Vishnu (D)By Lrs vs State Of Maharashtra & Ors on 4 October, 2013

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Bench: C. Nagappan, V. Gopala Gowda, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 3680 OF 2005

Vishnu (dead) by L.Rs. ...Appellant

versus

State of Maharashtra and others ...Respondents

WITH

CIVIL APPEAL NO. 3681 of 2005

J U D G M E N T

G.S. SINGHVI, J.

1. Whether Clause 30 of B-1 Agreements entered into between the Government of Maharashtra and the appellant is in the nature of an arbitration clause is the question which arises for consideration in this appeal filed against judgment dated 6.5.2004 of the learned Single Judge of the Bombay High

Court, Aurangabad Bench.

2. The tenders submitted by the appellant, who is now represented by his legal representatives, for Tondapur Medium Project, Jalgaon Medium Project Division, Jalgaon and Hatnoor Canal Division No.3, Chopda, District Jalgaon were accepted by the Competent Authority and five agreements were executed between the parties on 19.5.1983 and 5.10.1983 (hereinafter referred to as 'B-1 Agreements').

3. In January 1985, the appellant abandoned the works and submitted bills for the works already done. He also claimed damages in lieu of the alleged loss suffered by him.

4. After four years, the appellant served notice under Section 80 CPC and then filed Civil Suit No.995/1989 before the trial Court for declaring the recovery proceedings initiated by the defendants as illegal, null and void.

5. During the pendency of the suit, the appellant filed an application under Section 21 of the Arbitration Act, 1940 (for short, 'the 1940 Act') and prayed that the matter may be referred to an Arbitrator by appointing the Superintending Engineer or any other Arbitrator as the sole Arbitrator in terms of Clause 30 of B-1 Agreement. The same was dismissed by the trial Court vide order dated 29.7.1994 on the ground that both the parties had not given consent for making a reference to an Arbitrator.

6. Soon thereafter, the appellant filed an application under Order VI Rule 17 CPC for leave to amend the plaint and incorporate an additional prayer for reference of the dispute to an Arbitrator. The same was allowed by the trial Court vide order dated 27.9.1994.

7. The respondents challenged the aforesaid order in Civil Revision Application No.153/1995, which was partly allowed by the learned Single Judge of the High Court and the order of the trial Court granting leave to the appellant to amend the prayer clause was set aside.

8. In the meanwhile, the appellant filed application dated 3.2.1995 under Section 20 of the 1940 Act for settlement of accounts and prayed that respondent Nos.3 and 4 may be directed to file Arbitration Agreement in terms of Clause 30 of B-1 Agreement executed between the parties and an Arbitrator may be appointed to decide all the disputes. On 17.6.1995, the trial Court directed the parties to adduce evidence on the nature of Clause 30 of B-1 Agreement.

9. After considering the evidence adduced by the parties and by placing reliance on some judgments of the High Courts, the trial Court allowed the application and declared that Clause 30 of B-1 Agreement is an arbitration clause. The trial Court also appointed Shri D.G. Marathe, Chief Engineer (PWD) as an Arbitrator and referred all the disputes to him.

10. Civil Revision Application No.447 of 1997 filed by the respondents against the order of the trial Court was allowed by the learned Single Judge of the Bombay High Court and it was held that Clause 30 of B-1 Agreement cannot be treated as an arbitration clause. In support of this conclusion,

the High Court relied upon the judgment of this Court in Civil Appeal No. 4700/1985 – State of Maharashtra v. M/s. Ranjeet Construction.

11. While issuing notice of the special leave petition on 4.1.2005, this Court passed the following order:

> "The learned counsel for the petitioner places reliances on a three Judge Bench decision of this Court in Mallikarjun Vs. Gulbarga University 2004 (1) SCC, 372 wherein a similar clause, as arises for consideration in the present case, was held to be an arbitration clause.
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> The abovesaid decision seems to be at divergence from the view taken by a two Judge Bench decision in Bharat Bhushan Bansal Vs.U.P. Small Industries Corporation Ltd., Kanpur 1999 (2) SCC, 166 wherein reliance has been placed on two judgments, of this Court, each by three Judges, namely, State of Orissa Vs. Damodar Das 1996 (2) SCC, 216 and State of U.P. Vs. Tipper Chand 1980(2) SCC, 341.

Issue notice to the respondents and place for hearing before a three Judge Bench.

Issue notice also on the prayer for grant of interim relief."

12. By an order dated 11.07.2005, the three-Judge Bench referred the matter to the Constitution Bench for resolving the conflicting opinions expressed by the co-ordinate Benches. However, vide order dated 8.12.2010, the Constitution Bench declined to decide the matter and directed that the case be listed before the three Judge Bench.

