IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.62 OF 2017

M/s. F.A.Enterprise
A registered Partnership firm
having its registered office at
Plot No.112, 1st Floor, 6th Road, T.P.S. III,
Opposite Hotel Oriental Place, Khar,
Mumbai – 400 052. … Petitioner

Versus

1. Vidarbha Irrigation Development Corporation,
A Government of Maharashtra undertaking
Yavatmal Irrigation Circle, Yavatmal.

2. The Executive Director,
Vidarbha Irrigation Development Corporation,
A Government of Maharashtra undertaking
Yavatmal Irrigation Circle, Yavatmal. ... Respondents

Ms. Shilpa Kapil, for Petitioner.
Mr. P.M.Palshikar, for Respondent Nos.1 and 2.

CORAM: S.J. KATHAWALLA, J.

DATE : 13th AUGUST, 2021

JUDGMENT :

1. The above Arbitration Petition is filed by the Petitioner under Section 11

of the Arbitration and Conciliation Act, 1996 ('the Act') seeking appointment of an Arbitrator to decide the disputes between the Petitioner and the Respondents arising out of the Work Contract dated 17th August, 2009.

2. The facts which have led to the filing of the above Arbitration Application, are in brief set out hereunder :

2.1 The Petitioner is a registered Partnership Firm, undertaking engineering and irrigation contracts of various organizations.

2.2 Respondent No.1 is a Statutory Corporation formed by the Government of Maharashtra in the year 1997, for timely completion of irrigation projects in the Vidarbha Region. Respondent No.2 is the Executive Director of Respondent No.1.

2.3 Pursuant to a Tender Notice No.1/2009-2010, a Work Order dated 17th August, 2009 was issued by the Respondents to the Petitioner for *"Construction of left bank, main canal of Lower Penganga Project @ RD 36000 mt to 55000 mt., of District Yavatmal",* at Tender Cost of Rs.699,76,22,994/-, to be completed within 72 months from the date of issue of the said Work Order. The work was to be carried out as per the General and Special Conditions mentioned in the Tender.

2.4 Relying on Clauses 30.1, 30.2 and 30.3 of the General Conditions of the Contract, the Petitioner has submitted that there exist an Arbitration Agreement between the Petitioner and the Respondent No.1. The said Clauses 30.1, 30.2 and 30.3 read thus :

"Clause 30.1 - Except where otherwise specified in the contract and subjected to the powers delegated to him by Corporation under the code, rules then in force, the decision of Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions herein before mentioned and as to the quality of workmanship or material used on the work or as to any other questions claims, right matter or thing whatsoever if any way arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute same, whether arising during the progress of work or after the completion or abandonment thereof.

Clause 30.2 The contractor may within 30 days of receipt by him of any order passed by the Superintending Engineer of the circle as aforesaid appeal against it to the Chief Engineer concerned with the contract work or project provided that .....

a) The accepted value of the contract exceeds Rs. 100 Lakhs (Rs. One Hundred Lakhs)

b) Amount of claims is not less than Rs.1.00 Lakh (Rupees one Lakhs)

Clause 30.3 - If the contractor is not satisfied with the order passed by the Chief Engineer as aforesaid the contractor may

> within 30 days of receipt by him of any such order appeal against it to the Executive Director, Vidarbha lrrigation Development Corporation, Nagpur. Who, if convinced that prima facie the contractor's claim rejected by Superintendent Engineer / Chief Engineer is not frivolous and that there is some substance in the claim of the contractor as would merit a detailed examination and decision by the Executive Committee / Claim Committee at Corporation level for suitable decision."

2.5 By a Letter dated 12th May, 2011, the Respondent No.2 on behalf of the Respondent No.1, informed the Petitioner that the Chief Engineer, Water Resources Department, Amaravti, has ordered the said work to be cancelled due to non availability of funds and therefore the said Notice of Cancellation was being issued to the Petitioner under Clause 15 of the Tender Document.

2.6 Since disputes arose between the parties in this regard, the Petitioner vide its Letter dated 11th April, 2014 invoked Clause 30.1 of the General Conditions of the Contract and requested for payment as set out in the said Letter dated 11th April, 2014.

