

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR
MISC. CIVIL APPLICATION (ARBITRATION) NO.293/2021

APPLICANT : Pankaj Rameshchandra Kothari,
Proprietor of M/s Kothari Construction
Company, Aged 50 years, Occupation-Business,
Having office at A-103, 1st Floor Rami Heritage,
Opp. Old RTO Road, Akola, Dist. Akola.

...VERSUS...

RESPONDENT : Chief Officer, Municipal Council,
Murtizapur, Dist. Akola.

WITH
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RESPONDENT : Chief Officer, Municipal Council,
Murtizapur, Dist. Akola.

Shri Dhiraj Ailani, Advocate h/f Shri M.G. Sarda, Advocate for applicant
Shri P.P. Deshmukh, Advocate for the respondent

CORAM : AVINASH G. GHAROTE, J.

Order reserved on : 28/04/2023

Order pronounced on : 04/05/2023

ORDER :

1. Heard Mr. Dhiraj Ailani, learned counsel, holding for Mr. M.G. Sarda, learned counsel for the applicant and Mr. P.P. Deshmukh, learned counsel for the respondent.

2. Both the applications seek appointment of an arbitrator, in view of a dispute claimed to be in existence between the parties hereto.

3. In Misc. Civil Application No.293/2021, the agreement in question is dated 29/10/2013 executed between the parties hereto for work of construction of 620 dwelling units at Madaripura Survey nos.7, 8 and 9, Murtizapur under the integrated housing and slum development programme of Murtizapur town, Scheme-II. It is contended that due to faulty estimates, unprofessional contract management and delays and deficiency on part of the non-applicant, the applicant has suffered a huge loss of Rs.25,04,68,181.71 paise. As according to the applicant, as there was an arbitration clause in the agreement dated 29/10/2013, a legal notice was issued on 30/12/2020 (pg.171) under which it is contended that the arbitration clause was invoked and since in spite of an acknowledgment (pg.174) there was no response the present application has been filed.

4. In Misc. Civil Application No.294/2023 the agreement is dated 26/08/2009 for the construction of 1003 housing units and related development work under the Integrated Housing and Slum Development Programme (IHSDP) Scheme of the respondent. Here also, on account of the aforesaid reasons a loss was claimed to have suffered by the applicant to the tune of Rs.51,26,24,362.41 paise, as a result of which, a notice was issued on 30/12/2020 purporting to invoke the arbitration clause (pg.136) in spite of receipt of which as is indicated by the acknowledgment (pg.139) since there was no response, the application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short, “A and C Act”, hereinafter) has been filed.

5. Mr. Ailani, learned counsel for the applicant submits that since there is a clause for referral of a dispute, it is submitted that the parties should be referred to arbitration, for which reliance is placed by him upon *Bihar State Mineral Development Corporation and another Vs. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418* (para 13). He also relies upon *Jagdish Chander Vs. Ramesh Chander and others (2007) 5 SCC 719 (para 8) ; P. Dasaratharama Reddy Complex*

Vs. Government of Karnataka and another (2014) 2 SCC 2001 (para 16).

6. Mr. Deshmukh, learned counsel for the respondent submits that clauses in the contract cannot be construed to be an arbitration clause and it is merely an in-house mechanism for resolution of dispute and therefore there is no question of referring the parties to arbitration.

7. For the purpose of appreciating the rival contentions, it is necessary to consider the language of the clauses of the aforesaid contracts. The dispute resolution mechanism in the agreement dated 29/10/2013 in Misc Civil Application No.293/2021 reads as under :-

“24. Disputes

24.1 *If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the **Chief Officer, MURTIZAPUR Municipal Council, MURTIZAPUR**, within 14 days of the notification of the Engineer's decision.*

25. Procedure of Disputes : *All disputes and differences of any kind whatever arising out of or in connection with the Contract or the carrying out of the work (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the CHIEF OFFICER, MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR. But if the contractor be dissatisfied with the decision of the CHIEF OFFICER, MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR or as to withholding by the **CHIEF OFFICER, MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR** of any certificate of the Engineer or as to withholding by the CHIEF OFFICER,*

MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR of any certificate to which the contractor may within 60 days after receiving notice of such decision give a written notice to the other party requiring that/may claim to entitled them and in any such case the contractor such matters in dispute be referred to in appeal before a Committee as mentioned below. Such written notice shall specify the manner, which are in disputes and such disputes or differences of which such notice has been given and no other shall be and is hereby referred to Committee consisting of the Chief Officer MURTIZAPUR Municipal Council, The Engineer, Public Works, MMC and Chief Accountant of MURTIZAPUR Municipal Council, the decision taken by the Committee will be final and binding on both the parties.”

