IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO. 4 OF 2016

M/s. Mehra & Company,
Through its Partner,
Mr. Shailendra Mahendraprasad Mehra,
R/o. Congress Bhavan, Sarojinidevi Road,
Jalna-431203 ...Applicant

Versus

The State of Maharashtra,
Through

(A) Executive Director
GMIDC, Jalna Road, Aurangabad.

(B) The Chief Engineer,
Nanded Irrigation Circle,
Nanded-431605

(C) The Superintending Engineer,
Nanded Irrigation Circle,
Nanded

(D) The Executive Engineer,
Degloor Lendi Project Division,
Degloor-431717 ...Respondents

Mr Girish K. (Naik) Thigale, Advocate for Applicant
Mr S.S. Dande, A.G.P. for State
Mr B.R. Surwase, Advocate for Respondent Nos. (B) and (D)

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 28th NOVEMBER, 2022
DELIVERED ON : 2nd DECEMBER, 2022

JUDGMENT :

1. This application is filed for appointment of arbitrator under sub section 6 of section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996" for the sake of brevity).

2. The relevant clauses of the agreement between the parties under which appointment of arbitrator is sought are as under :-

> 30 (1) Except otherwise specified in the contract & subject to the powers delegated to him by Corporation under the code, rules then in force, the decision of the Superintending Engineer of the circle for the time being shall be final, conclusive, & binding on all parties of the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality or workmanship or materials used on the work, or as to any other question, claim, right matter, or thing whatsoever, if any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof.
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> 30 (2) : The contractor may within 30 days of receipt by him of any order passed by the Superintending Engineer of the circle as aforesaid appeal against it to the Chief Engineer concerned with the contract,work or project provided that.
>
> a) The accepted value of the contract exceed Rs. 100 lakhs (Rupees hundred lakhs only.)
> b) Amount of claim is not less than Rs. 1.00 Lakh (Rupees one lakh only.)
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> 30 (3) : If the contractor is not satisfied with the order passed by the Chief Engineer as aforesaid, the contractor may within 30 deays of receipt by him of any such order, appeal against it to the Executive Director, Godawari Marathwada Irrigation Development Corporation Aurangabad, who, if convinced that Prima-facie the contractor's claim rejected by S.E/C.E. is not frivolous and that there is some substance in the claim of the contractor as would merit a detailed examination and decision by the Executive Committee/Standing committee at Corporation level for suitable decision.

3. Mr Surwase, the learned counsel appearing for respondent Nos. (B) and (D) has relied upon judgment of this Court in ***B.T. Patil Construction Vs. Maharashtra Krishna Valley Development Corporation,*** *Arbitration Application No. 117/2013 decided on 11.07.2014* in support of his contention that similar clause has been interpreted by this Court to mean that there exists no arbitration

agreement between the parties. Mr Surwase has therefore prayed for rejection of the application.

4. In ***B.T. Patil Construction*** (supra), clauses 30.1, 30.2 and 30.3 of the agreement therein were as under :-

> Clause – 30.1 : Except where otherwise specified in the contract and subject to the powers delegated to him by Corporation under the code, rules then in force the decision of the Superintending Engineer of the circle for the time being shall be final, conclusive and "binding on all parties of the contract upon all questions" relating to the meaning of the specification, design, drawing and instructions hereinbefore mentioned and as to the quality or workmanship or materials used on the work or as to "any other question claim, right matter or thing whatsoever if any way arising out of or relating to the contract, designs, designs, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute same, whether arising during the progress of work or after the completion or abandonment thereof.
> Clause – 30.2 : The contractor may within 30 days of receipt by him of any order passed by the Superintending Engineer of the Circle as aforesaid appeal against it to the Chief Engineer concerned with the contract, work or project provided that -
> (a) The accepted value of the contract exceeds Rs. 10 lakhs (Rs. Ten lakhs)
> (b) Amount of claim is not less than Rs. 1 lakh (Rs. One lakh)
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> Clause – 30.3 : If the contractor is not satisfied with the order passed by the Chief Engineer as aforesaid the contractor may within 30 days of receipt by him of any such order appeal it to the Executive Director, Maharashtra Krishna Valley Development Corporation, Pune, who if convinced that prima-facie the contractor claim rejected by Superintending Engineer/Chief Engineer is not frivolous and that there is some substance in the claim of the contractor as would merit detailed examination and decision by the Executive Committee/Standing Committee, shall put upto the Executive Committee/Standing Committee at Corporation level for suitable decision.

5. After considering the interpretation of clauses 30.1, 30.2 and 30.3 placed by both sides, this Court has held in para No. 18 and 23 is as under :-

> 18. In my view, on plain rading of clauses 30.1, 30.2 and 30.3, it is clear that powers given to the Superintending Engineer was in the nature of a departmental dispute resolution mechanism and was meant for expeditious sorting out of problems and cannot be construed as an arbitration in any manner whatsoever. Supreme Court in case of ***M/s P. Dasaratharama Reddy Complex*** (supra) has considered similar provisions in several contracts and has held that none of those clauses can be construed as an arbitration agreement. The clauses under consideration before the Supreme Court are identical to the clauses considered in this case. In my view, the judgment of Supreme Court in case of ***M/s P. Dasaratharama Reddy Complex*** (supra) is squarely applicable to the facts of this case. I am respectfully bound by the said judgment.
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> 23. In the premises aforesaid, I am of the view that there exists no arbitration agreement between the parties. The application filed under Section 11(6) of the Arbitration & Conciliation Act 1996 is thus not maintainable and is accordingly dismissed. No order as to costs.

