in Substitution Agreement was to take care of any disputes that may arise between the parties in the context of the Concession Agreement, as well as the Substitution Agreement. In fact, in the order dated 08th February, 2021, the said Court at Solapur also found that the disputes between the parties were to be resolved through arbitration on the basis of the said clause.

5. The Arbitration Clause reads as follows :

*“v). Any dispute, difference or claim arising out
or in connection with or in relation to this*

Agreement which is not resolved amicably shall be decided finally by arbitration as per the provisions of the Arbitration and Conciliation Act, 1996. The arbitrator shall issue a reasoned award. The venue of such arbitration shall be Regional Headquarter of the Chief Engineer, Public Works Department. The Award shall be final and binding on the parties. The parties agree and undertake to carry out the award of the arbitrator. (The "Award") without delay."

6. Dr. Tulzapurkar, learned Senior Counsel appearing for the Petitioner and the Appellant in both the proceedings submitted that since there is an Arbitration Clause in the said agreement, which was invoked by notice dated 17th October, 2020, this Court may consider appointing a sole Arbitrator for resolution of disputes between the parties. It was further submitted that this Court may further give liberty to the Petitioner/ Appellant to move the Arbitrator under Section 17 of the said Act, for interim reliefs with a further observation that the learned Arbitrator shall decide such an application without being influenced by the order dated 08th February, 2021, passed by the Court at Solapur, whereby the application under Section 9 of the said Act was rejected. It is further pointed out that in the interregnum the project has been taken over by the National Highway Authority of India (NHAI) and therefore,

Respondent No. 6 i.e. Union of India through the Chief General Manager, NHAI was arrayed as a party in the petition filed under Section 11 of the said Act.

7. Mr. Dipak Merchant, learned Senior Counsel appearing for Respondent Nos. 1 to 4 could not dispute the fact that there is indeed an Arbitration Clause for resolution of disputes between the parties. It is also pointed out that as on today, the project is taken over by the NHAI. In this context a letter dated 24th December, 2021, addressed by the Competent Authority of Respondent No. 1 – State to the NHAI is brought to the notice of this Court, which records that the State Government of Maharashtra would bear all existing and future liabilities arising out such previous agreements, including the agreements in the present case. A copy of the said communication is taken on record and marked “X” for identification.

8. The learned Counsel appearing for Respondent No. 5 – Bank submits that it is party to the Substitution Agreement and that therefore, the said party also needs to be before the learned Arbitrator to be appointed by this Court.

9. The learned Counsel appearing for Respondent No. 6 submits that there is no arbitration agreement executed with the said Respondent. The said aspect of the matter could be raised before the

learned Arbitrator, who would undoubtedly take into consideration the fact that the NHAI has taken over the entire project and by the aforementioned communication dated 24th December, 2021, addressed by the Competent Authority of the State Government of Maharashtra, the NHAI is already informed about the fact that the State Government will bear all existing and future liabilities.

10. A perusal of the documents placed on record does show that the above quoted Arbitration Clause exists in the Substitution Agreement which also refers to the Concession Agreement executed between the parties. The Petitioner has also placed on record notice dated 17th October, 2020, whereby the Arbitration Clause was invoked for resolution of disputes between the parties. In fact, the name of an Arbitrator was proposed on behalf of the Petitioner.

11. Admittedly, there was no response to the said notice, necessitating filing of the present petition under Section 11 of the said Act for appointment of the Arbitrator.

12. This Court is convinced that sufficient grounds are made out under Section 11 of the said Act for appointment of Arbitrator for resolution of disputes between the parties. There is substance in the contention raised on behalf of the Petitioner that if liberty is granted to the Petitioner to move the Arbitrator for granting interim reliefs

under Section 17 of the said Act, it ought to be observed that the learned Arbitrator may decide such an application on its own merit, without being influenced by the order dated 08th February, 2021, passed by the Court at Solapur in the application filed under Section 9 of the said Act on behalf of the Petitioner.

13. Considering the fact that the Arbitration Clause specifies that venue of Arbitration shall be Pune, it would be appropriate that an Arbitrator available at Pune, is appointed for resolution of disputes between the parties.

14. In view of the above, Justice S.R. Sathe, former Judge of this Court, available at Pune, is appointed as the sole Arbitrator for resolution of disputes between the parties.

15. The details of the learned Arbitrator are as follows :

Hon'ble Shri Justice S.R. Sathe,
A-802, Ruturang Apartment,
Behind Paranjape School, Kothrud
Pune - 411 038.
Tel. : 020 - 25396407

16. The parties undertake to inform the learned Arbitrator about the order passed today at the earliest.

17. The learned Arbitrator is requested to communicate his consent and Disclosure Statement as per Section 11(8) r/w Section

12(1) of the said Act, within four weeks to the Registrar (Judicial) of this Court.

18. The fees of the Arbitrator shall be as per Schedule IV to the Aforesaid Act.

19. All questions are kept open for decision of the learned Arbitrator.

20. It is further clarified that in the event the Petitioner applies for grant of interim reliefs under Section 17 of the said Act before the learned Arbitrator, such an application shall be decided by the learned Arbitrator on its own merits without being influenced by the order dated 08th February, 2021, passed by the Court of District Judge-1, Solapur in Civil Miscellaneous Application No. 123 of 2020.

21. The petition as well as the Appeal stand disposed of in above terms.

22. Interim Applications, if any, also stand disposed of.

(MANISH PITALE, J.)