2.7 Since the Superintendent Engineer failed to order the payment as demanded by the Petitioner, the Petitioner vide its Letter dated 12th May, 2014 invoked the authority of the Chief Engineer, as per Clause 30.2 of the General Conditions of the Contract.

2.8 Since the Chief Engineer failed to respond to the Petitioner's Letter dated 12th May, 2014, the Petitioner filed the above Arbitration Petition seeking the following reliefs :

> "(i) the Respondents be directed to file Original Tender No.1/2009-2010 along with Work Order No.2806/LLP/TC/dt 21/08/09 and General & Special Conditions containing arbitration clause in this Hon'ble Court;
>
> (ii) the Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Executive Committee / Claim Committee to adjudicate the claims of the Petitioner made vide their Letter dated 11th April, 2014 (Annexure N);
>
> (iii) Alternatively, the Hon'ble Chief Justice and Hon'ble designated Judge may be pleased appoint a qualified, independent, impartial fit and proper person preferably retired Judge from this Hon'ble Court as an Arbitrator and refer the letter dated 11/04/2014 (Annexure N) for arbitration on terms of reference;"

3. The Learned Advocate appearing for the Petitioner has taken us through the above facts and has submitted that the Petitioner is entitled to the aforestated reliefs. The Learned Advocate for the Respondents have submitted that there is no arbitration agreement entered into between the parties and thus, the Petition filed under Section 11(6) of the Act, is not maintainable. In support of their submission, the Respondents have relied on the Judgments of the Supreme Court in the case of *Vishnu (Dead) by Lrs V/s. State of Maharashtra and Ors.*[1] and in the case of *M/s. P.*

1 (2014) 1 SCC 516

Dasarathorama Reddy Complex V/s. Government of Karnataka[2], which judgments are followed by the Learned Single Judge of this Court in his Judgment in the case of *B.T.Patil and Sons, Belgaum and Anr. V/s. Maharashtra Krishna Valley Development Corporation and Ors.*[3]

4. The Learned Advocate for the Petitioner on the other hand has submitted that even if this Court comes to the conclusion that Clauses 30.1, 30.2 and 30.3 of the General Conditions of the Contract do not constitute a valid arbitration agreement, this Court may direct the Executive Committee / Claim Committee of the Respondents to adjudicate the claim of the Petitioner made vide its Letter dated 11th April, 2014 (Annexure N to the Petition). In support of this contention, the Petitioner has relied on an Unreported Order dated 12th August, 2010 passed by a Learned Single Judge of this Court in the case of M/s. U.P. State Bridge Corporation Limited V/s. Government of Maharashtra and Anr.[4], and an Unreported Judgment of the Supreme Court in the case of M/s. Master Tours and Travels V/s. The Chairman, Shri Amarnath Ji Shrine Board and Ors[5].

5. We have considered the above submissions made on behalf of the Petitioner, as well as the Respondents and have also gone through the case laws cited by them. For the sake of convenience, we at the cost of repetition, once again

2 (2014) 2 SCC 201
3 Judgment dated 11th July, 2014 in Arbitration Application No.117 of 2013
4 Order dated 12th August, 2010 in Arbitration Application No.229 of 2008
5 Judgment dated 15th December, 2015 in Civil Appeal No.14620 of 2015

reproduce Clauses 30.1, 30.2 and 30.3 of the General Conditions of the Contract relied upon by the Petitioner :

> "Clause 30.1 - Except where otherwise specified in the contract and subjected to the powers delegated to him be Corporation under the code, rules then in force, the decision of Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions herein before mentioned ans as to the quality of workmanship to material used on the work or as to any other questions claims, right matter or thing whatsoever if any way arising out of or relating to the contract designs, drawing, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute same, whether arising during the progress of work or after the completion or abandonment thereof.
>
> Clause 30.2 The contractor may within 30days of receipt by him of any order passed by the Superintending Engineer of the circle as aforesaid appeal against it to the Chief Engineer concerned with the contract work or project provided that .....
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> a) The accepted value of the contract exceeds Rs. 100 Lakhs (Rs. One Hundred Lakhs)
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> b) Amount of claims is not less the n Rs.100 Lakh (Rupees one Lakhs)

> Clause 30.3 - If the contractor is not satisfied with the order passed by the Chief Engineer as aforesaid the contractor may within 30 days of receipt by him of any such order appeal against it to the Executive Director, Vidarbha lrrigation Development Corporation, Nagpur. Who, if convinced that prima facie the contractor's claim rejected by Superintendent Engineer / Chief Engineer is not frivolous and that there is some substance in the claim of the contractor as would merit a detailed examination and decision by the Executive Committee / Claim Committee at Corporation level for suitable decision."