13. Shri Rana Mukherjee, learned counsel for the appellant argued that the impugned order is liable to be set aside because the High Court's interpretation of Clause 30 of B-1 Agreement is contrary to the law laid down in Mallikarjun v. Gulbarga University (2004) 1 SCC 372 and Punjab State v. Dina Nath (2007) 5 SCC 28. Learned counsel emphasized that Clause 30 of B-1 Agreement makes the decision of the Superintending Engineer binding on all parties to the agreement and, therefore, the trial Court was right in treating the same as an arbitration clause. Shri Mukherjee further argued that in view of circulars dated 9.5.1977, 12.8.1982 and 21.5.1983 issued by the State Government, Clause 30 of B-1 Agreements has to be treated as an arbitration clause and the respondents had no right to challenge the reference made by the trial Court and thereby question the wisdom of the State Government.

14. Shri Manish Pitale, learned counsel for the respondents relied upon the judgments of this Court in State of U.P. v. Tipper Chand (1980) 2 SCC 341, State of Orissa v. Damodar Das (1996) 2 SCC 216 and Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur (1999) 2 SCC 166 and argued that Clause 30 of B-1 Agreement cannot be construed as an arbitration clause simply because the decision of the Superintending Engineer is made binding on all parties to the contract. Learned counsel submitted that the judgment in Mallikarjun v. Gulbarga University (supra) is clearly distinguishable because Clause 30 of the Agreement, which was interpreted in that case was

substantially different from the one under consideration. Shri Pitale pointed out that the Superintending Engineer of Gulbarga Circle was not directly involved in the execution of contract between the University and the appellant, whereas Superintending Engineer, who has been named as the officer in Clause 30 of B-1 Agreement entered into between the appellant and the State Government is overall incharge of the work.

15. We have considered the respective arguments. Clauses 29 and 30 of the B-1 Agreement entered into between the parties read as under:

> "Clause 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.
>
> Clause 30 —Except where otherwise specified in the contract and subject to the powers delegated to him by 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 or the contracts 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."

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

> "Para 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 agreement as an arbitrator."

17. We shall first consider the question whether Clause 30 of B- 1 Agreement can be construed as an arbitration clause. 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 Superintending Engineer of the Circle, who could issue directions from time to time about the manner in which work was to commence and execute. By virtue of Clause 30, 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. These two clauses by which the Superintending Engineer was given over all supervisory control were incorporated for smooth execution of the works in accordance with the approved designs and specifications and also to ensure that 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. 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. 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.

18. 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...."

19. A clause substantially similar to Clause 30 of B-1 Agreement was interpreted by a three Judge Bench in State of U.P v. Tipper Chand (supra) and it was held that the same cannot be construed as an arbitration clause. Paragraphs 2 and 3 of the judgment which contain the reasons for the

aforesaid conclusion are reproduced below:

> "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 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."
>
> 3. After perusing the contents of the said clause and hearing 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."

20. In State of Maharashtra v. M/s. Ranjeet Construction (supra), the two Judge Bench of this Court interpreted Clause 30 of the agreement entered into between the parties, which is almost identical to the clause under consideration, relied upon the judgment in State of U.P. v. Tipper Chand (supra) and held that Clause 30 cannot be relied upon for seeking a reference to an Arbitrator of any dispute arising under the contract.

21. In State of Orissa v. Damodar Das (supra), the 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. 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:

> "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."
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> 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)

22. In K.K. Modi v. K.N. Modi (1998) 3 SCC 573, this Court interpreted Clause 9 of the Memorandum of Understanding signed by two groups of Modi family. Group 'A' consisted of Kedar Nath Modi (younger brother of Seth Gujjar Mal Modi and his three sons) and Group 'B' consisted of five sons of Seth Gujjar Mal Modi. To resolve the disputes and differences between two groups, the financial institutions, which had lent money, got involved. Ultimately, a Memorandum of Understanding was signed by the parties on 24.1.1989, Clause 9 of which reads as under:

> "Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups." The Chairman, Industrial Finance Corporation of India (IFCI) formed a committee of experts to assist him in deciding various questions. The committee of experts and the Chairman held discussion with both the groups. On 8.12.1995, the Chairman, IFCI gave his detailed report / decision. In his covering letter, the Chairman indicated that the Memorandum of Understanding had been substantially implemented during 1989 to 1995 and with his decisions on the disputes / clarifications given by him, it will be possible to implement the remaining part. The report of the Chairman was neither filed in the competent Court as an award nor any application was submitted for making the report a rule or decree of the Court. However, the Chairman issued series of directions for implementing the

> report. On 18.5.1996, the appellants filed a petition under Section 33 of the 1940 Act in the Delhi High Court challenging report dated 8.12.1995 by asserting that it was an award in arbitration proceedings. The opposite parties filed civil suit in the High Court to challenge the report of the Chairman.