8. The dispute resolution mechanism in the agreement dated 26/08/2009 in Misc. Civil Application No.294/2021 reads as under :-

“Clause -25 :-

All disputes and differences of any kind whatever arising out of or in connection with the Contractor the carrying out of the work (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the CHIEF OFFICER, MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR. But if the contractor be dissatisfied with the decision of the CHIEF OFFICER, MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR or as to with holding by the CHIEF OFFICER, MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR of any certificate of the PMC or as to with holding by the CHIEF OFFICER, MURTIZAPUR MUNICIPAL COUNCIL, MURTIZAPUR of any certificate to which the contractor may within 60 days after receiving notice of such decision give a written notice to the other party requiring that / may claim to entitled them and in any such case the contractor such matters in dispute be referred to in appeal before a Committee as mentioned below. Such written notice shall specify the manner which are in disputes and such disputes or

difference of which such notice has been given and no other shall be and is hereby referred to Committee consisting of the Chief Officer Murtizapur Municipal Council. The Engineer, P.W.D. MURTIZAPUR and Chief Auditor of Murtizapur Municipal Council, the decision taken by the Committee will be final and binding on both the parties.”

The clauses in both the matters are thus identical.

9. What constitutes an arbitration clause has been elucidated by the Hon’ble Apex Court in ***Jagdish Chander*** (supra) in the following terms :-

“8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K. K. Modi v. K. N. Modi [1998 (3) SCC 573], Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd. [1999 (2) SCC 166] and Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. [2003 (7) SCC 418]. In State of Orissa v. Damodar Das [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an “arbitration agreement” only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted

from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words “arbitration” and “Arbitral Tribunal (or arbitrator)” are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word “arbitration” or “arbitrator” in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as

"parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

10. In ***Bihar State Mineral Development Corporation*** (supra) the following were held to be essential elements of an arbitration agreement :

"13. The essential elements of an arbitration agreement are as follows :

(1) There must be a present or a future difference in connection with some contemplated affair.

(2) There must be the intention of the parties to settle such difference by a private tribunal.

(3) The parties must agree in writing to be bound by the decision of such tribunal.

(4) The parties must be ad idem.

14. There is no dispute with regard to the proposition that for the purpose of construing an arbitration agreement, the term 'arbitration' is not required to be specifically mentioned therein. The High Court, however, proceeded on

the basis that having regard to the facts and circumstances of this case, the arbitration agreement could have been given effect to. We may, therefore, proceed on the basis that Clause 60 of the Contract constitutes an arbitration agreement.

17. There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well-settled principle of law that a person cannot be a judge of his own cause. It is further well-settled that justice should not only be done but manifestly seen to be done.”

11. In ***P. Dasaratharama Reddy Complex*** (supra) after considering the law in this regard while considering clause 29 (a), as contained in the contract therein, it has been held as under :-

“10. We have considered the respective submissions. Clause 29 of the agreement entered into between the parties (the appellant and the respondents in Civil Appeal No.1586/2004) and majority of other cases read as under:

“29. (a) Settlement of dispute time-limit for decision. - If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/Superintending Engineer and the contractor regarding the following matters, namely -

(i) The meaning of the specifications designs, drawings and instructions hereinbefore mentioned;

(ii) The quality of workmanship or material used on the work; and

(iii) Any other questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of the work, or after the completion, termination or

abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the contractor to do so, given written notice of his decision to the contractor.

(b) Chief Engineer's decision final.- Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor. The said decision shall forthwith be given effect to and contractor shall proceed with the execution of the work with all due diligence.

(c) Remedy when Chief Engineer's decision is not acceptable to contract.- In case the decision of the Chief Engineer is not acceptable to the contractor, he may approach the law courts at Karwar for settlement of dispute after giving due written notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of the written notice of the decision of the Chief Engineer.