6. The Respondents have relied upon the Judgment of the Supreme Court in the case of Vishnu (dead) by LRs (Supra), more particularly, paragraphs 11 to 15 and 23 and 24 and have submitted that the Supreme Court has held that clauses similar to the clauses relied upon by the Petitioner herein, cannot be treated as an arbitration agreement and there is an inherent danger in treating the Superintendent Engineer as an Arbitrator. Paragraphs 11 to 15 and 23 and 24 of the said Judgment are reproduced hereunder :

> "11. We have considered the respective arguments. Clauses 29 and 30 of the B-1 Agreements entered into between the parties read as under :
>
> *"29. All works to be executed under the contract shall be executed under the direction and subject to the approval in all respects of*

the Superintending Engineer of the Circle for the time being, who shall be entitled to direct at what point or points and in what manner they are to be commenced, and from time to time carried on.

30. Except where otherwise specified in the contract and subject to the powers delegated to him by the Government under the Code Rules then in force the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions, relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter, or thing whatsoever, if any way arising, out of, or relating to the contract designs, drawings, specifications, estimates, instructions, orders, or these conditions 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 or abandonment thereof."

12. Para 224 of the Maharashtra Public Works Manual, as amended by Government C.M No. CAT-1070/460—DSK.2, dated 9-5-1977, reads as under:

"224. Clause 30 of B-1 and B-2 Agreement forms lays down that the decision of the Superintending Engineer in certain matters relating to the contract would be final. The Superintending Engineer's decision taken under this clause should be considered as that taken as an arbitrator and this should be considered as the decision taken under the Arbitration Act. The decisions taken by the Superintending Engineer under the other clauses should be considered different from his decision taken under Clause 30 of B-1 and B-2 tender agreements as an

arbitrator."

13. We shall first consider the question whether Clause 30 of B-1 Agreements can be construed as an arbitration clause:

13.1 A conjoint reading of Clauses 29 and 30 of B-1 Agreements entered into between the parties shows that the appellant had to execute all works subject to the approval in all respects of the Superintending Engineer of the Circle, who could issue directions from time to time about the manner in which work was to commence and be executed. By virtue of Clause 30, the decision of the Superintending Engineer of the Circle was made final, conclusive and binding on all the parties in respect of all questions relating to the meaning of the specifications, designs, drawings, quality of workmanship or materials used on the work or any other question relating to claim, right, matter or things arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders, etc.

13.2 These two clauses by which the Superintending Engineer was given overall supervisory control were incorporated for smooth execution of the works in accordance with the approved designs and specifications and also to ensure that the quality of work is not compromised. The power conferred upon the Superintending Engineer of the Circle was in the nature of a departmental dispute resolution mechanism and was meant for expeditious sorting out of problems which could crop up during execution of the work.

13.3 Since the Superintending Engineer was made overall in-charge of all works to be executed under the contract, he was considered by the parties to be the best person who could provide

immediate resolution of any controversy relating to specifications, designs, drawings, quality of workmanship or material used, etc. It was felt that if all this was left to be decided by the regular civil courts, the object of expeditious execution of work of the project would be frustrated. This is the primary reason why the Superintending Engineer of the Circle was entrusted with the task of taking decision on various matters.

13.4 However, there is nothing in the language of Clause 30 from which it can be inferred that the parties had agreed to confer the role of arbitrator upon the Superintending Engineer of the Circle.

14. In Russell on Arbitration, 21st Edn., the distinction between an expert determination and arbitration has been spelt out in the following words:

"Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'Arbitral Tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive…. Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the

procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an Arbitral Tribunal as opposed to the expertise of the expert;…. An Arbitral Tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or, if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion…."

