

A H. LATHAKUMARI

v.

VAMANAPURAM BLOCK PANCHAYAT AND ORS.
(Civil Appeal No. 4152 of 2009)

B JULY 7, 2009

B [R.V. RAVEENDRAN AND J.M. PANCHAL, JJ.]

C *Arbitration and Conciliation Act, 1996: s.11 – Panchayati Raj Department did not decide to delete the arbitration clause in its contracts in terms of Government order dated 19.11.1988 which was applicable to PWD contracts – The agreement between appellant and Respondent- Panchayat contained arbitration clause – Hence, dispute referable to arbitration – Madras Detailed Standard Specifications – Clause 73.*

D *The parties entered into a contract agreement dated 15.3.1999 containing arbitration clause. Dispute arose in respect of said contract. The appellant filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator. The first respondent denied the claims and also contended that there was no arbitration agreement. The contention of the respondents was that the government had decided to scrap arbitration by Government Order dated 19.11.1988, High Court dismissed the application. Hence the appeal.*

F *Allowing the appeal, the Court*

G *HELD: A reading of the order dated 19.11.1988 clearly shows that the deletion of the arbitration clause was directed only in regard to the Public Work Department contracts. In fact, it specifically provided that the question of adopting such deletion by other departments of the Government or by statutory bodies would be examined by the concerned department/statutory body. Admittedly,*

neither the first respondent nor the Panchayat Raj Department, decided to delete the arbitration clause. On the other hand, the first respondent entered into an agreement with the appellant long after the said Government Order dated 19.11.1988, that is, on 15.3.1999 and did not choose to delete clause 73 from the MDSS made part of the agreement. If the first respondent wanted to delete the arbitration agreement, it ought to have scored out clause 73 from the MDSS which included a arbitration clause in the agreement. That was not done. In fact, in PWD contracts, to which the bar on arbitration was applied, the printed form of Articles of Agreement was amended to include a clause which confirmed that the "contractor has also signed the copy of the Madras Detailed Standard Specifications excluding clause 73 and other clauses relating to arbitration....." Significantly such an exclusion was not made in the articles of Agreement entered by the first respondent Panchayat. Thus the arbitration clause was intended to form a part of the contract between the parties. Therefore, the disputes between the parties were referable to arbitration in terms of the said arbitration agreement. The first respondent is directed to refer the disputes to the Superintending Engineer in terms of the arbitration agreement contained in clause 73 of MDSS. [Paras 5 and 7] [15-A-H; 16-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4152 of 2009.

From the Judgment and Order dated 13.01.2003 in Arbitration Request No. 9 of 2001 and order dated 14.12.2005 in O.P. No. 12477 of 2003 of the High Court of Kerala at Ernakulam.

P. Sureshan and Shakil Ahmed Syed for the Appellants.

R. Sathish for the Respondent.

A The Judgment of the Court was delivered by
R.V. RAVEENDRAN, J. 1. Leave granted. Heard both parties.

B 2. The Vamanapuram Block Panchayat, first respondent herein, entered into a "contract agreement" dated 15.3.1999 with the appellant under which the work of "RIDF-III, Pangode Sivakshetram - Thannichal Road improvements" was entrusted to her as per the articles of agreement, plans, specifications and conditions of contract approved by the Superintending

C Engineer, Commissionerate of Rural Development, State of Kerala. The Articles of agreement confirmed that the contractor had also signed the copy of the Madras Detailed Standard Specifications (for short 'MDSS') and addenda volume thereto in acknowledgement of being bound by all the conditions of the

D clauses. The MDSS which thus became a part of the contract between the parties, provided for settlement of disputes by arbitration vide clause 73 which is extracted below :

E "73. Arbitration.—In case of any dispute or difference between the parties to the contract either during the progress or after the completion of the works or after the determination, abandonment, or breach of the contract as to the interpretation of the contract, or as to any matter or thing arising thereunder except as to the matters left to the sole discretion of the Executive Engineer under clauses 20, 22, 27(c), 29, 36, 37 and 40 of the Preliminary Specification, or as to the withholding by the Executive Engineer of payment of any bill to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration of the Superintending Engineer of the nominated circle mentioned in the 'Articles of Agreement' (hereinafter called the "arbitrator") and the award of such arbitrator shall be final and binding on the parties."

