A MALLIKARJUN

v.

GULBARGA UNIVERSITY

NOVEMBER 5, 2003

B [V.N. KHARE, CJ., S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.]

Arbitration :

Arbitration agreement—Essential elements of—Work contract—Assigned
C *to contractor by University—Clause in the agreement stipulating that in case of dispute between parties arising out of or relating to contract, decision of Superintending Engineer, PWD shall be final, conclusive and binding—Dispute between parties—Award given by Superintending Engineer made rule of court—In execution proceedings objections filed by University u/s 47 CPC contending*
D *that the purported agreement on the basis whereof dispute between the parties was referred to Superintending Engineer was not an arbitration agreement and as such award made by him was not in terms of provisions of Arbitration Act, 1940—Held, the relevant clause should be construed to be an arbitration agreement—The agreement did contain an arbitration clause—Essential elements of arbitration agreement enumerated—Besides, before the arbitrator*
E *parties proceeded on the basis that a reference of the disputes had been made to him in terms of the relevant clause of the contract which was construed to be an arbitration agreement—No objection was taken by University in this regard nor any objection filed by it in terms of s.34 of Arbitration and Conciliation Act, 1996—Arbitrator entered into the reference in view of the*
F *reference made by the Registrar of the University on the claims and disputes arising out of contract—Executing court would proceed with the execution of the award.*

Arbitration clause and clause for prevention of dispute—Distinguished.

G *Bihar State Mineral Development Corporation and Anr.* **v.** *Encon Builders (I) (P) Ltd.,* **[2003] 7 SCC 418, relied on.**

Bharat Bhushan Bapsal **v.** *U.P. Small Industries Corporation Ltd., Kanpur,* **[1999] 2 SCC 166, distinguished.**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2758 of 2002. A

From the Judgment and Order dated 30.11.2001 of the Karnataka High Court in C.R.P. No. 3719 of 2000.

Bhaskar P. Gupta, G.V. Chandrashekhar for P.P. Singh for the Appellant.

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Basava Prabhu, S. Patil, Shivaprabhu S. Hiremath, B. Subrahmanya Prasad, Mohd. Rishal S. for A.S. Bhasme for the Respondent.

The following Order of the Court was delivered by

In response to the Notification issued by the Gulbarga University inviting C tenders for construction of an Indoor Stadium, the appellant herein submitted his tender. His tender was accepted and on 21st May, 1993, an agreement was executed between the appellant and the respondent-University in connection with the work to be carried out by the appellant. The estimated cost of construction for the work order issued to the appellant was for Rs. D 91,88,909. It is not disputed that in pursuance of the work order, the appellant completed the construction. Certain disputes arose in relation where to the appellant herein invoked the arbitration clause. It is not in dispute that the Superintending Engineer, P.W.D., Gulbarga Circle, Gulbarga, ex-officio, was named to decide such disputes. Before the Arbitrator, the parties filed their claims and counter claims. The University also filed certain counter claims. E After hearing the parties, the Superintending Engineer, Gulbarga Circle, Gulbarga, who acted as an Arbitrator, gave the Award. However, no copy of the Award was furnished to the appellant as a result of which the appellant filed a petition under Article 226 of the Constitution of India for issue of writ of *mandamus* directing the Arbitrator to deliver a certified copy of the Award F given by him. In compliance of the directions of the High Court, the Arbitrator sent a certified copy of the Award dated 30th July, 1999. After the receipt of the certified copy of the Award, the appellant put the Award for execution before the Principal Civil Judge (Senior Division), Gulbarga. The Gulbarga University filed an objection in the execution petition filed by the appellant purported to be under Section 47 of the Code of Civil Procedure. However, G the Executing Court rejected the said objection on 19th October, 2000. Aggrieved, the Gulbarga University filed a Civil Revision Petition No. 3719 of 2000 under Section 115 of the Code of Civil Procedure, 1908 before the High Court of Karnataka.

In the said Civil Revision Petition a plea was raised that the purported H

A agreement on the basis whereof the dispute between the parties was referred to the Superintending engineer, Gulbarga Circle, Gulbarga, was not an arbitration agreement and consequently, the Award made by him is not one made in terms of the provisions of the Arbitration Act, 1940. The High Court accepted the plea taken by the University. Consequently, the execution
B proceedings were set aside and the Civil Revision Petition was allowed. It is against the said judgment of the High Court, the appellant is in appeal before us.

Shri Bhaskar P. Gupta, learned senior counsel appearing for the appellant, submitted that Clause 30 of the contract agreement constitutes an arbitration
C agreement as the same fulfills all the criteria laid down therefor and, thus, the High Court must be held to have erred in passing the impugned judgment.

Learned counsel appearing on behalf of the respondent on the other hand support the judgment of the High Court.