6. Mr Surwase has also placed reliance on the Judgment of this Court in ***M/s Akash Construction Vs. Chief Executive Officer,*** *First Appeal No. 1030/2003 decided on 17th December, 2003* in which also similar clause numbers 30.1, 30.2 and 30.3 in the contract executed with the Zilla Parishad, Aurangabad have been construed not to constitute an arbitration agreement. For the sake of brevity since the clauses 30.1, 30.2 and 30.3 in ***Akash Construction*** (supra) are similar to the clauses in the present petition, the same are not reproduced. This Court held in para No. 20 of the Judgment are as under :-

> 20. In the present case reading of clause 30.1, 30.2 and 30.3 does not indicate that the parties had agreed for reference of a dispute to an arbitrator. The parties did not agree for any such decision in case of reference to be binding on them. There is absence of mutual agreement for referring a dispute for arbitration. What is provided in the agreement clause is that, in case a contractor is not satisfied with the decision of the Chief Executive Officer, he has a remedy to file appeal which shall be considered by the General Body of the Zilla Parishad again. The placement of the appeal filed by the contractor before the General Body is subject to the satisfaction of the chief Executive Officer. In view of the scheme of Arbitration Act, 1996 the clause 30 in the present agreement does not indicate for resolving the dispute by an arbitrator.

7. Since similar clauses in contracts executed with Krishna Valley Development and Zilla Parishad, Aurangabad are held by this Court not to constitute valid arbitration agreement between the parties, this application could have been rejected summarily. However, Mr Thigle, the learned counsel appearing for the applicant contends that decision of section 11 application does not constitute a binding precedent and that therefore judgments relied upon by the Respondents would not bind this court, which is required to consider the true intent of the parties for dispute resolution mechanism in the light of the latest law laid down by the Apex Court. He has placed reliance on several Judgments in support of his contentions that clauses 30.1, 30.2 and 30.3 do constitute the valid arbitration agreement between the parties. I accordingly proceed to deal with the submissions and Judgments cited by Mr Thigle.

8. Mr Thigle has contended that the Judgment of this Court in ***B.T. Patil Construction*** (supra) cannot be treated to have a precedential value and reliance in this regard is placed on the Judgment of the Supreme Court in ***A. Ayyasamy Vs. A. Paramasivam and others (2016) 10 SCC 386.*** In para No. 24 of the Judgment, it is held as under :-

> 24. Before we apply the aforesaid test to the facts of the present case, a word on the observations in *Swiss Timing Ltd. Case* to the effect that the judgment of N. Radhakrishnan was per incuriam, is warranted. In fact, we do not have to labour on this aspect as this task is already undertaken by this Court in *State of W.B. V. Associated Contractors.* It has been clarified in the aforesaid case that *Swiss Timing Ltd.* Was a judgment rendered while dealing with Section 11(6) of the Act and Section 11 essentially confers power on the Chief Judge of India or the Chief Justice of the High Court as a designate to appoint an arbitrator, which power has been exercised by another Hon'ble Judge as a delegate of the Chief Justice. **This power of appointment of an arbitrator under Section 11, by the Court, notwithstanding the fact that it has been held in *SBP & Co. v. Patel Engg. Ltd.,* as a judicial power, cannot be deemed to have precedential value and,**

therefore, it cannot be deemed to have overruled the proposition of law laid down in *N. Radhakrishnan*.

(emphasis supplied)

9. Mr Thigle has contended that mere existence of two tier dispute resolution system under clauses 30.1, 30.2 and 30.3 before Superintending Engineer and Chief Engineer cannot be construed to mean absence of arbitration agreement between the parties. In support of his contention, he has relied upon the Judgment in ***Centrotrade Minerals and Metal Inc. Vs. Hindustan Copper Ltd.*** *(2017) 2 SCC 228.* In that case, the agreement provided for first stage arbitration in India, with a right to appeal to a second stage arbitration in London. In the light of that position, the Supreme Court has held that there is nothing in the Act of 1996 that prohibits the contracting party from agreeing upon second stage arbitration. Clause 14 of the agreement in that case provided for resolution of disputes through arbitration panel of Indian Council of Arbitration. The clause also provided a right to appeal to second arbitration in London. In the present case, the word "arbitration" or "arbitrator" are clearly absent in clause 30(1) under which the Superintending Engineer is empowered to resolve the disputes. As held in ***B.T. Patil Constructions*** (supra), the same is merely a departmental dispute resolution mechanism meant for expeditious sorting out of problems. While in ***Centrotrade***, there was specific agreement for arbitration, albiet in two stages, in the present case there is complete absence of any such agreement. Therefore, mere existence of two stage dispute resolution mechanism would not mean that the same can be construed as an arbitration agreement. The judgment in ***Centrotrade*** therefore cannot be used to import an arbitration agreement, which is inherently absent, in every two tier dispute resolution mechanism system. The reliance of Mr Thigle on the Judgment in ***Centrotrade*** (supra) is completely misplaced.

