

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	Case No.	Arbitration Case No.14/2015
2	Parties Name	Indian Construction Co. (Guj.) Ltd. Vs. Indore Municipal Corporation and Anr.
3	Date of Judgment	1/8/2017
4	Bench constituted of	Hon'ble Shri Justice Prakash Shrivastava
5	Judgment delivered by	Hon'ble Shri Justice Prakash Shrivastava
6	Whether approved for reporting	Yes
7	Name of counsels for parties.	Shri K.G. Sukhwani, learned counsel for the applicant. Shri Aniket Naik, learned counsel for the respondents.
8	Law laid down	The Municipal Corporation is a public undertaking within the meaning of Section 2(1)(i) of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 and in respect of the agreement relating to Works Contract with the Municipal Corporation, remedy lies before the Madhyastham Tribunal.
9	Significant paragraph numbers	4 to 21

(PRAKASH SHRIVASTAVA)
J u d g e

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(SB: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Arbitration Case No.14/2015

Indian Construction Co. (Guj.) Ltd. Applicant

Vs.

Indore Municipal Corporation and Anr. Respondents

Shri K.G. Sukhwani, learned counsel for the applicant.

Shri Aniket Naik, learned counsel for the respondents.

Whether approved for reporting :

ORDER

(Passed on 1/8/2017)

1/ By this arbitration case filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 a prayer has been made by the applicant for appointing the independent arbitrator for resolving the dispute between the parties.

2/ The case of the applicant is that the Respondent-Indore Municipal Corporation had awarded the contract to the applicant for construction of overflow spillway across river Gambhir and the work order dated 18.4.2007 was issued with stipulated period of 24 months. The completion of the work was delayed for certain reasons and the completion certificate was finally issued on 30.9.2012. Certain amount was withheld by the respondent-Municipal Corporation, therefor, the applicant had sent the letter dated 21.5.2012 and 26.9.2012. The defect liability period of 24 months expired on 30.9.2014,

therefore, vide letter dated 13.10.2014 a request was made by the applicant for retaining Rs.20 Lakhs and releasing the balance amount but the respondent-Municipal Corporation retained more than the said amount and had released only Rs.45,32,727/-. According to the applicant, he is entitled to a sum of Rs.5,75,74,381.50. The applicant had served the notice dated 21.4.2015 on the Commissioner and made unsuccessful attempt to serve notice dated 21.4.2015 and 15.5.2015 to the Engineer-in-charge and the Project Officer. Thereafter notice dated 2.7.2015 was sent to appoint the panel of arbitrator in terms of the arbitration clause. Since no action was taken by the respondents, therefore, present arbitration case is filed.

3/ The respondents have filed the reply taking the stand that the work awarded to the applicant was in the nature of Works Contract and the respondent-Indore Municipal Corporation is a public undertaking, therefore, the applicant has remedy to seek arbitration under the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (For short "Madhyastham Act") and the present application is not maintainable and that the bills of the applicant have been settled and the claim has now become time barred.

4/ Core issue is as to whether the Indore Municipal Corporation is a public undertaking as defined in Section 2(1) (g) of the Madhyastham Act and applicant has remedy before the Madhyastham Tribunal?

5/ Counsel for both the parties have relied upon the judgments of this Court as well as the Hon'ble Supreme Court in support of their submission. In order to find out if the aforesaid issue is concluded by any of them, these judgments are examined at the first instance.

6/ Learned counsel for the respondents has referred to the Full Bench judgment of this Court in the matter of **Gulab Bai wd/o Shriram Chandra Sanotia and others Vs. Subhash Chandra reported in 2013(3) MPLJ 434** but the said judgment was delivered in different context wherein the issue was in respect of the entitlement of a landlord, who was a retired employee of the Municipal Corporation, to approach the Rent Controlling Authority under Section 23-A of the M.P. Accommodation Control Act. In the definition of landlord under Section 23-J, retired servant of a Company owned and controlled either by the Central or State Government, are covered. The said definition is materially different from the definition of public undertaking given in Section 2(1)(g) of the Madhyastham Act. Even otherwise in the matter of **Subhash Chandra Vs. Gulab Bai and others reported in (2016) 4 SCC 750**, the Hon'ble Supreme Court has referred the matter to the larger bench for interpretation of Section 23(J)(ii) of the M.P. Accommodation Control Act.

