(2015) 3 ARBLR 43 : (2015) 3 CDR 1351

Rajasthan High Court (Jaipur Bench)

Case No: Arbitration Application No. 90 of 2012

Mohammed Arif Contractor		APPELLANT
	Vs	
State of Rajasthan and Others		RESPONDENT

Date of Decision: April 8, 2015

Acts Referred:
Arbitration and Conciliation Act, 1996 - Section 11, 7

Citation: (2015) 3 ARBLR 43 : (2015) 3 CDR 1351

Hon'ble Judges: Bela M. Trivedi, J

Bench: Single Bench

Advocate: Satish Chandra Mittal, for the Appellant; A.S. Khangarot, Deputy Government Counsel, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Bela M. Trivedi, J.
The present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter

referred to as "the said Act") seeking appointment of an arbitrator in respect of the alleged disputes having arisen between the parties as regards

the contract work awarded to the applicant for the upgradation and rehabilitation work on Darda Turki to Bagri Road and Nathari Peeplu Ranoli

Jaisinghpura Road. During the course of the arguments, the learned government counsel Dr. A.S. Kharigarot raising the preliminary objection

against the maintainability of the application under Section 11 of the said Act, had submitted that Clause 23 (wrongly printed as Clause 21) of the

agreement in question could not be said to be an arbitration agreement within the meaning of Section 7 of the said Act, and, therefore, the present

application seeking appointment of the arbitrator under Section 11 of the said Act itself is not maintainable. Since the said clause is the standard

clause normally contained in all the government contracts and since similar issue has been raised in many other petitions pending before this court,

the court had called upon all the concerned learned counsel to address the court on the interpretation of Clause 23 of the said agreement, in the

light of the various decisions of the Apex Court. The question raised by the learned counsel for the non-applicants being pure question of law, the

court had permitted all the interested advocates to address the court on the said question.

2. The short facts of this case are that the applicant was awarded the work order being No. Ar. TonkII/2011-12/D-4306 dated 29.07.2011 in

respect of the aforestated work for the estimated cost up to Rs. 1,10,61,819 for which the agreement No. 64/2011-12 was executed. The copy

of the work order is at Annexure 1. The original agreement No. 64/2011-12, along with the procedure and application for settlement of disputes

by Standing Committee, was produced by the learned counsel for the respondents during the course of arguments, which has been taken on

record. It appears that some disputes having arisen between the parties in respect of the said agreement, the applicant invoking the Clause 23 of

the said agreement submitted an application in the prescribed form RPWA 90 along with the demand draft dated 09.10.2012 for Rs. 30,000,

which was received by the respondent No. 2 on 10.10.2012. According to the applicant, despite receipt of the said application, the respondents

did not take any step for referring the case for adjudication to the Empowered Standing Committee pursuant to the Clause 23 of the agreement

within the stipulated period, and, therefore, the application under Section 11 of the said Act for appointment of the arbitrator has been filed.

3. The respondents have resisted the present application by filing the reply contending inter alia that the present application, filed without availing

the remedy under the agreement, was not maintainable. It has also been contended that the application of the applicant seeking settlement through

the Empowered Standing Committee was also under process, and, therefore, also the present application seeking appointment of arbitrator under

Section 11 was not maintainable.

4. The relevant Clause 23 reads as under:

Clause 23--Standing Committee for settlement of disputes--If any question, difference or objection, whatsoever, shall arise in anyway, in

connection with or arising out of this instrument of the meaning of operation of any part thereof, of the rights, duties or liabilities of either part then,

save insofar, as the decision of any such matter, as hereinbefore provided has been otherwise provided for and whether it has been finally decided

accordingly, or whether the contract should be terminated, or has been rightly terminated and as regards the rights or obligations of the parties as

the result of such termination, shall be referred for decision to the Empowered Standing Committee, which would consist of the following:

(i) Administrative Secretary concerned.

(ii) Finance Secretary or his nominee, not below the rank of Deputy Secretary and/or Chief Accounts Officer.

(iii) Law Secretary or his nominee, not below the rank of Joint Legal Remembrancer.

(iv) Chief Engineer-cum-Addl. Secretary of the concerned department.

(v) Chief Engineer concerned (Member-Secretary).