23. One of the questions formulated by this Court was whether Clause 9 of the Memorandum of Understanding constituted an Arbitration Agreement and whether the decision of the Chairman, IFCI constituted an award. The two Judge Bench first culled out the following attributes of an Arbitration Agreement:

> "(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement, (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration, (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal, (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides, (5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly, (6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law." The Court then referred to several precedents including English cases and held:

> "In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. The valuation is to be done by M/s S.B. Billimoria & Co. Three companies which have to be divided between the two groups are to be divided in accordance with a scheme to be prepared by Bansi S. Mehta & Co. In the implementation of the Memorandum of Understanding which is to be done in consultation with the financial institutions, any disputes or clarifications relating to implementation are to be referred to the Chairman, IFCI or his nominees whose decision will be final and binding. The purport of clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of

division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. This clause does not contemplate any judicial determination by the Chairman of the IFCI. He is entitled to nominate another person for deciding any question. His decision has been made final and binding. Thus, clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for a proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated. The decision of the Chairman, IFCI is to be binding on the parties. Moreover, difficulties and disputes in implementation may not be between the parties to the Memorandum of Understanding. It is possible that the valuers nominated in the Memorandum of Understanding or the firm entrusted with the responsibility of splitting some of the companies may require some clarifications or may find difficulties in doing the work. They can also resort to clause 9. Looking to the scheme of the Memorandum of Understanding and the purpose behind clause 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with the valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so." (emphasis supplied)

24. In Bharat Bhushan Bansal v. U.P. Small Industries Corporation Limited, Kanpur (1999) 2 SCC 166, the 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. 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:

> "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.
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> 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."

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

26. The issue deserves to be looked into from another angle. In terms of Clause 29 of B-1 Agreement, 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 un-biased 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. This facet of the problem was highlighted in the judgment of the two Judge Bench in Bihar State Mineral Development Corporation and another v. Encon Builders (I)(P) Limited (2003) 7 SCC

418. In that case, the agreement entered into between the parties contained a clause that any dispute arising out of the agreement shall be referred to the Managing Director of the Corporation and his decision shall be final and binding on both the parties. After noticing several precedents, the two Judge Bench observed:

> "There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well-settled principle of law that a person cannot be a judge of his own cause. It is further well settled that justice should not only be done but manifestly seen to be done.
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> Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.
>
> As the acts of bias on the part of the second appellant arose during execution of the agreement, the question as to whether the respondent herein entered into the agreement with his eyes wide open or not takes a back seat. An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation.
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> It will bear repetition to state that the action of the second appellant itself was in question and, thus, indisputably, he could not have adjudicated thereupon in terms of the principle that nobody can be a judge of his own cause."
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> 27. We may now notice the judgments relied upon by the learned counsel for the appellant and find out whether the proposition laid down therein supports his argument that Clause 30 should be treated as an arbitration clause.
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> 28. The facts of Mallikarjun v. Gulbarga University case (supra) were that the respondent-University had accepted the tender submitted by the appellant for construction of an indoor stadium. In pursuance of the work order issued by the competent authority, the appellant completed the construction. Thereafter, he invoked the arbitration clause for resolution of the disputes which arose from the execution of the project. Superintending Engineer, PWD, Gulbarga Circle was entrusted with the task of deciding the disputes. The parties filed their respective claims before the Superintending Engineer. He considered the same and passed an

award. The appellant filed execution petition in the Court of Principal Civil Judge (Senior Division), Gulbarga. The respondent filed an objection petition under Section 47 of the CPC. The Executing Court rejected the objection. The University challenged the decision of the Executing Court and pleaded that the agreement on the basis of which the dispute was referred to the Superintending Engineer was not an arbitration agreement and, as such, award made by him cannot be treated as one made under the 1940 Act. The High Court accepted the plea of the University and set aside the order of the trial Court. Clause 30 of the agreement which came up for interpretation by this Court was as under:

"The decision of the Superintending Engineer of Gulbarga 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 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 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." After analyzing the aforesaid clause and making a reference to essential elements of arbitration agreement enumerated in Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Limited (supra), the three Judge Bench held:

"Applying the aforesaid principle to the present case, clause 30 requires 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 there also 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.

In the aforesaid view of the matter, it must be held that the agreement did contain an arbitration clause." The Bench distinguished the judgment in Bharat Bhushan Bansal's case by making the following observations:

"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 case would show that they are not identical. Whereas clause 30 of the agreement in question provides for resolution of the dispute arising out of the contract by persons named therein; in terms of clause 24, there was no question of decision by a named person in the dispute raised by the parties to the agreement. The matters which are specified under clauses 23 and 24 in Bharat Bhushan Bansal case 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 the dispute arising out of the contract by the Superintending Engineer, Gulbarga Circle, Gulbarga. For that reason, the case relied upon by the learned counsel for the respondent is distinguishable.

