



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

902 ARBITRATION APPEAL NO. 10 OF 2009

M/S GANJEWAR CONSTRUCTION COMPANY
VERSUS
THE STATE OF MAHARASHTRA

Mr. N. S. Jaju h/f Mr. A. S. Bajaj, Advocate for the appellant
Mr. S. B. Jadhav, AGP for the respondent/State
Mr. S. B. Bhapkar, Advocate for the respondent

CORAM : R. M. JOSHI, J.
DATE : 21st MARCH, 2025

PER COURT :-

1. This appeal takes exception to the judgment dated 11th April, 2005 passed in Misc. R.J.E. No. 159 of 2002 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act').

2. Admittedly respondent entered into contract with the appellant in respect construction of earth work and structures in kilometer No. 1 to 6 of M-1 (Chenapur Barad Distributary). The completion of the said work was to be done before 30th December, 1988. There were three extensions granted for the completion of said work and last extension expired on 30th April, 1990. A dispute arose between the parties during execution of the said construction work. The appellant appointed the Chief Engineer, P.W.D. (retired) as a sole Arbitrator by invoking Clause No. 52 of the agreement between the parties. The said

appointment came to be challenged before the C.J.S.D., Nanded in Misc. (R.J.E.) Application No. 150 of 1995. By order dated 20th January, 1996 the appointment of sole Arbitrator was declared as null and void. Being aggrieved by the said order an Appeal was preferred before this Court being No. 29 of 1997. The Division Bench of this Court by order dated 6th March, 2000 has set aside the said order with observations that it will be open for the State of Maharashtra to raise all contentions including the contentions of there being no arbitration provided before the sole Arbitrator. In the light of these facts a specific objection was raised before the Arbitrator under Section 16 of the Act about the existence of the arbitration agreement as well as the appointment of the Arbitrator. It was specific case of the respondent before the Arbitral Tribunal that Clause No. 52 of the agreement was deleted and as such in absence of any procedure agreed between the parties, it was incumbent on the part of the appellant to invoke provisions of Section 11 of the Act of 1966 before the High Court for appointment of the Arbitral Tribunal. This objection raised by the respondent was rejected by the Arbitrator. Respondent participated in the arbitration proceeding under protest. The award came to be passed on 15th July, 2002. This award was challenged before the District Court under Section 34 of the Act. Since the District Court entertained to allow the said application, this appeal under Section 37 of the Act.

3. Learned counsel for the appellant submits that by correspondence dated 24th October, 1994 and the letter dated 1st June, 1995 the terms of Clause No. 52 stood revived. It is his submission that in the letter dated 24th October, 1994 it is specifically communicated by the Superintending Engineer that the appellant can go for the arbitration as per the provisions of Clause No. 52. According to him similar is the observations in the other communication. By taking aid of Section 115 of the Evidence Act it is his submission that there is a bar of estoppel against the respondent from contending that Clause No.52 does not apply to the agreement. It is his further submission by referring to Section 62 of the Contract Act that the parties have substituted the old terms by new contract and as such the original contract need not be performed. It is his further submission that the Arbitral Tribunal has rightly taken into consideration the correspondence referred above and has held that the Clause No. 52 of the agreement is applicable to the present case. It is his submission that there was extremely limited scope for the District Court to cause interference in the said findings under Section 34 of the Act. He referred to Section 7(4)(b) in order to contend that the subsequent communication also amounts to agreement between the parties.

4. Learned counsel for the respondents supported the impugned

judgment. It is his contention that admittedly the provisions of Act of 1996 are applicable to the present case. Referring to Section 11 of the Act it is his contention that unless any separate procedure is agreed between the parties, it is incumbent on the part of the parties to move the High Court for appointment of Arbitral Tribunal under Section 11 of the Act. It is his further submission that the correspondence does not revive Clause No.52 in absence of any such specific statement therein. It is his submission that the letter dated 24th October, 1994 does not call upon the appellant to invoke Clause No.21. In any case it is his submission that unless there is a specific agreement or even correspondence would indicate that there was revival of Clause No.52, the said Clause which was consciously deleted by the parties cannot be acted upon.

5. There is no dispute about the fact that in the agreement between the appellant and respondent, Clause No. 52 which was otherwise part of the general terms of the contract was specifically deleted. Once there is a conscious decision of the parties to specifically delete any terms of the contract, unless there is a subsequent contract between the parties contrary thereto, such deletion must be held to be final. In this regard reference made to the correspondence as mentioned above is totally misplaced. Pertinently, the said correspondence has been

entered into after the period of contract was over and after a dispute was raised by the appellant. In such circumstances there was no reason or occasion for the respondent to revive the terms of the contract which were specifically deleted. This Court also finds substance in the contention of the learned counsel for the respondent that even bare perusal of the said communication does not indicate the intention of the parties to revive the Clause No. 52.

6. In so far as the issue of estoppel is concerned, since the admission is not unequivocal, first of all there would not be any estoppel against the respondent in this regard. In any case it is open for the respondent to explain the same on the basis of communication entered between parties. In so far as the novation of the contract as observed herein above there is admittedly no novation of contract till the dispute in respect of the work performed under the contract is done. Hence, question of novation of the same does not arise.

7. Section 34(2)(iv) of the Act provides further ground for challenge to the award passed by the Arbitral Tribunal under Section 34 of the Act. The said provision indicates that when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing

such agreement, was not in accordance with this Part. The admitted facts on the record indicates that Clause No. 52 was consciously deleted by the parties. As such there was no separate procedure agreed upon by the parties for the sake of appointment of Arbitrator. In view of Section 11(2) of the Act, 1996, in absence of any other agreed procedure for appointment of the Arbitrator, the appellant had no other option but to move the High Court for appointment of the Arbitrator under Section 11 of the Act. The Arbitral Tribunal has rendered perverse finding which are contrary to the terms of the agreement. It was not open for the Arbitral Tribunal to coin a new term in the agreement for the parties. The learned District Court has rightly caused interference into the award passed by the Tribunal on the ground that its maintainability for appointment of Arbitrator is not in consonance with the Section 11 of the Act. The District Court has also held that Clause No. 51 of the agreement clearly indicates the agreement between the parties for arbitration. Owing to the said clause the District Court has permitted the parties to take resort to Section 11 of the Act for appointment of the Arbitral Tribunal. No fault can be found with the said observations having regard to the Clause No. 51.

8. In view of the above, there is no merit in the appeal, appeal stands dismissed.

9. At this stage, learned counsel for the appellant submits that if the application is filed within a period of six weeks from today, no objection with regard to the limitation shall be entertained.

10. Learned counsel for the respondent records no objection for the same.

11. In case, application is filed under Section 11 of the Act within a period of six weeks, the issue of limitation shall not be raised by the respondent.

(R. M. JOSHI, J.)

ssp