The Engineer-in-charge on receipt of application along with non-refundable prescribed fee (the fee would be two per cent of the amount in dispute,

not exceeding Rs. One lakh) from the contractor shall refer the disputes to the committee within a period of one month from date of receipt of

application.

5. The other clause relevant to decide the issue involved is Clause 51, which is also reproduced as under:

Clause 51--Jurisdiction of court--In the event of any dispute arising between the parties hereto, in respect or any of the matters comprised in this

agreement, the same shall be settled by a competent court having jurisdiction over the place, where agreement is executed and by no other court

after completion of proceedings under Clause 23 of this contract.

6. It would be also beneficial to reproduce the procedure mentioned in the prescribed form RPWA 90 for making application for settlement of

disputes by the Standing Committee, pursuant to Clause 23 of the agreement in question:

1. An application seeking reference of the ""dispute"" for settlement by the Standing Committee shall be submitted in the pro forma given in the

annexure to form RPWA 90.

2. The application duly filled in shall be submitted by the contractor to the Chief Engineer concerned, with two copies thereof to the concerned

Executive Engineer. All the three copies of the application form shall be accompanied by a statement of claims, in the manner indicated in the

application form.

3. The Executive Engineer on receipt of the application (in triplicate) from the contractor shall prepare columnar statement giving his comments

against every claim. The additional columns will be reserved for comments of (1) Executive Engineer, (2) Superintending Engineer, (3) Additional

Chief Engineer, (4) Highest Level Officer of Finance and Accounts (Financial Advisor/Chief Accounts Officer) in the Department, (5) Chief

Engineer and send two copies thereof to the Superintending Engineer without waiting for a reference from the Chief Engineer/Superintending

Engineer within 10 days from the date of receipt of contractor''s application in his office, along with the following:

(a) An attested copy of relevant clause for settlement of disputes (Clause 23 of Conditions of Contract-Appendix XI).

(b) A note regarding verification of the actual facts and data furnished by the contractor in the application form.

(c) Brief comments on each claim of the contractor, while giving such comments, the admissibility of the claim in the light of Clause 23 and

Limitation Act will be kept in view.

(d) Statement of counter-claims of the department, if any. However/if counter-claims are not readily enlisted or available, comments on

contractor''s claims should not be delayed. The Standing Committee can consider counterclaims of the department even if separately filed for

settlement.

4. The counter-statement of facts/views should in all cases be got quickly cleared from the Superintending Engineer, and senior/junior counsel by

the Executive Engineer through a D.O. letter and by keeping watch on such reference. The Superintending Engineer will send his comments to the

Additional Chief Engineer within a week, and the Additional Chief Engineer will send his comments to the Chief Engineer within a week.

5. Before sending the case for settlement by the Standing Committee under Clause 23, Chief Engineer will get the views of the F.A./C.A.O.

recorded in the columnar statement and after recording his own views, will refer the case to administrative Secretary concerned. All such

correspondences should be through confidential D.O. letters and should be sent through special messenger if located at the same station, or

otherwise considered expedient.

6. On receipt of the award of the Standing Committee, the Executive Engineer will record his comments on the award of the Standing Committee

and send the same in duplicate to the Chief Engineer direct, with a copy to the Superintending Engineer. The financial statement and comments

should be combined in the covering letter itself.

7. The Executive Engineer will await executive instructions of the Chief Engineer before acting upon the award.

7. The issue that falls for consideration before this court is, whether the Clause 23 of the agreement in question could be said to be an arbitration

agreement as contemplated in Section 7 of the said Act?

8. The learned counsel Mr. Satish Chandra Mittal, Ms. Susan Mathew, Mr. R.P. Garg, Mr. N.L. Agarwal, Mr. S.S. Hora, Mr. D.D. Sharma had

addressed the court on behalf of the applicants, whereas learned Additional Advocate General Mr. Rajendra Prasad, Deputy Government

Counsel Dr. A.S. Khangarot, Mr. Anurag Kalvatiya for Mr. J.M. Saxena have addressed the court on behalf of the non-applicants.

9. The learned counsel for the applicants taking the court to the various decisions of the Apex Court and this court submitted that for the purpose

of determining whether there is an arbitration agreement or not, the intention of the parties while entering into the agreement has to be seen, as there

is no specific form prescribed in the Act to constitute an arbitration agreement. According to them, if the agreement is in writing, if the parties had

agreed to refer the disputes to the private tribunal, and if private tribunal is empowered to adjudicate upon the dispute and the parties had agreed

to abide by the decision of the private tribunal, then such agreement or clause in the agreement should be treated as arbitration agreement.