Once clause 30 is constituted 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 with 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 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 arose 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 they are conclusive which clearly spells out the finality of such decisions as also their 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-in-Charge to take a decision thereupon in relation to the matters envisaged under clauses 31 and 32 of the said agreement. Clauses 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 are limited and they cannot be equated with an arbitration 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 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. He might be an ex officio member of the Building Committee, but thereby or by 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 contractor as regards performance of the contract." (emphasis supplied)

29. In Punjab State v. Dina Nath (supra), the two Judge Bench was called upon to consider whether clause 4 of work order No.114 dated 16.5.1985 constituted an arbitration agreement. The clause in question was as under:

> "Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1, Chandigarh for orders and his decision will be final and acceptable/binding on both the parties." After noticing the judgment in K.K. Modi v. K.N. Modi, the Court observed:
>
> "Keeping the ingredients as indicated by this Court in K.K.Modi in mind for holding a particular agreement as an arbitration agreement, we now proceed to examine the aforesaid ingredients in the context of the present case:
>
> a) Clause 4 of the Work Order categorically states that the decision of the Superintending engineer shall be binding on the parties.
>
> b) The jurisdiction of the Superintending Engineer to decide the rights of the parties has also been derived from the consent of the parties to the Work Order.
>
> c) The agreement contemplates that the Superintending Engineer shall determine substantive rights of parties as the clause encompasses all varieties of disputes that may arise between the parties and does not restrict the jurisdiction of the Superintending Engineer to specific issues only.
>
> d) That the agreement of the parties to refer their disputes to the decision of the Superintending Engineer is intended to be enforceable in law as it is binding in nature.

The words "any dispute" appears in clause 4 of the Work Order. Therefore, only on the basis of the materials produced by the parties in support of their respective claims a decision can be arrived at in resolving the dispute between the parties. The use of the words "any dispute" in clause 4 of the Work order is wide enough to include all disputes relating to the said Work Order. Therefore, when a party raises a dispute for non-payment of money after completion of the work, which is denied by the other party, such a dispute would come within the meaning of "arbitration agreement" between the parties. Clause 4 of the Work Order also clearly provides that any dispute between the department and the contractor shall be referred to the Superintending Engineer, Hydel Circle No.1, Chandigarh for orders. The word "orders" would indicate some expression of opinion, which is to be carried our, or enforced and which is a conclusion of a body (in this case Superintending engineer, Hydel Circle No.1, Chandigarh). Then again the conclusion and decision of the Superintending Engineer will be final and binding on both the parties. This being the position in the present case and in view of the fact that clause 4 of the Work Order is not under challenge before us, the decision that would be arrived at by Superintending Engineer, Hydel Circle No.1, Chandigarh must also be binding on the parties as a result whereof clause 4 must be held to be a binding arbitration agreement." The Bench distinguished the judgment in State of Orissa v. Damodar Das (supra) by making the following observations:

> "From a plain reading of this clause in Damodar Das it is evident that the powers of the Public Health Engineer were essentially to supervise and inspect. His powers were limited to the questions relating to the meaning of the specifications, drawings and instructions, quality of workmanship or materials used on the work or as to any other question, claim, right, matter, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same. However, in the case before us, the Superintending Engineer was given full power to resolve any dispute arising between the parties which power in our view is wide enough to cover any nature of dispute raised by the parties. The clause in the instant case categorically mentions the word "dispute" which would be referred to him and states "his decision would be final and acceptable/binding on both the parties."

30. In our opinion, neither of the judgments relied upon by Shri Mukherjee help the cause of his client. In Mallikarjun's case, this Court noted that Superintending Engineer, Gulbarga Circle, Gulbarga was not an officer of the University and he did not have any authority or jurisdiction either to supervise the construction work or issue any direction to the contractor in relation to the project. The Court also emphasized that the parties had agreed that any dispute arising from the contract would be referred to the decision of the Superintending Engineer. These factors are missing in the instant case. Likewise, Clause 4 of the work order which came up for interpretation in Punjab State v. Dina Nath (supra) contemplated resolution by the Superintending Engineer of any dispute arising between the department and the contractor. Therefore, the relevant clause of the work order was rightly treated as an Arbitration Agreement.

31. In view of the above discussion, we hold that the High Court had rightly held that Clause 30 of B-I Agreement is not an Arbitration Agreement and the trial Court was not right in appointing the Chief Engineer as an Arbitrator.

32. Before concluding, we may observe that circulars issued by the State Government may provide useful guidance to the authorities involved in the implementation of the project but the same are not conclusive of the correct interpretation of the relevant clauses of the agreement and, in any case, the Government's interpretation is not binding on the Courts.

33. In the result, the appeals are dismissed.

.....J. (G.S. SINGHVI) .....J. (V. GOPALA GOWDA) .....

.....J. (C. NAGAPPAN) New Delhi, October 4, 2013.