7/ In another judgment in the matter of **Administrator, Municipal Corporation, Drug and others Vs. M/s. Janico Designers and Executors, Drug reported in AIR 1991 M.P. 233** before the Full Bench of this Court issue of arbitrability by Madhyastham Tribunal had come up, wherein the Municipal Corporation was superseded and administrator was appointed, therefore, the full bench had taken the view that for the dispute between the administrator and contractor executing the municipal work, the Madhyastham Tribunal was competent to adjudicate, but in that case the issue if the Municipal Corporation is a Public Undertaking either owned or controlled by the Government within the meaning of Section 2(1)(g) of the

Madhyastham Act, was left open.

8/ Learned counsel for the applicant has placed reliance upon the judgment of the Supreme Court in the matter of **Om Construction Company Vs. Ahmedabad Municipal Corporation and Another reported in (2009) 2 SCC 486**, wherein in reference to the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, the Ahmedabad Municipal Corporation has not been held to be a Public Undertaking on the ground that the notification in that regard under Section 2(1)(i) of the Gujarat Act was not published. Section 2(1)(i) of the Gujarat Act defines Public Undertaking as under:-

“Public Undertaking” means:-

(i) any company as defined in section 3 of the Companies Act, 1956 in which not less than fifty-one per cent of the paid up share capital is held by the State Government or any company which is a subsidiary (within the meaning of the Act) of the first mentioned company.

(ii) any corporation (not being a company as defined in section 3 of the Companies Act, 1956 or a local authority) established by or under a Central Act or a State Act and owned or controlled by the State Government.

(iii) such class of local authorities as the State Government may, by notification in the Official Gazette, specify.

In terms of sub-section (iii) above, separate notification for local authorities is necessary. Though sub-section (ii) is in respect of Corporation but local authorities are expressly excluded. The language of Section 2(1)(g) of the Madhyastham Act is different, therefore, the present issue can not be held to be concluded by above judgment and benefit of above

judgment cannot be granted to the applicant.

9/ Since no authoritative pronouncement on the issue involved has been pointed out, therefore, the issue is examined in the light of the provisions of Madhyastham Act and the Municipal Corporation Act.

10/ A reference under the Madhyastham Act can be made to the tribunal under Section 7(1) by a party to a works contract, which reads as under:-

7. Reference to Tribunal.-

(1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.

11/ It is not in dispute in the present case that the work awarded to the applicant was in the nature of Works Contract but the only dispute raised by the applicant is that the Indore Municipal Corporation is not a public undertaking for the purpose of Madhyastham Act.

12/ The contention of learned counsel for the applicant is that for approaching Madhyastham Tribunal under Section 7(1) as against Municipal Corporation, a separate notification under Section 2(1)(i) of the Act for the Municipal Corporation is required.

13/ Section 2(1)(i) defines works contract and reads as under:-

Section 2(1)(i) :-

“Works Contract” means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers or such

other works of the State Government or Public Undertaking as the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said work.”

14/ A minute examination of above definition reveals that the presence of following ingredients is necessary for holding an agreement to be a Works Contract:-

- (a) There should be an agreement in writing.
- (b) The agreement should be for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers.
- (c) The agreement can also be for such other works of the State Government or Public Undertaking as the State Government by notification specify at any of its stages.
- (d) The agreement should be entered into by the State Government or an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking.
- (e) Such agreement also includes an agreement for supply of goods and material and all matters relating to the execution of the said work.