According to them, the Standing Committee constituted as per Clause 23 is empowered to decide the disputes between the parties, and hence the

Clause 23 of the agreement in question meets the attributes of the arbitration agreement as contemplated under Section 7 of the said Act. The

learned counsel have relied upon the decisions of Apex Court in case of Kaikara Construction Company Vs. State of Kerala, (2014) AIRSCW

3796 : (2014) 8 JT 36 : (2014) 8 SCALE 206 : (2014) 7 SCC 352 ; in case of Powertech World Wide Limited Vs. Delvin International General

Trading LLC, (2011) 4 ARBLR 278 : (2012) 1 CompLJ 62 : (2011) 13 JT 187 : (2012) 3 RCR(Civil) 691 : (2011) 12 SCALE 519 : (2012) 1

SCC 361 ; in case of Jagdish Chander Vs. Ramesh Chander and Others, (2007) 2 ARBLR 302 : (2007) 3 CompLJ 191 : (2007) 6 JT 375 :

(2007) 147 PLR 18 : (2007) 6 SCALE 325 : (2007) 80 SCL 149 : (2007) 5 SCR 720 ; in case of VISA International Ltd. Vs. Continental

Resources (USA) Ltd., AIR 2009 SC 1366 : (2008) 4 ARBLR 539 : (2008) 13 JT 242 : (2008) 15 SCALE 497 : (2009) 2 SCC 55 : (2009) 1

UJ 331 : (2009) AIRSCW 791 : (2009) 1 Supreme 8 ; and in case of Mallikarjun Vs. Gulbarga University, (2003) 3 ARBLR 579 : (2005) 6 JT

402 : (2003) 9 SCALE 596 : (2004) 1 SCC 372 : (2003) 5 SCR 272 Supp in support of their submissions. They have also submitted that the

said Clause 23 has been treated as the arbitration clause by the Division Bench of this court in case of Suri Constructions Vs. State of Rajasthan

and Others, AIR 2006 Raj 53 : (2006) 1 ARBLR 553 : (2006) 1 RLW 219 : (2005) 4 WLC 563 , and accordingly .in number of cases

appointments of arbitrators have been made by the courts.

10. Per contra, the learned counsel appearing for the respondents submitted that the Clause 23 in question read with Clause 51 of the agreement

and the procedure contained in the prescribed form, could not be construed as an arbitration agreement, inasmuch as one of the essential elements

of the arbitration agreement that the reference of disputes could be made by both the parties to the agreement, is absent in the said clause. The

learned Additional Advocate General Mr. Rajendra Prasad submitted that as per the said clause and the prescribed form for making application

under the said clause, only the contractor can make such application and not the other party, i.e. the government. He also submitted that there is

nothing in the said clause to suggest that the decision of the Standing Committee for settlement of disputes would be final and binding on the

parties. He further submitted that the very fact that as per Clause 51 of the agreement, if the dispute is not settled under Clause 23, the same has to

be decided by the competent court having jurisdiction proves that no finality is attached to the decision of the committee constituted under Clause

23. According to him, the committee constituted under the said clause could not be said to be a private tribunal by any stretch of imagination, much

less the members of the committee could be said to be impartial members. The learned counsel for the respondents have also relied upon almost

the same decisions of the Apex Court on which the reliance has been placed by the learned counsel for the applicants however have further relied

upon the recent decision of Division Bench of this court in case of State of Rajasthan and others vs. SPML Infra Ltd. and another, in D.B. Civil

Special Appeal (Writ) No. 112/2015, decided on 24.02.2015 in which Clause 23 in question has been held to be not an arbitration clause.

11. At the outset, it is required to be mentioned that there are two divergent views of two different Division Benches of this High Court on the

interpretation of Clause 23 of the contract in question. In case of Suri Construction vs. State of Rajasthan and others (supra) the Division Bench of

this court has held that the said Clause 23 is an arbitration clause, whereas in case of State of Rajasthan and others vs. SPML Infra Ltd. and

another (supra) the other Division Bench recently held that the said clause could not be treated as an arbitration clause. In Suri Construction vs.