H

3. Certain disputes having arisen in respect of the said contract, the appellant, by letter dated 28.12.2000, sought reference to arbitration of its claims aggregating to Rs.13,06,936/- in terms of the aforesaid arbitration clause contained in the MDSS forming part of the agreement. The Block Development Officer, Vamanapuram Panchayat, sent a reply dated 4.1.2001 denying the claims and informing the contractor that if she did not resume the work, the contract would be terminated at her risk and cost. The respondents, however, did not deny the existence of the arbitration agreement in the said reply.

4. Thereafter, the appellant filed an application under section 11 of the Arbitration & Conciliation Act, 1996 ('Act' for short) seeking appointment of an Arbitrator. The first respondent filed a counter denying the claims and also contending that there was no arbitration agreement. The said application was dismissed by the designate of the Chief Justice of the High Court by order dated 13.1.2003. He considered the contention of the appellant that there was an arbitration agreement in terms of clause 73 of MDSS for resolving the disputes. He also referred to the contention of the respondents that the government had decided to scrap arbitration by Government Order dated 19.11.1988, relevant portions of which read as under :

"On a detailed examination of the matter, Government finds that the system of arbitration has generally gone against the interests of the government and therefore, government has decided to stop altogether the system of referring the disputes for arbitration under any circumstances.

Accordingly, Government orders the following :

- (1) xxxxxxxx
- (2) Disputes and differences arising between the department and the contractors *in the PWD*

A contracts shall not be referred to arbitration hereafter and all provisions relating to arbitration in the tender documents shall be deleted or scored off under the signature of the executing parties.

B However, If any work is financed by an agency and that agency insists to have provision for arbitration, provision for arbitration may be provided in the agreement in respect of such work.

(3) xxxxx

C (4) The question of adopting the above procedure in other departments and organizations like Kerala State Electricity Board will be examined by the concerned department."

D [emphasis supplied]

The learned Designate of the Chief Justice accepted the said contention of the respondents and held as follows :

E "In view of the above notification (Government Order?) the arbitration clause in the tender documents and in the agreement shall stand deleted or scored off. When the above arbitration clause from the tender documents had been specifically deleted by the above notification, the applicant cannot again rely on the above arbitration clause and seek an order for appointing an arbitrator. As the above arbitration clause has been deleted by the above notification, the prayer for appointing an arbitrator for resolving the disputes and differences between the parties cannot be allowed."

G 5. The said order is challenged in this appeal by special leave. The question therefore is whether there is an arbitration agreement between the parties? The first respondent did not deny the existence of an arbitration clause in terms of clause 73 of MDSS, which was admittedly a part of the agreement.

H The contention was that the said arbitration clause stood

deleted from contracts in view of the G.O. dated 19.11.1988. The question is whether the arbitration clause has, in fact, stood deleted. A reading of the said order dated 19.11.1988 clearly shows that the deletion of the arbitration clause was directed only in regard to the Public Work Department contracts. In fact, it specifically provided that the question of adopting such deletion by other departments of the Government or by statutory bodies would be examined by the concerned department/statutory body. It is thus clear that the deletion of clause 73 of MDSS from the contract was made applicable only in regard to the contracts entered into by the Public Works Department of the State of Kerala and the question whether other governmental or quasi-governmental agencies should delete such a provision, was left to the individual decision/discretion of the respective authorities.

6. Admittedly, neither the first respondent nor the Panchayat Raj Department, decided to delete the arbitration clause. On the other hand, the first respondent entered into an agreement with the appellant long after the said Government Order dated 19.11.1988, that is, on 15.3.1999 and did not choose to delete clause 73 from the MDSS made part of the agreement. If the first respondent wanted to delete the arbitration agreement, it ought to have scored out clause 73 from the MDSS which was signed and made a part of the agreement or included a clause in the agreement that clause 73 of MDSS would not apply or that there shall be no arbitration. That was not done. In fact, in PWD contracts, to which the bar on arbitration was applied, the printed form of Articles of Agreement was amended to include a clause which confirmed that the "contractor has also signed the copy of the Madras Detailed Standard Specifications *excluding clause 73 and other clauses relating to arbitration.....*" Significantly such an exclusion is not made in the articles of Agreement entered by the first respondent Panchayat. It is thus clear that the arbitration clause was intended to form a part of the contract between the parties. Therefore, the disputes between the

A parties are referable to arbitration in terms of the said arbitration agreement. No other objection to the arbitration is raised.

B 7. In view of the above, the appeal is allowed and the first respondent is directed to refer the disputes to the Superintending Engineer in terms of the arbitration agreement contained in clause 73 of MDSS within six weeks from today. Nothing stated above shall be construed as an expression of any opinion on the merits of the claim.

C D.G. Appeal allowed.