15. A clause substantially similar to Clause 30 of B-1 Agreements was interpreted by a three-Judge Bench in State of U.P. v. Tipper Chand[6] and it was held that the same cannot be construed as an arbitration clause. Paras 2 and 4 of the judgment which contain the reasons for the aforesaid conclusion are reproduced below: (SCC pp. 341-42)

"2. The suit out of which this appeal has arisen was filed by the respondent before us for recovery of Rs 2000 on account of dues recoverable from the Irrigation Department of the petitioner State for work done by the plaintiff in pursuance of an agreement, Clause 22 of which runs thus:

'Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other

6 6 (1980) 2 SCC 341

question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, 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 or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor.'

4. After perusing the contents of the said clause and hearing the learned counsel for the parties we find ourselves in complete agreement with the view taken by the High Court. Admittedly, the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time."

23. The aforesaid judgments fully support the view taken by us that Clause 30 of B-1 Agreements is not an arbitration clause.

24. The issue deserves to be looked into from another angle. In terms of Clause 29 of B-1 Agreements, the Superintending Engineer of the Circle was invested with the authority to approve all works to be executed under the contract. In other words, the Superintending Engineer was to supervise execution of all works. The power conferred upon him to take decision on the matters enumerated in Clause 30 did not involve adjudication of any dispute or lis between the State Government and the contractor. It would have been extremely anomalous to appoint him as arbitrator

> to decide any dispute or difference between the parties and pass an award. How could he pass an award on any of the issues already decided by him under Clause 30? Suppose, he was to decline approval to the designs, drawings, etc. or was to object to the quality of materials, etc. and the contractor had a grievance against his decision, the task of deciding the dispute could not have been assigned to the Superintending Engineer. He could not be expected to make adjudication with an unbiased mind. Even if he may not be actually biased, the contractor will always have a lurking apprehension that his decision will not be free from bias. Therefore, there is an inherent danger in treating the Superintending Engineer as an arbitrator."

7. The Respondents have also relied upon the judgment of the Supreme Court in the case of M/s. P. Dasarathorama Reddy Complex (Supra) more particularly, paragraphs 10, 14, 15, 19, 20, 24, 25 and 27 and has submitted that the Supreme Court in its judgment in that case considered the similar provisions in several contracts and has held that none of those clauses can be construed as an arbitration agreement. Paragraphs 10, 14, 15, 19, 20, 24, 25 and 27 of the said Judgment are reproduced hereunder :

> **"10.** We have considered the respective submissions. Clause 29 of the Agreement entered into between the parties (the appellant and the respondents in Civil Appeal No.1586 of 2004) and majority of other cases read as under:
>
> (*Mysore Construction Co. Case,* ILR pp. 4956-58, para 3)

"29.(a) S*ettlement of dispute time-limit for decision* – If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/Superintending Engineer and the Contractor regarding the following matters namely, --

(i) The meaning of the specifications designs, drawings and instructions herein before mentioned;

(ii) The quality of workmanship or material used on the work and

(iii) Any other questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of' the work, or after the completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the Contractor to do so, given written notice of his decision to the contractor.

(b) *Chief Engineer's decision final* - Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor. The said decision shall forthwith be given effect to and contractor shall proceed with the execution of the work with all due diligence.

(c) *Remedy when Chief Engineer's decision is not acceptable to Contract* - In case the decision of the Chief Engineer is not acceptable to the contractor, he may approach the Law Courts at for settlement of dispute after giving due written notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of the written notice of the decision of the Chief Engineer.

(d) *Time-limit for notice to approach law Court by Contractor* - If the Chief Engineer has given written notice of his decision to the Contractor and no written notice to approach the law court has been communicated to him by the Contractor within a period of ninety days from receipt of such notice, the said decision shall be final and binding upon the Contractor.

(e) *Time-limit for notice to approach law court by contractor when decision is not given by CE as at (b)* - If the Chief Engineer fails to give notice of his decision within a period of ninety days from the receipt of the Contractors request in writing for settlement of any dispute or difference as aforesaid, the contractor may within ninety days after the expiry of the first named period of ninety days approach the Law Courts at giving due notice to the Chief Engineer. Contractor to execute and complete work pending settlement of disputes.