15/ The phrase “such other works of the State Government or Public Undertaking as the State Government

may, by notification, specify in this behalf at any of its stages” is a single phrase and notification mentioned therein is referable to the work to be executed under the agreement and not to the Public Undertaking, meaning thereby, by notification the State Government can specify other works also at any stage to be covered by the definition. If the petitioner’s contention that the notification in above definition refers to the Public Undertaking is accepted, then the phrase “at any of its stages” becomes otiose. On reading the aforesaid definition as a whole, it is clear that no separate Notification for Public Undertaking is required.

16/ Such a submission can not be accepted also because Section 2(1)(g) of the Madhyastham Act separately defines Public Undertaking as under:-

“Public Undertaking” means a Government Company within the meaning of Section 617 of the Companies Act, 1956 (No.1 of 1956) and includes a Corporation or other statutory body by whatever name called in each case, wholly or substantially owned or controlled by the State Government.”

Any Government Company including a corporation and statutory authority satisfying the conditions of above definition, is a Public Undertaking for the purposes of the Madhyastham Act. Under above definition clause a Corporation or other statutory body substantially controlled by the State Government falls within the net of public undertaking.

17/ To examine the issue if Indore Municipal Corporation is substantially controlled by the State Government, the provisions of Municipal Corporation Act, 1956 (for short “the Act”) need to be looked into.

18/ The respondent-Municipal Corporation Indore has been constituted under the provisions of the Act. Chapter 36 of the Act deals with the control of the State Government on the Municipal Corporation. Section 417 of Chapter 36 empowers the State Government to require the Commissioner to furnish the return or to call for and examine the record of any case pending before or disposed of by the Commissioner, the Corporation or the Mayor-in-Council. Section 417-A empowers the Government to depute officers to make enquiry into the affairs of the Corporation or inspection or examination of any department, office, service, work or thing under the control of any Corporation authority and to report to it the result of such enquiry, inspection or examination. Section 418 gives power to the State Government to require Municipal Authority to take action. Section 418-A gives power to the State Government to issue directions to the Municipal Corporation for implementation of welfare measure. Under Section 419 the Government is empowered to appoint a person if the Corporation fails to take action within stipulated period on the order issued under Section 418 or directions issued under Section 418-A. If the Government feels that any officer or servant of the Corporation is negligent in the discharge of his duty, it can require the Corporation to suspend, fine or otherwise punish him Under Section 420. Section 421 empowers the Government to suspend any resolution or order of the Corporation and Section 422 empowers the State Government to dissolve the Corporation on certain contingencies. Under Section 423 on dissolution of the Corporation, the administrator can be appointed by the Government. Section 425 empowers the Government to enforce its order if the Corporation makes

default in carrying out them. In terms of Section 425-A authorized officials of the State Government are entitled to attend any meeting of the Corporation or Mayor-in-Council and address it on any matter concerning the work of his department. Section 426 empowers the Government to make rules authorizing inspection by servants of the Government, of Institution and works which are under the management and control of the Corporation and regulating such inspection. Section 426-A authorises the Government to remove any difficulty which arises in giving effect to the provisions of the Act.

19/ The aforesaid provisions make it clear that the Municipal Corporation is substantially controlled by the State Government, therefore, it is a public undertaking under Section 2(1)(g) of the Madhyastham Act.

20/ The record further reveals that in the matters relating to Works Contract with the Municipal Corporation, other aggrieved parties are approaching the Madhyastham Tribunal and such references are being entertained and adjudicated by the Tribunal. Along with the additional reply one such award passed by the Madhyastham Tribunal has been placed on record.

21/ Having regard to the aforesaid analysis, I am of the opinion that the Municipal Corporation, Indore being substantially controlled by the State Government, is a Public Undertaking within the meaning of Section 2(1)(i) of the Madhyastham Act and since undisputedly the agreement was for execution of Works Contract, therefore, the applicant has a remedy to approach the statutory Arbitration Tribunal constituted under the Madhyastham Act and the present

application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is not maintainable, which is accordingly rejected.

(PRAKASH SHRIVASTAVA)
J u d g e

Trilok/-