D Clause 30 of the agreement, which reads as under:

> "The *decision* of the Superintending Engineer of the Gulbarga Circle for the time being *shall be final, conclusive, and binding* on all *parties to the contract* upon all question relating to the meaning of the specifications, designs, drawings and instructions herein before
> E mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way *arising out of, or relating to the contract,* designs, drawings, specifications, estimates, instructions, orders or those conditions, or otherwise concerning the works or the execution,
> F or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof *in case of dispute arising between the contractor and Gulbarga University.*"
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> (Emphasis supplied)

G A plain reading of the aforementioned clause would show that in case of dispute between the contractor and Gulbarga university, the decision of the Superintending Engineer of the Gulbarga Circle, Gulbarga, shall be final and binding to all parties to the contract, such dispute may embrace within its fold all questions relating to the matters specified therein as also any other question, claim, right, matter or thing whatsoever in any way arising out of
H or relating to the contract. Such dispute may also relate to designs, drawings,

specifications, estimates, instructions, orders or those conditions or otherwise concerning the works or the execution or failure to execute the same. Such disputes may be referred to for decision of the Superintending Engineer; whether arising during the progress of the work after the completion thereof. A

There cannot, thus, be any doubt whatsoever that Clause 30 aforementioned fulfills all the criteria of a valid arbitration agreement. It is further not in dispute that the Superintending Engineer, Gulbarga Circle, Gulbarga is an independent person. B

In *Bihar State Mineral Development Corporation and Anr.* v. *Encon Builders (I) (p) Ltd.,* reported in [2003] 7 SCC 418, laid down the essential elements of the arbitration agreement, which are as follows: C

(i) There must be a present or a future difference in connection with some contemplated affair;

(ii) There must be the intention of the parties to settle such difference by a private tribunal; D

(iii) The parties must agree in writing to be bound by the decision of such tribunal; and

(iv) The parties must be *ad idem.*

The principles laid down in the aforementioned decision are not in question. We, therefore, are required to construe Clause 30 of the said agreement. E

Applying the aforesaid principle to the present case, Clause 30 requires that the Superintending Engineer, Gulbarga Circle, Gulbarga, to give his decision on any dispute that may arise out of the contract. Further we also find that the agreement postulates present or future differences in connection with some contemplated affairs inasmuch as also there was an agreement between the parties to settle such difference by a private tribunal, namely, the Superintending Engineer, Gulbarga Circle, Gulbarga. It was also agreed between the parties that they would be bound by the decision of the tribunal. The parties were also *ad idem.* F G

In the aforesaid view of the matter, it must be held that the agreement did contain an arbitration clause.

Learned counsel appearing for the respondent, relying on or on the H

A basis of the decision of this Court in *Bharat Bhushan Bansal* v. *U.P. Small Industries Corporation Ltd., Kanpur,* reported in [1999] 2 SCC 166, argued that in the said case it was held by this Court that it does not constitute arbitration clause. In *Bharat Bhushan Bansal's* case (supra), Clauses 23 and 24 read as follows:

B "23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

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24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contact upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein."

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It was difficult for the Court to spell out any intention of the parties to appoint the Managing Director as an Arbitrator having regard to the contents of the said two clauses. We may refer to the observations of this Court therein made in this regard, which are as under:

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"Therefore, in respect of certain claims, the decision of the Executive Engineer is final and binding on both the parties to the contract. While in respect of the remaining matters, the decision of the Managing Director of the respondent is final, conclusive and binding on both the parties to the contract. Clause 24 does not mention that may dispute can be referred to the arbitration of the Managing Director. Clause 24 also does not spell out any duty on the part of the Managing Director to record evidence or to hear both parties before deciding the questions before him. From the wording of clause 24, it

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is difficult to spell out any intention of the parties to leave, any disputes to the adjudication of the Managing Director of the respondent as an arbitrator." A

Para 5 of *Bharat Bhushan Bansal's* case (supra) reads as thus:

"In the present case, reading clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by the Arbitration Act." B C

A bare comparison of Clause 30 of the contract agreement involved in the present matter and clauses 23 and 24 involved in *Bharat Bhushan Bansal's* case (supra), it would show that they are not identical. Whereas Clause 30 of the agreement in question provides for resolution of the dispute arising out of contract by persons named therein; in terms of Clause 24, there was no question of decision by a named person on the dispute raised by the parties to the agreement. The matters which are specified under Clauses 23 and 24 in *Bharat Bhushan Bansal's* case (supra) were necessarily not required to arise out of the contract, but merely claims arising during performance of the contract. Clause 30 of the agreement in the present case did provide for resolution of dispute arising out of contract by the Superintending Engineer, Gulbarga Circle, Gulbarga. For that reason, the case relied upon by the learned counsel for the respondent is distinguishable. D E F

Once Clause 30 is constitute to be a valid arbitration agreement it would necessarily follow that the decision of the Arbitrator named therein would be rendered only upon allowing the parties to adduce evidence in support of their respective claims and counter claims as also upon hearing the parties to the dispute. For the purpose of constituting the valid arbitration agreement, it is not necessary that the conditions as regards adduction of evidence by the parties or giving an opportunity of hearing to them must specifically be mentioned therein. Such conditions, it is trite are implicit in the decision making process in the arbitration proceedings. Compliance of G H

A the principles of natural justice inheres in an arbitration process. They, irrespective of the fact as to whether recorded specifically in the arbitration agreement or not are required to be followed. Once the principles of natural justice are not complied with, the Award made by the Arbitrator would be rendered invalid. We, therefore, are of the opinion that the arbitration clause does not necessitate spelling out of a duty on the part of the arbitrator to hear B both parties before deciding the question before him. The expression decision' subsumes adjudication of the dispute. Here in the instant case, it will bear repetition to state, that the disputes between the parties arise out of a contract and in relation to matters specified therein and, thus, were required to be decided and such decisions are not only final and binding on the parties, but C they are conclusive which clearly spells out the finality of such decisions as also its binding nature.

