

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO. 118 OF 2023**

SMC Infrastructures Private Limited	...Petitioner
<i>Versus</i>	
Maharashtra Jeevan Pradhikaran	...Respondent

Mr. Shardul Singh, a/w Ms. Sayali Sawant & Mr. Anish Shahapurkar, for the Petitioner.
Mr. Ajit Pitale, a/w Mr. Ameya Pitale & Mr. Siddharth Pitale, for the Respondent.

**CORAM Dr. Neela Gokhale, J.
DATED: 17th January 2024**

PC:-

1. The Petitioner seeks appointment of an Arbitrator to adjudicate the disputes that have arisen between the parties out of the agreement dated 5th April 2013.
2. The Petitioner is a company registered under the Companies Act, 1956 and the Respondent is the undertaking of the Government of Maharashtra established under the Maharashtra Jeevan Authority Act, 1976.
3. The Petitioner was a successful bidder in respect of a tender floated by the Petitioner for the work of augmentation to Ambarnath Water Supply Scheme, Taluka-Ambarnath, District-Thane, construction of C.C. weir at Chikhloli Dam, designing, constructing

and commissioning 7.20 ML capacity WTP at Chikhloli and other allied works as mentioned therein.

4. It is the Petitioner's case that the contract is concluded and the work was completed on 31st December 2018 itself. The dispute between the parties is in respect of certain outstanding bills as claimed by the Petitioner. The Petitioner has thus invoked the arbitration agreement. Clause 20(b) of the agreement reads thus,

“20. LAWS AND REGULATIONS

b. Resolving the disputes :

In case of disputes, between a Contractor decision of the Member Secretary, MJP, shall be final and binding to both the parties.”

5. By notice dated 29th December 2022, the Petitioner invoked the arbitration agreement contained in Clause 20(b) of the contract.

6. The Respondent issued a reply denying all the claims of Petitioner and also objected to the arbitrability of the dispute.

7. Mr. Ajit Pitale, learned Counsel appearing for the Respondent states that Clause 20(b) of the agreement does not fulfill the criteria of an arbitration agreement since the word ‘arbitration’ does not appear in the clause. Mr. Singh, learned Counsel appearing for the Petitioner however contends that it is not necessary for the word ‘arbitration’ to be specifically contained in the arbitration clause as long as the intention of the parties to refer to arbitration can be clearly ascertained from the clause. He has placed reliance on the following two decisions of the Supreme Court :

1. *Bihar State Mineral Development Corporation and Another v. Encon Builders (I) (P) Ltd.*¹ and

2. *State of Orissa and Others v. Bhagyadhar Dash*².

8. In the matter of *Bihar State Mineral Development Corporation (supra)*, there was a clause similar to the one in the present arbitration agreement of the matter. In this decision, the Supreme Court held as follows :

“12. The short question which arises for consideration in this appeal is as to whether the learned court below committed an illegality in refusing to refer the matter to arbitration.

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.”

1. (2003)7 Supreme Court Cases 418.

2. (2011)7 Supreme Court Cases 406.

9. Even in the matter of *State of Orissa (supra)*, the Supreme Court has interpreted same to be an arbitration clause and held as under :

“17. In *Encon Builders (supra)* this court proceeded on the assumption that the following clause was an arbitration agreement, as that issue was not disputed:

“60. In case of any dispute arising out of the agreement, the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding.”

The clause specifically provided for “disputes being referred to the Managing Director” and made the said authority's decision not only final, but also binding on the parties. Therefore it can be said that it answers the tests of an arbitration agreement. The issue considered therein was whether the High Court committed an error in refusing to refer the dispute to arbitration, even after finding the clause to be an arbitration agreement, by presuming bias in view of the fact that the named arbitrator was an employee of one of the parties to the dispute. This Court held that disputes were arbitrable in terms of the said clause. Be that as it may. A similar clause was also considered in *Punjab State Vs. Dina Nath ((2007) 5 SCC 28)* and held to be arbitration agreement.”

Hence, Mr. Shardul Singh submits that even though the word ‘arbitration’ is not contained in Clause 20(b) of the agreement, the parties very much intended to refer their disputes to arbitration.

10. Mr. Ajit Pitale draws my attention to paragraph no. 21 of the decision in the matter of *Vishnu (Dead) by LRs. v. State of Maharashtra and Others*³, which reads thus,

“21. In *State of Orissa v. Damodar Das ((1996)2 SCC 216)*, the three Judge Bench interpreted Clause 21 of the contract entered into between the appellant and the respondent for construction of sump and pump chamber etc. for pipes W/S to Village Kentile. The respondent abandoned the work before completion of the project and accepted payment of the fourth running bill. Subsequently, he raised dispute and sent communication to the Chief Engineer, Public Health, Orissa for making a reference to an Arbitrator. The Subordinate Judge, Bhubaneswar allowed the application filed by the respondent under Section 8 of the 1940 Act and the order

3. [2013]11 Supreme Court Reports 340.

passed by him was upheld by the High Court. This Court referred to Clause 25 of the agreement, relied upon the judgment in *State of U.P. v. Tipper Chand* ((1980)2 SCC 341) and held that the said clause cannot be interpreted as providing resolution of dispute by an Arbitrator. Paragraphs 9 and 10 of the judgment, which contain discussion on the subject, are extracted below:

“9. The question, therefore, is whether there is any arbitration agreement for the resolution of the disputes. The agreement reads thus:

“25. Decision of Public Health Engineer to be final.— Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract.”

10. Section 2(a) of the Act defines “arbitration agreement” to mean “a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not”. Indisputably, there is no recital in the above clause of the contract to refer any dispute or difference present or future to arbitration. The learned counsel for the respondent sought to contend from the marginal note, viz., “the decision of Public Health Engineer to be final” and any other the words “claim, right, matter or thing, whatsoever in any way arising out of the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract” and contended that this clause is wide enough to encompass within its ambit, any disputes or differences arising in the aforesaid execution of the contract or any question or claim or right arising under the contract during the progress of the work or after the completion or sooner determination thereof for reference to an arbitration. The High Court, therefore, was right in its conclusion that the aforesaid clause gives right to arbitration to the respondent for resolution of the dispute/claims raised by the respondent.....”

(emphasis supplied).

11. I have gone through the decisions in all the matters and infact the decision in *Vishnu (supra)* supports the contention of Petitioner and it is of no assistance to the Respondent.

12. In view of the foregoing, I am of the view that Clause 20(b) clearly reveals the intention of the parties to refer their disputes to arbitration. The invocation of said agreement by the Petitioner by notice dated 29th December 2022 is thus valid. In the result, I pass the following order leaving all contentions of the parties open, to be agitated before the arbitrator :

ORDER

- a. **Mr. M. G. Gaikwad**, Former Judge, Bombay High Court is appointed as a Sole Arbitrator to enter reference and adjudicate the disputes between the parties out of the Agreement dated 5th April 2013. The seat of the arbitration shall be Thane as agreed by the parties in the Clause 20(b) of the agreement.
- b. The learned Sole Arbitrator shall forward a statement of disclosure as per the requirement of Section 12(1) of 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.
- c. 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.

- d. All contentions of the parties on merits of the disputes are expressly left open.
- e. 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.
- f. The petition is disposed of in the above terms. There will be no order as to costs.
- g. Office to forward a copy of this order to the learned Sole Arbitrator on the following address :

104, Biryra House, 1st Floor, 265 Perin Nariman Street,
Near Apna Bazar, Fort, Mumbai-400 001.

E-mail ID : justicegaikwad@gmail.com

Phone : +91-9167461686.

(Dr. Neela Gokhale, J.)

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