10. Mr. Thigle also contended that while dealing with an application under section 11 of the Act of 1996, the Court has to refer the matter for arbitration by default and leave the issue of arbitrability or non-arbitrability to the arbitrator. In support of his contention, he has relied upon the Judgment of the Supreme Court in case of ***Mohammad Masroor Shaikh Vs. Bharat Bhushan Gupta and others*** *reported in (2022) 4 SCC 156,* in which it is held as under:

> *11.* ***Thus, this Court held that while dealing with petition under Section 11, the Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable.*** *In such case, the issue of non-arbitrability is left open to be decided by the Arbitral Tribunal. On perusal of the impugned order, we find that the issues of non arbitrability and the claim being time barred have not been concluded by the learned Single Judge of the Bombay High Court. In fact, in clause (vii) of the operative part of the impugned Order, the learned Single Judge has observed that the contentions of the parties have been kept open. The petitions filed by the appellant under Section 34 of the Arbitration Act, challenging the Order dated 25th May 2021 are pending before the High Court in which the appellant can raise all permissible contentions.*
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> *(emphasis & underlining supplied)*

11. Relying on the above judgment, Mr. Thigle contends that this court must 'by default' refer the disputes to arbitration while deciding application under Section 11 of the Act of 1996. The proposition sought to be advanced, in my view, is stated only to be rejected. It is trite that while deciding application under Section 11(6), the Court has to first satisfy itself that there is a valid and binding arbitration agreement between the parties. The issue in ***Mohammad Masroor Shaikh*** was whether the Court can entertain the issue of arbitrability of dispute while deciding application under section 11 of the Act of 1996. In that case, there was clear and unambiguous arbitration agreement whereas in the present case, the parties have not agreed to resolve the dispute by arbitration. The judgment has therefore no application to present case.

12. Mr Thigle has further contended that merely because the words 'arbitration' or 'arbitrator' are absent in the clause in the agreement, the same

cannot be *ipso facto* a reason to reject application under section 11 of the Act of 1996. In support of his contention, he has placed reliance on the Judgment of the Apex Court in ***Babanrao Rajaram Pund Vs. M/s Samarth Builders & Developers and Anr.*** *Special Leave Petition (Civil) No. 15989 of 2021 decided on 7th September, 2022.* In that Judgment, however, there was clause 18 in the development agreement providing that "*the same shall be referred to arbitration of a sole arbitrator mutually appointed*". In para No. 22 of the Judgment, the Apex Court has held as under :-

> 22. Adverting to the case in hand, it may be seen that the contents and the nature of Clause 18 are substantially different from the dispute resolution pacts in ***K.K. Modi, Jagdish Chander,*** or ***Encon Builders*** (supra). We say so far three reasons. Firstly, apart from the fact that Clause 18 of the Development Agreement use the terms “Arbitration” and “Arbitrator(s)”. It has clearly enunciated the mandatory nature of reference to arbitration by using the term ***“shall be*** referred to arbitration of a Sole Arbitrator mutually appointed, failing which, two Arbitrators, one to be appointed by each party to dispute or difference.” Secondly, the method of appointing the third arbitrator has also been clearly mentioned wherein the two selected Arbitrators are to appoint a third arbitrator. Finally, even the governing law was chosen by the parties to be “the Arbitration and Conciliation Act, 1996 or any re-enactment thereof.” These three recitals, strongly point towards an unambiguous intention of the parties at the time of formation of the contract to refer their dispute(s) to arbitration.

13. In the present case, there is complete absence of the words 'arbitration' or 'arbitrator' in clauses 30.1, 30.2 and 30.3. The Judgment is therefore clearly distinguishable.

14. There can be no dispute to the proposition that power of appointment of an arbitrator under section 11 of the Act of 1996 cannot be said to have a precedential value. But the same cannot be a reason to completely ignore the interpretation placed by this Court in respect of identical clauses in its previous decisions. Even if the decisions in ***B.T. Patil Construction*** *(supra) and* ***Akash***

Construction (supra) are to be momentarily ignored accepting the contention of Mr Thigle that they do not have precedential value, plain and simple reading of clauses 30 (1),(2) and (3) would indicate that the parties have not alleged for resolution of the disputes by arbitration. Both clauses merely provide for departmental remedies to the contractor for faster resolution of disputes. The same cannot be treated as a valid and arbitration agreement between the parties.

15. In the result, I conclude that there is no arbitration agreement between the parties. Therefore, the application filed by petitioner under section 11(6) of the Act of 1996 must fail and is accordingly rejected without any orders as to costs. Needless to say that rejection of application would not come in the way of Petitioner pursuing any other remedies as may be available to it under law in respect of its claims.

[SANDEEP V. MARNE, J.]

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