

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).10304/2007
(From the judgment and order dated 31/08/2005 in SBAA No.5/2004 and dated
02/11/2006 in DBCWP No.8398/2005 of The HIGH COURT OF RAJASTHAN AT JAIPUR)

M/S WAGAD CONSTRUCTION CO. Petitioner(s)

VERSUS

STATE OF RAJASTHAN & ORS. Respondent(s)

(With appln(s) for c/delay in filing SLP and office report)

Date: 24/09/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

For Petitioner(s) Mr. S. Guru Krishna Kumar, Sr. Adv.
Mr. P.V. Yogeswaran, Adv.
Mr. A. Prasanna Venkat, Adv.
Mr. A. Mohan Raj, Adv.

For Respondent(s) Mr. Abhishek Gupta, Adv.
Ms. Pragati Neekhara, Adv.

UPON hearing counsel the Court made the following
O R D E R

Delay condoned.

Leave granted.

The appeal is allowed in terms of the signed order.

|(VINOD LAKHINA) | |(VEENA KHERA) |
|Court Master | |Court Master |

(SIGNED ORDER IS PLACED ON THE FILE)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8574 OF 2013

[Arising out of Special Leave Petition (Civil) No.10304 of 2007]

M/S WAGAD CONSTRUCTION CO. ...APPELLANT

VERSUS

STATE OF RAJASTHAN & ORS. ...RESPONDENTS

ORDER

Delay condoned.

Leave granted.

This appeal arises out of an order passed by a single judge of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur, whereby an application filed by the appellant under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking a reference of disputes between the parties to arbitration, has been dismissed.

The appellant had, it appears, secured a contract from the respondent State of Rajasthan for execution of earth work and linking work of Tonk Distributory of RMC of Bisalpur Project in the State of Rajasthan. An agreement executed between the parties governed the mutual rights and obligations in relation to the said contract and,

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inter alia, provided for settlement of differences and disputes between the parties by reference to what is described as Standing Committee comprising as many as five officers of the State Government, that included, Administrative Secretary concerned; Finance Secretary or his nominee, not below the rank of Deputy Secretary and/or Chief Accounts officer; and the Law Secretary or his nominee, not below the rank of Joint Legal Remembrancer. Two Chief Engineers were the other two members of the said Committee, which were, according to the scheme of the clause, supposed to examine and determine the disputes between the parties, subject to the receipt of an application from the contractor along with a fee equivalent to 2 per cent of the amount in dispute, not exceeding Rs.1 lakh. The appellant, it appears, raised certain disputes, but instead of approaching the Standing Committee in the manner prescribed and instead of depositing the fee stipulated for the purpose, filed an application under Section 11(6) of the Arbitration & Conciliation Act, 1996, which application has

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been, as noticed earlier, dismissed by the High Court, primarily on the ground that the procedure prescribed for invoking the arbitration clause had not been complied with by the contractor. The present appeal questions the correctness of the said order, as mentioned earlier.

Mr. S. Guru Krishna Kumar, learned Senior Counsel appearing for the appellant submitted that the High Court was in error in declining to make a reference of the disputes to the Committee or to a sole arbitrator for adjudication of the same, inasmuch as the existence of an agreement between the parties, not being in dispute, the High Court ought to have made a reference no sooner it was found that disputes had indeed arisen and required to be adjudicated upon. The High Court was, according to the learned counsel, competent to make a reference to a sole arbitrator if it was of the view that a reference to five Senior Officers of the State Government was an unwieldy and cumbersome exercise which could be avoided in the interests of an expeditious disposal of the matter. He drew our attention to the orders passed by this Court in a

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batch of special leave petitions filed by the State of Rajasthan, against orders passed by the High Court referring the disputes in those cases to a sole arbitrator based on the very same clause 23 that appeared in similar agreements executed between the parties in those cases. It was submitted that the High Court had failed to notice the said earlier orders and the fact that this Court had declined interference with the same. It was argued that refusal of a reference to arbitration at this belated stage would render the appellant remediless and causing an irreparable loss to it.

On behalf of the respondent State, it was contended that the references, based on clause 23, relied upon by the appellant, had, no doubt, been made by the High Court in other cases, which orders when challenged before this Court had been affirmed by this Court's order dated 16th February, 2010. All the same, a reference to arbitration could be made only if the appellant had complied with the essential requirements stipulated in clause 23, by

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making a formal application and depositing the fee stipulated for the purpose. It was urged that although the respondent State had all along held the view that clause 23 in the agreement was an arbitration clause, it was doubtful whether the same in law constituted a valid arbitration agreement that could be made a basis for a reference to arbitration.

The material facts are not in dispute. It is not in dispute that the parties have executed an agreement in relation to the works in question. It is also not in dispute that the differences have arisen between the parties which were sought to be referred for arbitration through the medium of the petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 used by the appellant. The only reason why the said petition

failed was that the appellant had not filed a formal application and failed to deposit the fee that was stipulated under the said clause. In our view, both these reasons were insufficient to deny a reference to arbitration, especially when it was common ground that clause 23 was always understood by the parties

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to be a arbitration clause and the existence of disputes between the parties was not denied. So also the fee could be deposited once a reference was made and the Arbitral Tribunal entered upon the reference. It is true that, on a more careful and critical reading of clause 23, it may appear that the same does not really constitute an arbitration agreement, but having regard to the fact that no such contention was ever raised by the respondent State before the High Court nor was it raised in the counter affidavit filed before this Court, we do not see any reason to allow that contention to be urged at this belated stage. That is so especially when the very same clause was the basis of references made earlier to sole arbitrators nominated by the High Court, which orders have been affirmed by this Court.

In the circumstances, therefore, we allow this appeal; set aside the order passed by the High court and direct that the disputes between the parties shall stand referred to the sole arbitration of Mr. M.N. Singhvi, Retired Chief Engineer, Government of Rajasthan, Jaipur. We are

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deliberately ignoring the Committee of Officers as in our opinion a reference to sole arbitration will not only be more appropriate in the circumstances having regard to similar orders made in the past by the High Court and affirmed by this court, but also because any reference to a five member Tribunal comprising Senior Officers of the State Government is bound to delay the disposal of the matter.

The parties are directed to appear before the nominated Arbitrator on 28th October, 2013 for further directions. We make it clear that the reference shall relate to all claims made by the appellant and all counter claims that the respondent may make against the appellant.

While we do not propose to fix the fee of the sole arbitrator and leave it to him to determine the same, we direct that whatever fee may be fixed on per hearing basis, the same shall not exceed a total amount of Rs. 2 lakhs, to be paid equally by both the parties.

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The appeal is disposed of in the above terms. No costs.

.....J.
(T.S. THAKUR)

.....J.
(VIKRAMAJIT SEN)

NEW DELHI
SEPTEMBER 24, 2013