(f) Whether the claim is referred to the Chief Engineer or to the Law Courts, as the case may be, the contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences. Obligations of the Executive Engineer and Contractor shall remain unsettled during consideration of dispute.

(g) The reference of any dispute or difference to the Chief Engineer or the Law Court may proceed notwithstanding that the works shall then be or be alleged to be complete, provided always that the obligations of the Executive Engineer and the Contractor shall not be altered by reason of the said dispute or difference being referred to the Chief Engineer or the Law Court during the Progress of the works."

(emphasis supplied)

14. In *Mysore Construction Company v. Karnataka Powr Corporation Limited* and others (supra), the learned Designated Judge referred to the passage

from Russell on Arbitration (19th Edn., p.59), the judgments of this Court in *K.K. Modi v. K.N. Modi and others (supra)*, *Chief Conservator of Forests, Rewa v. Ratan Singh Hans*, *Smt. Rukmanibai Gupta v. The Collector, Jabalpur (supra)*; *State of Uttar Pradesh v. Tipper Chand* ; *State of Orissa v. Damodar Das* ; *Bharat Bhushan Bansal v. Uttar Pradesh Small Industries Corproaiton Limited, Kanpur* and observed: *(Mysore Construction Co. Case,* ILR p. 4953*)*

> "The above decisions make it clear that an agreement or a clause in an agreement can be construed as an arbitration agreement, only if,
>
> (i) it provides for or contemplates reference of disputes or difference by either party to a private forum (other than a Court or Tribunal) or decision;
>
> (ii) it provides either expressly or impliedly, for an enquiry by the private forum giving due opportunity to both parties to put forth their cases; and
>
> (iii) it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both would abide by such decision.
>
> Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious enquiry, or for a decision which is final and binding on parties to the dispute, there is no arbitration agreement."

15. The learned Designated Judge then analysed Clause 29 (old Clause 67) and recorded his observations in the following words: (Mysore Construction Co. Case, ILR pp. 4969-71, paras 22-23)

> "22. ... (a) The heading of the clause is 'settlement of disputes'. There is no reference to either 'arbitration' or 'Arbitrator'.
>
> (b) Sub-clause (a) provides that if any dispute or difference of any kind whatsoever to arise between the Executive Engineer/Superintending Engineer and the Contractor, regarding the

matters mentioned therein, the dispute shall in the first place be referred to Chief Engineer, who has jurisdiction over the work specified in the contract. Thus the reference to the Chief Engineer is only the first phase of the process of settlement of disputes and not the final phase of the settlement of disputes. This is evident from the provision that when a dispute arises, it should in the first place, be referred to the Chief Engineer for decision.

(c) The reference is to a person, who has jurisdiction over the contract work and not to an independent Authority nor to an officer of the Corporation, who has no connection or control over the work. In other words, the decision of Chief Engineer is a decision by a person who has overall supervision and charge of the execution of the work. This gives an indication that the decision of the Chief Engineer is not intended to be an adjudication of the rights of the parties to the dispute, but intended to be a decision of one party in regard to the claim of the other party, to enable the other party to seek relief in a Court of law, if he is not satisfied with the decision.

(d) Sub-clause (b) provides that subject to other form of settlement provided in the ensuing sub-clause, the Chief Engineer's decision in respect of every dispute or difference so referred, shall be final and binding upon the Contractor. This clause makes it clear that the final remedy of the Contractor is to approach the law Court for decision on the dispute. It is also significant that the decision given by the Chief Engineer is made final and binding upon the Contractor (subject to other remedies specified) and not KPC. Any decision, which is made binding only on one party and not on both the parties, cannot be an adjudicatory decision. The very principle of adjudication of a dispute is that it is binding on both the parties.

(e) Clause (c) provides that if the Contractor is not satisfied with the decision of the Chief Engineer, he can approach the law Court

at Karwar for settlement of the dispute The clause requires the Contractor to approach the law Court for settlement of disputes. If as contended by the petitioner, the disputes are to be settled by way of arbitration by the Chief Engineer, acting as Arbitrator, then the question of one of the parties being permitted to approach the law Courts for settlement of the disputes does not arise. If the Chief Engineer is the Arbitrator and his decision is an award, then a party can approach the Civil Court only for setting aside the award and not for settlement of the disputes. This provision makes it clear that the decision of the Chief Engineer is not intended to be a decision by way of adjudication of the disputes/differences between the parties by way of arbitration but is intended to be merely a decision of the party (employer) which, when intimated to the other side, gives rise to a cause of action to the other party (Contractor) to approach the Civil Court for adjudication of its dispute/claim.

