

(2009) 06 BOM CK 0023
In the Bombay High Court
Case No : First Appeal No. 644 of 1991

Padmashree Enterprises

APPELLANT

Vs

The State of Maharashtra and The Executive Engineer,
Kaner Canal Division

RESPONDENT

Date of Decision : 12-06-2009

Acts Referred:

Arbitration Act, 1940 — Section 17, 30, 8, 8(1)

Citation : (2009) 06 BOM CK 0023

Hon'ble Judges : R.Y. Ganoo, J

Bench : Single Bench

Advocate : Atul Rajadhyaksha, Kedar Wagle and Pankaj Vernekar, instructed by V.D. Surve, for the Appellant; Gita Mulekar, AGP for Respondent No. 1 and Vijay Patil, for the Respondent

Judgement

R.Y. Ganoo, J.—Appellants herein were awarded contract to carry out certain Civil Construction Work in regard to Krishna Project. The appellants and respondents have for the purpose of complying with the terms and conditions of the said agreement entered into what may be referred to as Tender Contract and in the tender contract there were Clauses No. 54 and 55 concerning reference of dispute to arbitration in case dispute arises between the appellants and respondents. As to which points could be referred to the Arbitrator is well discussed in Clauses 54 and 55 of the tender contract and there is no dispute about it. The record also indicates that between the appellants and the respondents certain dispute arose in regard to the performance of the contract and the related aspects and as a result of that the appellants called upon the respondents to proceed to take steps to refer the dispute to arbitration and this was done in terms of letter dated 13.6.1985. The record also shows that in terms of Clause 55 of the Tender Contract the respondents were required to inform names of three persons out of whom one could be accepted by the appellants as Arbitrator. The record shows that the Respondents did not communicate to the appellants the said three names. It is seen that thereafter on 10.9.1985 the

appellants furnished to the respondents three names and requested the respondents to select one person for being appointed as Arbitrator in terms of Clause 55 of the tender contract. The said letter was replied to by the respondents by letter dated 24.9.1985 and the respondents took a stand that as the terms and conditions prescribed in Clause 55 of the tender contract were not complied with no further action can be taken for the purpose of referring the dispute to arbitration. That letter dated 24.9.1985 was treated by the appellants as the circumstance viz. Failure of Machinery for the purpose of appointment of Arbitrator by consent of both the parties as envisaged under Clause 55 of the tender contract.

2. Mr. S.S. Banhati who was concerned with the present appellants instituted Misc. Application No. 581 of 1986 in the Court of Civil Judge, Senior Division, Pune for appointment of the Arbitrator in accordance with the provisions of Section 8 of the Arbitration Act, 1940 (for short said Act). According to the appellants on account of various developments which took place between the appellants and respondents in the matter of referring the dispute to Arbitrator, the Arbitrator could not be appointed by consent and therefore the Court had power to appoint Arbitrator u/s 8 of the Arbitration Act, 1940, by exercising the powers conferred upon the Court in accordance with the provisions of Section 8(1) (Clause a) of said Act. It must be mentioned that notice of this application was served upon the respondents and the learned Civil Judge, Senior Division, Pune, by his Judgment and Order dated 27.2.1987 granted the said application and appointed Shri R.G. Kulkarni, Superintending Engineer as the sole Arbitrator to decide the dispute (claims) raised by the present applicant.

3. Record shows that Mr. R.G. Kulkarni who was appointed as Arbitrator took charge of the dispute and performed the job as an Arbitrator. Before the Ld. Arbitrator Mr. Kulkarni the appellants put up their claim. The respondents herein also lodged their counter claim and the claim of the appellants as well as the claim of the respondents were attended to by the learned Arbitrator Mr. Kulkarni. It is seen that appropriate opportunity was given to both the sides to present their respective cases and the learned Arbitrator by his award dated 22.10.1998 gave his ruling and declared the award. Thereafter this award was filed in the Court at Pune on 31.10.1988. This was done by the appellant as a successful party was required to apply for decree in terms of the award. The application was filed by the present appellants requesting the concerned Court for converting the award into decree. The application was numbered as Special Civil Suit No. 1091 of 1988.

4. As per the provisions of Section 30 of the said Act, the respondents herein filed Civil Misc. Application No. 12 of 1989 praying that the award passed by the learned Arbitrator should be set aside. The proceedings filed by the present appellants as well as the Civil Misc. Application No. 12 of 1989 came to be tagged together and the said proceedings were assigned to the Learned 6 Joint Civil Judge, Senior Division, Pune, (Hereinafter referred to as the learned Judge).

The learned Judge heard the respective parties and passed the following Order dated 15.3.1990.

The award in the instant case is set aside. Civil Misc. Application No. 12/1989 is allowed and the impugned award is set aside as found non-est and void-ab-initio. As the award is set aside there is no necessity to pass a decree in pursuance thereof u/s 17 of the Arbitration Act. Considering the circumstances of the case, I further find and order that both the parties to bear their own costs of these proceedings. Decree be drawn accordingly.

5. By the said award the Special Civil Suit No. 1091 of 1988 was dismissed. The Civil Misc. Application No. 12 of 1989 was granted and the award was set aside. Being aggrieved by this Judgment and Order dated 15.3.1990, the appellants have filed the present First Appeal. Before this Court, learned Senior Counsel Mr. Rajadhyaksha and learned Advocate Mr. Patil and AGP Mrs. Mulekar were heard on the question of correctness of Order dated 15.3.1990. Learned Senior Counsel Mr. Rajadhyaksha read to me the provisions of Clause 54 and 55 of the tender contract as well as the proceedings which were initiated by the present appellants being Application u/s 8 of the said Act and Order passed below it, and text of the award which came to be attended to by the learned Judge. Learned Senior Counsel Mr. Rajadhyaksha has submitted that if one reads all these proceedings it is clear that both the parties, namely the appellants and the respondents were in agreement that the disputes raised by the appellants as well as the respondents could be referred to the Arbitrator. He further submitted that provisions of Clause 55 in the tender contract indicated the procedure for appointment of Arbitrator. He further submitted that the record clearly indicates that in view of certain developments the Arbitrator could not be appointed in accordance with the machinery set out in accordance with Clause 55 of the tender Contract and therefore the present appellants were required to file application u/s 8 of the said Act. He pointed out that the concerned Court which entertained the said application and appointed Mr. R.G. Kulkarni as an Arbitrator. He stressed that this Order appointing Mr. R.G. Kulkarni was not challenged by the respondents and the respondents appeared before Mr. R.G. Kulkarni opposed the claim of the appellants, tendered their counter claim and invited the Arbitrator to pass the award. Learned Senior Counsel Mr. Rajadhyaksha therefore submitted that the way in which the developments took place in the matter clearly indicate that both the parties wanted to resolve the dispute through Arbitration. Learned Senior Counsel Mr. Rajadhyaksha submitted that the learned Judge who passed the Order dated 15.3.1990 erred in coming to the conclusion that the Arbitrator appointed u/s 8 of the said Act was not proper. Learned Senior Counsel Mr. Rajadhyaksha submitted that if one appreciates Clause 55 of the Tender Contract it would clearly go to show that if due procedure set out in Clause 55 was acted upon by both the parties the said Arbitrator would have been appointed by consent of both the parties. He submitted that on interpretation of Clause 55 of tender contract it should have been held that procedure for appointment of arbitrator was Appointment of Arbitrator by

Consent and once no Arbitrator was appointed by consent, the party which was intending to have Arbitrator appointed could resort to provisions of Section 8 of the said Act and call upon the Court to appoint the Arbitrator. Learned Senior Counsel Mr. Rajadhyaksha contended that the procedure followed in Section 8 of the said Act was attended to by the appellants and the Court passed an Order appointing Mr. R.G. Kulkarni as Arbitrator and therefore appointment of arbitrator was proper. Learned Senior Counsel Mr. Rajadhyaksha took me through the contents of paragraph 10 of impugned Order and submitted that the learned Judge erred in arriving at conclusion that the Arbitrator was to be appointed by named Authority. Learned Senior Counsel Mr. Rajadhyaksha submitted that the learned Judge wrongly resorted to the judgment in the case of Union of India Vs. M/s. Ajit Mehta and Associates, Pune and Others, . He submitted that reference to this judgment, and in particular reference to paragraph 9 of the said judgment was incorrect and there was nothing like Arbitrator being appointed by the named authority in so far as this case is concerned. Learned Senior Counsel Mr. Rajadhyaksha therefore submitted that the learned Judge erred in arriving at the conclusion that Clause 55 of the tender contract goes to show that the Arbitrator was to be appointed by named Authority. He submitted that if this submission of his is accepted by this Court, then the appointment of R.G. Kulkarni will have to be treated as properly made and then Special Civil Suit No. 1091 of 1988 as well as Civil Misc. Application No. 12 of 1989 filed by the respondents will have to be remanded to same Court which decided both the proceedings for decision on merits as the learned Judge who passed the Order on 15.3.1990 has not passed Orders on both the proceedings on merits.

6. Learned Counsel Mr. Patil appearing on behalf of the respondent No. 2 opposed the submissions advanced by learned Counsel Mr. Rajadhyaksha. He contended that Clause 55 of the tender Contract, if construed in proper manner would clearly go to show that the Chief Engineer of Irrigation Department, Specified Projects, Pune was the authority named in Clause 55 for the purposes of appointment of Arbitrator and because Arbitrator was not appointed by Chief Engineer, Irrigation Department, Specified Projects, Pune the appointment of R.G. Kulkarni as Arbitrator was not proper. Learned Counsel Mr. Patil tried to support the Order passed by the learned Judge who rejected both the proceedings and contended that the Order impugned in this First Appeal is properly passed and no interference is required.

7. Learned Counsel Mrs. Mulekar supported the submissions advanced by learned Counsel Mr. Patil.

8. After having considered the rival submissions, I hold that the point required to be decided by this Court is whether Clause 55 of the tender Contract lays down the procedure for appointment of Arbitrator by consent. Once the finding is recorded in that behalf, further views can be expressed by this Court. A perusal of Clause 55 of the tender Contract would clearly go to show that if the dispute is to be referred to the Arbitrator between the appellants and the respondents the

Chief Engineer, Irrigation Department, Sp. Projects, Pune, in the first place was required to suggest name of three persons and the present appellant was required to accept one of them so that the Order can be passed by the Chief Engineer for appointment of that person as Arbitrator. It also shows that if no steps are taken by the Chief Engineer to give the list of three persons then it was for the appellant to give the names of three persons and then the Chief Engineer was required to accept one of them. This will clearly go to show that whosoever would have been appointed as Arbitrator either from the list given by the Chief Engineer or from the list given by the Appellants would have been appointed by consent of both the parties as both of them had given their willingness to accept the person as Arbitrator.

9. In view of the aforesaid observations, I hold that the procedure prescribed for the appointment of Arbitrator between the appellant and respondents was Appointment of Arbitrator by Consent. I also hold that in the event of failure of machinery for appointment of Arbitrator by Consent as above the party which was interested in having Arbitrator appointed had to go to the Competent Court as provided u/s 8 of the said Act.

10. I now come to the observations of the learned Judge who passed the impugned Order. The learned Judge has observed as follows:

Considering the procedure given for appointment of the arbitrator as contemplated under Clause 55, it could be seen that the arbitrator is to be appointed in a given procedure by the claimant separately viz. The Chief Engineer and if he failed to appoint the arbitrator as provided then by the contractor himself. Therefore, it is the case where the arbitrator is not to be appointed by consent of both the parties, but it is to be appointed by the named authority firstly by the Chief Engineer and on its failure in prescribed manner by the contractor himself, and therefore, the ruling cited is applicable in the instant case as appointment of the arbitrator by name u/s 8 by the Court is itself illegal and without jurisdiction. Consequently the proceedings before the arbitrator are vitiated and must be observed categorically as void and hence award passed by the arbitrator is void-ab-initio and non-est.

11. In my view this observation would be contrary to the scheme which was provided under Clause 55 of the tender condition and there was no question of either Chief Engineer or the representative of the Appellants appointing a particular person as Arbitrator. The Clause 55 of tender contract is very clear viz. three names would originate from one side and one name out of them was to be accepted. Whether the three names would get originated at the instance of Chief Engineer or appellant was not relevant. In the end the appointment would be by consent and there was nothing like appointment of Arbitrator by named Authority. After having read the impugned Order, I am inclined to observe that the learned Judge without any specific reasons introduced the concept of appointment of Arbitrator by Named Authority in so far as the present case is concerned. None of the parties ever thought of Appointment of Arbitrator by

Named Authority . In my view, the learned Judge who passed the impugned Order without any specific reasons and justification came to the conclusion that the appointment of the Arbitrator was to be made by the Named Authority. He erred in coming to the conclusion that tender contract introduced the concept of appointment of Arbitrator by Named Authority.

12. For the aforesaid reasons, the observations of the learned Judge in the impugned judgment to that extent will have to be set aside. Once this is done, the final Order passed by the impugned Judge will also have to be set aside as the appellant as well as respondents must get opportunity to present their points before the Court to enable the learned Judge to decide whether the award should be converted into decree or it should be set aside. This will mean that both the proceedings will have to be remanded to the concerned Court. The concerned Court will have to give chance to the appellant as well as the respondents in the respective proceedings and pass the final Order.

13. In view of the aforesaid discussion, the first appeal is being disposed of by passing the following Order:

ORDER

i. Judgment & Order dated 15.3.1990 passed by the 6th Joint Civil Judge, Senior Division, Pune in Special Civil Suit No. 1091 of 1988 filed by the present appellants and the Civil Misc. Application No. 12 of 1989 filed by the present respondents is set aside.

ii. Special Civil Suit No. 1091 of 1988 and Civil Misc. Application No. 12 of 1989 are restored to the file of the Court of 6th Joint Civil Judge, Senior Division, Pune, Accordingly, both the proceedings are remanded to the Court of 6th Joint Civil Judge, Senior Division, Pune.

iii. The record and proceeding be sent back to the Court of 6th Joint Civil Judge, Senior Division, Pune.

iv. Upon receipt of the record by the 6th Joint Civil Judge, Senior Division, Pune, he shall issue notices to the appellants as well as to the respondents and fix the date for hearing of Special Civil Suit No. 1091 of 1988 and Civil Misc. Application No. 12 of 1989 and that he shall hear and dispose of these two proceedings on merits in accordance with the provisions of law. It is hereby ordered that the 6th Joint Civil Judge, Senior Division, Pune to whom the proceedings are remanded shall hear and dispose of both the proceedings as expeditiously as possible and preferably by 30th January, 2010. It is hereby clarified that no views are expressed by this Court on the merits of the aforesaid two proceedings.

v. In the facts and circumstances of the case there shall be no Order as to costs.