A clause which is inserted in a contract agreement for the purpose of prevention of dispute will not be an arbitration agreement. Such a provision has been made in the agreement itself by conferring power upon the Engineer D In-charge to take a decision thereupon in relation to the matters envisaged under Clauses 31 and 32 of the said agreement. Causes 31 and 32 of the said agreement provide for a decision of the Engineer In-charge in relation to the matters specified therein. The jurisdiction of the Engineer In-charge in relation to such matters is limited and they cannot be equated with an arbitration E agreement. Despite such clauses meant for prevention of dispute arising out of a contract, significantly Clause 30 has been inserted in the contract agreement by the parties.

The very fact that Clause 30 has been inserted by the parties despite the clauses for prevention of dispute is itself a pointer to the fact that the parties F to the contract were *ad idem* that the dispute and differences arising out of or under the contract should be determined by a domestic tribunal chosen by them.

The said clause being a part of the contract agreement, it is beyond any cavil that the parties were *ad idem* in relation thereto.

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The Superintending Engineer, Gulbarga Circle, Gulbarga, is an officer of the Public Works Department in the Government of Karnataka. He is not an officer of the University. He did not have any authority or jurisdiction under the agreement or otherwise either to supervise the construction works or issue any direction(s) upon the contractor in relation to the contract job. H He might be an ex-officio member of the building committee, but thereby or

by a reason thereof, he could not have been given nor in fact had been given an authority to supervise the contract job or for that matter issue any direction upon the contract as regards performance of the contract. A

In that view of the matter also Clause 30 of the contract agreement should be construed to be an arbitration agreement.

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The submission of the learned counsel for the respondent that the dispute was not referred to the Arbitrator is not correct. Whatever be the understanding of the Vice Chancellor of the respondent-University; before the Arbitrator the parties proceeded on the basis that a reference of the disputes had been made to him in terms of Clause 30 of the contract, which was construed to be an arbitration agreement. Further from the Award dated 30th July, 1999, it would appear that the Arbitrator entered into the reference in view of the reference made by the Registrar of the Gulbarga University on the claims and disputes arising out of contract of "Construction of Indoor stadium at university Campus", which has arisen between the parties hereto. C

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Learned counsel for the respondent then urged that his client has not been given sufficient opportunity to lead evidence. The contention cannot be accepted for more than one reason. The matter was heard by the Arbitrator. Both the parties were represented by their agents and authorised representatives. It will bear repetition to state that claims and counter claims were filed by the parties and they filed documents in support of their respective claims. E

The learned Arbitrator in his Award recorded that the parties were given full opportunity to present their case and have their say on each of their claims and contentions in the meeting held in his office on 5.3.99. The Arbitrator in his Award further stated that as the parties based their cases only on the documents and did not pray for adduction of oral evidence and in that view of the matter, in our opinion the Award cannot be faulted. Furthermore, concededly during the arbitration proceedings and immediately thereafter, no objection was taken by the respondent to the effect that Clause 30 does not constitute an arbitration agreement or the Superintending Engineer, Gulbarga Circle, Gulbarga, was not an Arbitrator. If the contention of the respondent is to be accepted, there was no occasion for them to submit their counter claim. They should have filed a suit. With their eyes wide open they submitted themselves to the jurisdiction of the Arbitrator, filed documents in support of their defence to the claims raised by the appellant as also their F G H

A own counter claims and took part in the proceedings. Even when an Award was made and the appellant herein filed a writ petition for direction upon the Arbitrator to issue a certified copy of the Award, it was not contended that the said writ petition was not maintainable as the Superintending Engineer, Gulbarga Circle, Gulbarga, did not act as an Arbitrator. When a writ was issued by the High Court of Karanataka to the Arbitrator, directing him to
B furnish a certified copy of his Award, the respondent herein must be held to have accepted the same as it did not carry the matter further.

Then took the said objection only in their purported objection filed in the execution proceedings under Section 47 of the Code of Civil Procedure.
C If their contention was that the Award made by the Superintending Engineer, Gulbarga Circle, Gulbarga, was without any authority or beyond his jurisdiction, they could have furthermore filed an appropriate application in terms of Section 34 of the Arbitration and Conciliation Act, 1996.

For the aforesaid reason, the appeal deserves to be allowed. The order
D under challenge is set aside. We direct the executing Court to proceed with the execution of the Award. There shall be no order as to costs.

R.P. Appeal allowed.