(f) Similarly, sub-clause (d) which provides that if the Chief Engineer does not give his decision within a particular period, the Contractor can approach the Civil Court for settlement of the dispute, again demonstrates that no finality is intended to be attached to the decision of the Chief Engineer and the final adjudication should be by the Civil Court and not by the Chief Engineer.....

23. The scheme of Clause 29 (or old Clause 67) therefore is, whenever the Contractor has a claim which is not settled by the Executive Engineer or Superintending Engineer, he has to make the claim before the Chief Engineer. If the Chief Engineer examines the matter and gives his decision which is not acceptable to the Contractor, or if the Chief Engineer does not give his decision within the time specified, the Contractor has to approach the Civil Court, by filing a civil suit and get his disputes/claims adjudicated, on merits. Use of words 'to approach the Civil Court for settlement of disputes' makes it clear that final adjudicating authority in the case of a dispute is the Civil Court and

not the Chief Engineer. Thus, the Intention of the parties is not to refer any dispute for adjudication by way of arbitration but to get adjudicated the dispute only through the normal procedure of approaching law Courts. The said clause does not also contemplate or require the Chief Engineer to hold any enquiry or hear the parties before deciding the matter. On the other hand, the clause merely requires the Chief Engineer to consider the claim of the Contractor and give his decision thereon. Such decision being on behalf of KPC, the Contractor can either accept it or approach the Civil Court for adjudication. Thus the petitioner has failed to make out two of the three ingredients -- requirement of enquiry by the named Authority and requirement of finality by a binding decision." (emphasis in original)

19. In *State of Orissa v. Damodar Das (supra)*, a three-Judge Bench interpreted Clause 21 of the contract entered into between the appellant and the respondent for construction of sump and pump chamber etc. for pipes W/S to Village Kentile. The respondent abandoned the work before completion of the project and accepted payment of the fourth running bill. Subsequently, he raised dispute and sent communication to the Chief Engineer, Public Health, Orissa for making a reference to an Arbitrator. The Subordinate Judge, Bhubaneswar allowed the application filed by the respondent under Section 8 of the 1940 Act and the order passed by him was upheld by the High Court.

20. This Court referred to Clause 25 of the agreement, relied upon the judgment in *State of U.P. v. Tipper Chand (supra)* and held that the said clause cannot be interpreted as providing resolution of dispute by an Arbitrator. Paragraphs 9 and 10 of the judgment, which contain discussion on the subject, are extracted below: (*Damodar Das case,* SCC pp. 222-23)

"9. The question, therefore, is whether there is any arbitration agreement for the resolution of the disputes. The agreement reads thus:

"25. Decision of Public Health Engineer to be final. — Except where otherwise specified in this contract, the

> decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials 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, drawings, specifications, estimates, instructions, orders or these conditions, 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 or the sooner determination thereof of the contract."

10. Section 2(a) of the Act defines "arbitration agreement" to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". Indisputably, there is no recital in the above clause of the contract to refer any dispute or difference present or future to arbitration. The learned counsel for the respondent sought to contend from the marginal note, viz., "the decision of Public Health Engineer to be final" and any other the words "claim, right, matter or thing, whatsoever in any way arising out of the contract, drawings, specifications, estimates, instructions, orders or these conditions, 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 or the sooner determination thereof of the contract" and contended that this clause is wide enough to encompass within its ambit, any disputes or differences arising in the aforesaid execution of the contract or any question or claim or right arising under the contract during the progress of the work or after the completion or sooner determination thereof for reference to an arbitration. The High Court, therefore, was right in its conclusion

that the aforesaid clause gives right to arbitration to the respondent for resolution of the dispute/claims raised by the respondent. In support thereof he relied on Ram Lal Jagan Nath v. Punjab State through Collector AIR 1966 Punj 436. It is further contended that for the decision of the Public Health Engineer to be final, the contractor must be given an opportunity to submit his case to be heard either in person or through counsel and a decision thereon should be given. It envisages by implication existence of a dispute between the contractor and the Department. In other words, the parties construed that the Public Health Engineer should be the sole arbitrator. When the claim was made in referring the dispute to him, it was not referred to the court. The respondent is entitled to avail of the remedy under Sections 8 and 20 of the Act. We find it difficult to give acceptance to the contention. A reading of the above clause in the contract as a conjoint whole, would give us an indication that during the progress of the work or after the completion or the sooner determination thereof of the contract, the Public Health Engineer has been empowered to decide all questions relating to the meaning of the specifications, drawings, instructions hereinbefore 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 drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works or the execution or failure to execute the same has been entrusted to the Public Health Engineer and his decision shall be final. In other words, he is nominated only to decide the questions arising in the quality of the work or any other matters enumerated hereinbefore and his decision shall be final and bind the contractor. A clause in the contract cannot be split into two parts so as to consider one part to give rise to difference or dispute and another part relating to execution of work, its workmanship etc. It is settled now that a clause in the contract must be read as a whole. If the

> construction suggested by the respondent is given effect then the decision of the Public Health Engineer would become final and it is not even necessary to have it made rule of the court under the Arbitration Act. It would be hazardous to the claim of a contractor to give such instruction and give power to the Public Health Engineer to make any dispute final and binding on the contractor. A careful reading of the clause in the contract would give us an indication that the Public Health Engineer is empowered to decide all the questions enumerated therein other than any disputes or differences that have arisen between the contractor and the Government. But for clause 25, there is no other contract to refer any dispute or difference to an arbitrator named or otherwise." (emphasis supplied)

24. *In Bharat Bhushan Bansal v. U.P. mall Industries Corpn Ltd.*, a two-Judge Bench interpreted Clauses 23 and 24 of the agreement entered into between the parties for execution of work of construction of a factory and allied buildings of the respondent at India Complex, Rai Bareli. Those clauses were as under:

> "*Decision of the Executive Engineer of the UPSIC to be final on certain matters*
>
> 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.
>
> *Decision of the MD of the UPSIC on all other matters shall be final*
>
> 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 contract 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."

It was argued on behalf of the appellant that Clause 24 should be construed as an arbitration clause because the decision of the Managing Director was binding on both the parties.

25. The two-Judge Bench analysed Clauses 23 and 24 of the agreement, referred to the judgment in *K.K. Modi v. K.N. Modi (supra)*, *State of U.P. v. Tipper Chand (supra)*, *State of Orissa v. Damodar Das (supra)* and observed: (*Bharat Bhushan Bansal case*, SCC p. 171, paras 9, 10)

> "9. In the present case, the Managing Director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In para 18.067 of Vol. 2 of Hudson on Building and Engineering Contracts. Illustration (8) deals with the case where, by the terms of a contract, it was provided that the engineer
>
> > 'shall be the exclusive judge upon all matters relating to the construction, incidents, and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the

> contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties.'
>
> It was held that this clause was not an arbitration clause and that the duties of the Engineer were administrative and not judicial.
>
> 10. Since clause 24 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration Act, 1940 was misconceived. The appeal is, therefore, dismissed though for reasons somewhat different from the reasons given by the High Court. there will, however, be no order as to costs."

27. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. The Chief Engineer or the Designated Officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a Court of Law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate Court. The use of the expression 'in the first place' unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy.

> Therefore, Clause 29 which is subject matter of consideration in most of the appeals and similar clauses cannot be treated as an Arbitration Clause".

8. In the case of B.T.Patil and Sons (Supra), the Petitioner had in support of its submission, that there exists an Arbitration Agreement between the parties, relied on the very same Clauses 30.1, 30.2 and 30.3, which are reproduced hereinabove, and which form the subject matter of the present Petition. Even in that case, the Respondent therein, had relied on the decision of the Supreme Court in the case of Vishnu (Dead) by LRs (Supra) and the decision in the case of M/s. P. Dasarathorama Reddy Complex (Supra). In response to the same, the Learned Senior Advocate for the Petitioner therein, had in rejoinder submitted that the said decisions of the Supreme Court are not applicable to the facts of the case in B.T.Patil and Sons (Supra), as the Supreme Court has not considered the clauses which are identical to clauses 30.1, 30.2 and 30.3, which provide for the remedy of an appeal against the order of the Superintendent Engineer. The Learned Single Judge has correctly not accepted the aforesaid contention of the Counsel for the Petitioner and has dismissed the Arbitration Application filed under Section 11(6) of the Act, by placing reliance on the reasons set out in paragraphs 17, 18 and 23 of the Judgment in B.T. Patil and Sons (Supra), which paragraphs are reproduced hereunder :

> 17. In case of Vishnu (dead) (supra), the Supreme Court has considered the identical clauses which empowered the

Superintending Engineer to take certain decisions and clause providing for an appeal. Supreme Court has held that the contractor has to execute all the work subject to the approval in all respects of the Superintending Engineer who can issue directions from time to time about the manner in which the work was to commence and to be executed. The powers given to the Superintending Engineer was of overall supervisory control for the purpose of smooth execution of work in accordance with the approved designs and specifications and also to ensure that the quality of work was not compromised. It is held that power conferred upon the Superintending Engineer was in the nature of a departmental dispute resolution mechanism and was meant for expeditious sorting out of problems which can crop up during execution of the work. It is held by the Supreme Court that there is nothing in the language of clause under consideration from which it could be inferred that the parties had agreed to confer the role of arbitrator upon the Superintending Engineer of the Circle. Supreme Court held that the power conferred upon the Superintending Engineer to take decision on the matters enumerated in the clause did not involve adjudication of any dispute or lis between the State Government and the contractor. It would have been extremely anomalous to appoint the Superintending Engineer as arbitrator to decide any dispute or differences between the parties and pass an award. In my view, the judgment in case of Vishnu (dead) (supra), the clauses considered by the Supreme Court in that case are

> identical to the clauses in hand and the said judgment, in my view, squarely applies to the facts of this case. I am respectfully bound by the judgment of Supreme Court.
>
> 18. In my view, on plain reading of clauses 30.1, 30.2 and 30.3, it is clear that powers given to the Superintending Engineer was in the nature of a departmental dispute resolution mechanism and was meant for expeditious sorting out of problems and cannot be construed as an arbitration in any manner whatsoever. Supreme Court in case of M/s P. Dasaratharama Reddy Complex (supra) has considered similar provisions in several contracts and has held that none of those clauses can be construed as an arbitration agreement. The clauses under consideration before the Supreme Court are identical to the clauses considered in this case. In my view, the judgment of Supreme Court in case of M/s P. Dasaratharama Reddy Complex (supra) is squarely applicable to the facts of this case. I am respectfully bound by the said judgment.
>
> 23. In the premises aforesaid, I am of the view that there exists no arbitration agreement between the parties. The application filed under Section 11(6) of the Arbitration & Conciliation Act 1996 is thus not maintainable and is accordingly dismissed. No order as to costs.

9. I am in respectful agreement with the view taken by the Learned Single Judge in the case of B.T.Patil and Sons (supra) and I reiterate that the Judgments of the Supreme Court in the case of Vishnu (Dead) by LRs (Supra) and M/s. P.

Dasarathorama Reddy Complex (Supra) are binding on this Court and I therefore hold that there exists no arbitration agreement between the parties to the present Arbitration Petition.

10. The decision of the Learned Single Judge of this Court in Arbitration Application No.229 of 2008 dated 12th August, 2010, relied upon by the Advocate for the Petitioner, is in the nature of a consent order and is of no assistance to the Petitioner. Again, the decision of the Supreme Court dated 15th December, 2015 in the case of M/s. Master Tours and Travels (supra), relied upon by the Learned Advocate for the Petitioner, infact lends assistance to the Respondents and not to the Petitioner. As far as the liberty in that case granted to the Appellant to make a comprehensive representation raising all disputes before the Chief Executive Officer of Shri Amarnath Ji Shrine Board is concerned, the said liberty is granted by the Supreme Court in exercise of its power under Article 142 of the Constitution of India, which power is not vested in the High Courts.

11. For all the above reasons, the above Arbitration Petition is dismissed.

(S.J.KATHAWALLA, J.)