(d) Time-limit for notice to approach law court by contractor.- If the Chief Engineer has given written notice of his decision to the contractor and no written notice to approach the law court has been communicated to him by the contractor within a period of ninety days from receipt of such notice, the said decision shall be final and binding upon the contractor.

(e) Time-limit for notice to approach law court by contractor when decision is not given by Chief Engineer as at (b).- If the Chief Engineer fails to give notice of his decision within a period of ninety days from the receipt of the contractors request in writing for settlement of any dispute or difference as aforesaid, the contractor may within ninety days after the expiry of the first-named period of ninety days approach the law courts at Karwar giving due notice to the Chief Engineer. Contractor to execute and complete work pending settlement of disputes;

(f) Whether the claim is referred to the Chief Engineer or to the law courts. As the case may be, the contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences. Obligations of the Executive Engineer and contractor shall remain unsettled during consideration of dispute.

(g) The reference of any dispute or difference to the Chief Engineer or the law court may proceed notwithstanding that the works shall then be or be alleged to be complete, provided always that the obligations of the Executive Engineer and the contractor shall not be altered by reason of the said dispute or difference being referred to the Chief Engineer or the law court during the Progress of the works.”

(emphasis supplied)

27. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. The Chief Engineer or the Designated Officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a court of law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate court. The use of the expression “in the first place” unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy. Therefore, Clause 29 which is

subject matter of consideration in most of the appeals and similar clauses cannot be treated as an arbitration clause.”

12. Applying the above principles to the clauses in question, it would be apparent, that the dispute resolution clauses do not contemplate reference of the dispute to any independent person, not having any control, over the subject matter of the dispute. What is contemplated by the dispute resolution clauses, is for the dispute, to be referred to and settled by the Chief Officer of the respondent and in case the applicant is dissatisfied with the decision of the Chief Officer, within 60 days of notice of such decision may file an appeal before a committee, comprising of the Chief Officer, Municipal Council, Murtizapur, Engineering Public Works, MMC and Chief Accountant of the Murtizapur Municipal Council.

13. This would clearly indicate that the basic requirement of an arbitration clause, namely, the referral or intention of the parties to settle such difference by a private Tribunal, unconnected with the contract or the works thereunder is absent.

14. In this context, it is also material to note as to what the parties understood by the aforesaid clauses. In the letter dated 18/11/2020 issued by the applicant to the respondent (MCA No.293/2021) in para 34 (pg.104) the following has been stated :-

“34. Though in the tender documents and contract agreement there is no provision for arbitration, we are ready for settlement of the dispute by arbitration. It may kindly be noted that now Maharashtra PWD has inserted arbitration clause in their new contract agreements. In case MMC agrees for arbitration, the arbitration will be held under Indian Arbitration & Conciliation Act 1996 (Amended 2015).”

15. Similar is the situation in the notice dated 27/11/2020 issued by the applicant to the respondent (MCA No.294/2021) in which in para 36 (pg.79) the following has been stated :-

“36. Though in the tender documents and contract agreement there is no provision for arbitration, we are ready for settlement of the dispute by arbitration. It may kindly be noted that now Maharashtra PWD has inserted arbitration clause in their new contract agreements. In case MMC agrees for arbitration, the arbitration will be held under Indian Arbitration & Conciliation Act, 1996 (Amended 2015).”

16. It is thus apparent that even the parties understood the aforesaid clauses, of the contract as not having any intention to create an arbitration agreement between the parties.

17. The clauses referred to above can at best be construed to be a dispute settlement mechanism between the parties, which even otherwise, would be unenforceable in view of Section 12 (5) r/w the VII th Schedule to the A and C Act as amended up to date.

18. In view of the above discussion, in my considered opinion, the aforesaid clauses, do not satisfy the test of the essential elements of the parties having agreed to settle their dispute by an independent Tribunal, unconnected with the contract or its subject matter and therefore, cannot be construed to be an arbitration clause, for the purpose of Section 11 (6) of the A and C Act, as the intention to arbitrate the dispute which may arise between the parties by a third person is clearly absent. The misc. civil applications therefore, fail and are rejected. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar