

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN. UNDER ARBITRATION ACT No.35 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

OM CONSTRUCTION COMPANY - Petitioner(s)

Versus

AHMEDABAD MUNICIPAL CORPORATION &amp; 1 - Respondent(s)

Appearance :

MR KG SUKHWANI for Petitioner(s) : 1,

MR RR MARSHALL for Respondent(s) : 1,

NOTICE SERVED for Respondent(s) : 2,

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 30/11/2007

ORAL JUDGMENT

(1) The petitioner, a "C" Class approved contractor, made an offer for Annual Rate Contract for providing and fixing Nibhada Stone for paving and footpath in Kalupur and

Dariapur wards in Central Zone within the City of Ahmedabad. The petitioner's tender cost was Rs.42,08,656.82. On 01.06.2006 the offer made by the petitioner was accepted and the contract for the period between 01.06.2006 to 08.06.2007 came to be awarded to the petitioner. The work order was issued on 06.06.2006 after the petitioner submitted Bank Guarantee of Rs.2,10,433/-. According to the petitioner, the work was completed by end of October 2006 and respondent No.1 was informed about the same. As per the petitioner, though Rs.25,00,000/- has been paid towards the contracted work, considering the work carried out by the petitioner, a sum of Rs.68,46,872/- is due in so far as Dariapur ward is concerned, and a sum of Rs.8,61,760/- is due for the work carried out in Kalupur ward. The petitioner has served a notice claiming these amounts on 24.05.2007. According to the petitioner, the amounts have not been paid to the petitioner in light of the facts stated in

Paragraph Nos.9 to 15 of the petition, wherein various averments have been made regarding conduct of respondent No.2 authority.

- (2) The petitioner, therefore, on 06.06.2007 issued a notice setting out facts in detail and claimed the total outstanding amount of Rs.77,08,632/- together with interest @ 18% p.a. from the due date till the date of realization. The notice further stated that either the claim should be accepted and payment be made within a period of 30 days from the date of receipt of the notice or an arbitrator be appointed by respondent No.1 within the period of 30 days from the date of receipt of the notice. The grievance of the petitioner is that though the notice has duly been received by the respondent-Municipal Corporation, neither has the petitioner been paid anything, nor is an arbitrator appointed, nor any reply sent by the respondent-Corporation.

(3) The learned advocate for the petitioner has placed reliance on Clause No.30 of the agreement between the parties to submit that the disputes between the parties to the agreement are governed by the arbitration clause and hence, the disputes be referred to an Arbitral Tribunal. It was submitted that though Clause No.30(1) stipulates referring the disputes to Tribunal the respondent-Ahmedabad Municipal Corporation is not a Public Undertaking as per definition of the term "public undertaking" within the meaning of Section 2(i) of The Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 (the GPWCD Arbitration Tribunal Act) and, therefore, the Tribunal would have no jurisdiction.

(4) Upon issuance of notice the respondent-Corporation has put in appearance and contested the petition, without tendering any reply, only on basis of legal issues raised at

the time of hearing.

- (5) On behalf of the respondent-Corporation it was submitted that on a conjoint reading of Clause Nos.30(1), 30(2) and 30(3) of the agreement even if there was any dispute between the parties the petitioner was required to be relegated to the Arbitration Tribunal, Gujarat State considering the language employed in the aforesaid three sub-clauses of Clause No.30 of the agreement. It was further stated that if for any reason the Arbitration Tribunal, Gujarat State did not have jurisdiction to undertake arbitration regarding disputes between the parties, the petition cannot be entertained and the matter was required to be rejected, leaving it open to the petitioner to pursue whatever legal remedy that may be available to the petitioner.

- 5.1) It was submitted that Clause No.30(1) in the title itself stated "Disputes to be referred

to Tribunal”; in the sub-clause itself the latter portion stipulates that the disputes “shall be referred” to the Arbitration Tribunal, Gujarat State. That under Clause No.30(2) it was stated that provisions of Section 21 of the GPWCD Arbitration Tribunal Act would be applicable, and lastly, it was submitted that Clause No.30(3) stated that provisions of Arbitration Act, in so far as they are inconsistent with the provisions of the GPWCD Arbitration Tribunal Act, shall cease to apply to any dispute arising from a work contract and all arbitration proceedings in relation to such dispute before an arbitrator, the Court or authority, shall stand transferred to the Tribunal. Therefore, it was contended that the submission on behalf of the petitioner that there was an intention of the parties to undertake arbitration was not fully correct, but the intention was to refer the disputes to the Arbitral Tribunal mentioned in the agreement, more particularly

Clause No.30 of the agreement. That the petitioner could not be permitted to urge that if the said Tribunal did not have jurisdiction, after taking into consideration the intention of the parties to the agreement, the matter be referred to any other Arbitral Tribunal.

5.2) It was further contended that provisions of Section 11(4) of the Arbitration and Conciliation Act, 1996 (the Act) stipulate that the Chief Justice or the designated Judge (hereinafter referred to as 'the Designated Court') can exercise powers only in a case where there was an agreement between the parties and one of the parties had failed to abide by the terms of the agreement. That in the present case the respondent No.1-Municipal Corporation had not failed to appoint an arbitrator as the agreement did not require such appointment to be made. Hence, before exercising powers under Section 11 of the Act, there must be an agreement for appointment of

an Arbitral Tribunal, and on receipt of notice on expiry of the period of 30 days stipulated by the provisions one of the parties fails to carry out the obligation cast on that party under the agreement. Therefore, the Designated Court cannot exercise powers under Section 11 of the Act.

5.3) Lastly it was submitted that in any view of the matter, if the agreement stipulated that the parties go before a specified Tribunal, the parties were bound by the terms of the agreement and cannot be permitted to opt out of the agreement by stating that such specified Tribunal has no jurisdiction. That even if such specified Tribunal was found to have no jurisdiction the agreement, or at least such part of the agreement, would be void and unenforceable, because the parties have no right to grant jurisdiction to a forum which otherwise does not have jurisdiction under the law. Therefore, in any view of the matter, this petition was required to be



rejected.

- (6) On behalf of the petitioner attention was invited to provisions of Section 2(1)(d) of the Act to point out that "arbitral tribunal" means a sole arbitrator or a panel of arbitrators. That this provision had to be read with Section 10 of the Act which provided for number of arbitrators to submit that the parties are free to determine the number of arbitrators, subject to such number not being an even number, and on failure to determine the number of arbitrators the Arbitral Tribunal shall consist of a sole arbitrator. Attention was also invited to the definition of "arbitration agreement" as provided under Section 2(1)(b) of the Act to mean an agreement referred to in Section 7. It was submitted that Section 7 of the Act only requires that an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between the parties

in respect of a defined legal relationship, which may be contractual or otherwise. It was, therefore, submitted that the agreement in question was an arbitration agreement whereunder the parties had agreed to submit to arbitration of the disputes between the parties and in absence of any agreement as to number of arbitrators Section 10(2) of the Act requires appointment of a sole arbitrator. That in the facts of the present case there was an agreement between the parties for referring the disputes to an Arbitral Tribunal, the arbitration agreement required referring the disputes to the Arbitration Tribunal, Gujarat State, but the said Tribunal did not have jurisdiction and hence, the arbitration agreement should be read as being silent as to the number of arbitrators and the Court should, therefore, appoint a sole arbitrator as required by Section 10(2) of the Act. That on the basis of the aforesaid submission the Designated Court would have

jurisdiction under Section 11 of the Act and the respondent-Corporation should not be heard to contend otherwise.

6.1) Learned advocate for the petitioner submitted that Section 14 of the Act which relates to 'Failure or impossibility to act' provides that mandate of an arbitrator shall terminate if the arbitrator becomes *de jure* or *de facto* unable to perform his functions. That in the present case by operation of provisions of law, more particularly, the definitions of the terms "works contract" and "public undertaking" the Arbitration Tribunal, Gujarat State was *de jure* unable to perform the functions qua the present agreement and hence, the Designated Court was empowered to exercise jurisdiction under Section 11 of the Act.

(7) Learned advocate for the respondent resisted the aforesaid contentions by referring to provisions of Sections 14 and 15 of the Act to submit that the same cannot be pressed into

service because no arbitrator as such has been appointed and in fact no arbitrator can be appointed. Therefore, none of the conditions stipulated would apply and if the agreement fails the petition was required to be rejected.

(8) On behalf of the respondent reliance was placed on the following three decisions:

(i) *Harshad Chiman Lal Modi Vs. DLF Universal Ltd. & Anr.*, (2005) 7 SCC 791;

(ii) *Jagdish Chander Vs. Ramesh Chander & Ors.*, (2007) 5 SCC 719; AND

(iii) *Asian Thermal Insulation (I)(P) Ltd. Vs. Bridge & Roof Co. (I) Ltd.*, (2007) 7 SCC 664.

(9) As against that on behalf of the petitioner reliance was placed on various orders made by this Court whereunder the matters were referred to the sole arbitrator by the Designated Court in various arbitration petitions vide orders made on 13.02.2004 and 26.10.2007 to submit that in similar set of

circumstances the Designated Court had exercised jurisdiction.

(10) The relevant part of Clause No.30, more particularly sub-clauses 1, 2 and 3 read as under:-

“Clause-30

1. Disputes to be referred to Tribunal:

The disputes relating to this contract, so far as they relate to any of the following matters, whether such disputes arises during the progress of the work or after the completion or abandonment thereof, shall be referred to the Arbitration Tribunal, Gujarat State.

2. The provision of Section-21 of the GPWD dispute Arbi. Tribunal Act – 92 & order issued by the Govt. in connection with this Act will now apply for Arbitration [As per Government in N & W.R.D.Letter No.SUT/1090/2679/K2 dtd.9/2/94.

3. The provision of Arbitration Act, shall in so far as they are inconsistent with the provision of this act ceased of to apply to any dispute arising from a works contract and all arbitration proceedings in relation to such dispute before an Arbitrator, court

of authority shall stand transferred to the Tribunal.”

- (11) As can be seen from the opening portion of Clause No.30 (1) it requires disputes being referred to Tribunal and the text of the clause in the latter part stipulates that disputes shall be referred to the Arbitration Tribunal, Gujarat State. When read in conjunction with sub-clauses (2) and (3) of Clause No.30 of the agreement it unmistakably points to an intention between the parties to have the disputes referred to the Arbitration Tribunal, Gujarat State. However, Section 2(1) (k) of the GPWCD Arbitration Tribunal Act which defines “works contract” stipulates that it means a contract made by the State government or public undertaking, and such public undertaking has to be one which has been notified in the Official Gazette by the State Government. “Public undertaking” is defined by Section 2(1)(i) of the GPWCD Arbitration Tribunal Act to mean – (a) any

Company; (b) any Corporation established by or under a Central Act or a State Act and owned and controlled by the State Government, (not being a Company or a legal authority); AND (c) such class of local authorities as the State Government specifies by notification in the Official Gazette. Admittedly, the respondent-Corporation, though established by a State Act, is not a public undertaking which has been notified in the Official Gazette by the State Government. Therefore, the contract between the parties would not fall within the meaning of the term 'works contract' as defined by Section 2(1)(k) of the GPWCD Arbitration Tribunal Act. Thus the Arbitration Tribunal, Gujarat State would have no jurisdiction to entertain the disputes between the parties emanating from the work order in question.

- (12) In the aforesaid circumstances can it be stated that because the parties had agreed to resolve the disputes through arbitration there

was an intention to refer the disputes to arbitration and the Designated Court is entitled to exercise jurisdiction under Section 11 of the Act. One way of looking at the matter would be as urged by the respondent-Municipal Corporation viz. that if the agreement stipulates a particular Arbitral Tribunal and such Arbitral Tribunal does not have jurisdiction by operation of law neither can the parties confer jurisdiction on that Arbitral Tribunal, which is specified in the agreement between the parties, nor can the Designated Court substitute that part of the agreement by appointing any other Arbitral Tribunal. Another way of looking at the matter would be that if the parties have agreed to have the disputes referred to an Arbitral Tribunal the agreement must be read so as to be given effect to and in case, the Arbitral Tribunal agreed upon by the parties, is not in a position to function, the Designated Court must read the clause of the agreement so as to



make it workable and give effect to the intention of the parties instead of rejecting the petition outright.

- (13) The learned advocate for the respondent is right in contending that powers under Section 11 of the Act can be exercised by the Designated Court only in the event there is any stipulated failure by one of the parties to the agreement and not otherwise. In the present case, even if one accepts the contention raised on behalf of the petitioner that the agreement must be given effect to by considering the intention of the parties, it is not possible to hold that the respondent-Corporation has failed to abide by the terms of the agreement. In fact the agreement, more particularly the Arbitration Agreement, does not lay down any procedure for appointing an arbitrator or arbitrators. The agreement to the procedure for appointment of an arbitrator has to be at the point of time when the Arbitration Agreement is entered into.

(14) The scheme of Section 11 of the Act vide sub-section (2) requires that the parties are free to agree on a procedure for appointing an arbitrator or arbitrators. Under sub-section (3) it is provided that if there is no agreement under sub-section (2) where arbitration is envisaged by three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. Sub-section (4) provides that in any event where the appointment procedure stipulated by sub-section (3) applies and – (a) a party fails to appoint an arbitrator within the prescribed period; or (b) the two appointed arbitrators fail to agree on the presiding arbitrator within thirty days from the date of their appointment, the Designated Court is vested with powers to make such appointment. Under sub-section (5) the Designated Court derives powers in a case where the arbitration is to

be undertaken by a sole arbitrator, in absence of any agreement on a procedure for appointment of the arbitrator, provided there is a failure to agree on the sole arbitrator within the prescribed period. Under sub-section (6) it is stipulated that if the appointment procedure agreed upon by the parties as envisaged by sub-section (2) of Section 11 of the Act is not adhered to in any of the contingencies mentioned in the three clauses of sub-section (6) the Designated Court gets powers to appoint an arbitrator.

- (15) Thus, on a plain reading of the scheme envisaged by Section 11 of the Act it is not possible to accept the contention raised on behalf of the petitioner that the Designated Court must go by the intention of the parties and read down a part of the relevant Arbitration Agreement, assume powers and appoint an arbitrator. On a conjoint reading of Sections 7 and 10 of the Act the contention raised on behalf of the petitioner does not

merit acceptance. It is the Arbitration Agreement envisaged under Section 7 of the Act which is supposed to lay down the procedure stipulated by sub-section (2) of Section 11 of the Act, and such procedure would also include the number of arbitrators as stated in Section 10 of the Act, but the principal requirement being the parties agreeing on a procedure for appointment of an arbitrator or arbitrators.

- (16) The provisions of Section 14 of the Act require termination of mandate of an arbitrator if the arbitrator becomes *de jure* or *de facto* unable to perform the functions. When read in conjunction with other provisions of the Act, and more particularly placement of the said section : being preceded by Section 12 of the Act relating to grounds for challenge of an arbitrator, and Section 13 of the Act stipulating the procedure for challenging an arbitrator, followed by Section 15 which talks of termination of mandate and substitution of arbitrator : it becomes

abundantly clear that provisions of Section 14 of the Act cannot assist the case of the petitioner.

(17) The Designated Court cannot state that in the facts of the present case there would be two forums available, in other words, two Arbitral Tribunals available, one being the Arbitration Tribunal, Gujarat State, and the other being the Arbitral Tribunal appointed by the Designated Court, so as to entertain the petition by stating that the parties have agreed to submit to arbitration, and if one of the forums does not have jurisdiction the other one would have jurisdiction.

(18) Therefore, in light of what is stated hereinbefore, without entering into the merits of the controversy between the parties, the petition is rejected, leaving it open to the petitioner to avail of any other legal remedy that may be available in law. There shall be no order as to costs.

Sd/-  
[ D.A. MEHTA, J ]

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