State of Rajasthan (supra) the Division Bench while distinguishing the Clause 23 in question from the relevant Clause 23 of the agreement referred

in case of State of Rajasthan Vs. Nav Bharat Construction Co., AIR 2005 SC 2795 : (2005) 1 ARBLR 495 : (2005) 125 CompCas 1 : (2005) 3

JT 558 : (2005) 11 SCC 197 : (2005) 1 SCR 988 Supp : (2005) 2 UJ 861 : (2005) AIRSCW 1691 : (2005) 3 Supreme 141 held in para 12 as

under (at pages 557-558 of Arb. LR):

12. A bare perusal of the aforesaid Clause 23 in the present case as well as in the case before Hon''ble Supreme Court in State of Rajasthan and

others vs. Nav Bharat Construction Co. (supra) clearly reveal that in the present case Arbitration Clause 23 deals with any question, difference or

objection, in anyway in connection with or arising out of this instrument, or the meaning of operation of any part thereof with the further reference

for decision and prerequisite condition for reference, i.e. notice and the requisite fee as well as the reference to the committee within a period of

one month from the date of receipt of the application whereas in case of Hon''ble Supreme Court in State of Rajasthan and others vs. Nav Bharat

Construction Co. (supra), the opening words are ""except where otherwise specified in the contract"" clearly reveal that the same is a residuary

clause for filling the gap with regard to specifications, decisions, drawings and instructions and further there is no reference of any dispute arising

between the parties in connection with or arising out of the instrument. Apart from the above, the case before Hon''ble Supreme Court was under

the Act of 1940 which clearly reveal that the Clause 23 which was in existence was prior to 1996, Clause 23 of agreement of 2002 which came

into force after Act of 1996. We are of the view that the Clause 23 before the Hon''ble Supreme Court was not of arbitration whereas Clause 23

of the present case is of arbitration.

12. In case of State of Rajasthan and others vs. SPML Infra Ltd. (supra) the other Division Bench, following the decision of Apex Court in case of

State of Orissa and Others Vs. Bhagyadhar Dash, AIR 2011 SC 3409 : (2011) 3 ARBLR 139 : (2011) 112 CLT 648 : (2012) 1 CTC 778 :

(2011) 7 JT 283 : (2012) 1 RCR(Civil) 160 : (2011) 7 SCALE 71 : (2011) 7 SCC 406 : (2011) 8 SCR 967 : (2011) AIRSCW 5303 , held that

the said Clause 23 could not be considered as the arbitration clause. It has been held in para 18 therein as under:

18. In the present case, the language of Clause 23 of the agreement/contract is almost the same as it was in Clause 10 of the conditions of

agreement/contract referred to in State of Orissa and others vs. Bhagyadhar Dash (supra), in which it was found by the Hon''ble Supreme Court

that the clause does not refer to arbitration as a mode of settlement of assessment. In the present case also, Clause 23 does not provide for

reference, to settle the dispute between the parties, as an arbitration. The decision of the Administrative Committee is not a mode, binding under

the clause on either of the parties. It does not provide for such procedure, which may show that the Superintending Engineer is to act judicially,

which is attribute of the arbitration, after considering the submissions of the parties. The clause does not disclose any intention to make Standing

Committee as an arbitrator in respect of dispute, which may arise. The decision of the Standing Committee is not a judicial determination, but a

decision of one party. It is open to challenge by either party in the court of law under Clause 51 of the agreement/contract. Clause 23 of the

agreement/contract, therefore, cannot be considered as an arbitration clause under the agreement....

13. As such, when there are two decisions of the Division Benches expressing conflicting views, the Single Bench ought to place the papers before

the Hon''ble Chief Justice for referring the issue to the special bench or larger bench, as held by the Apex Court in case of Tribhuvandas

Purshottamdas Thakur Vs. Ratilal Motilal Patel, AIR 1968 SC 372 : (1968) 1 SCR 455 . However, in the humble opinion of this court, apart from

the fact that in the later decision in case of State of Rajasthan vs. SPML Infra Ltd. (supra) the Division Bench has followed the decision of the

Supreme Court, it has also considered the Clause 51 of the agreement, which the earlier Division Bench had failed to consider. That apart, the later

decision of the Division Bench is also in conformity with the latest decision of the Apex Court in case of P. Dasaratharama Reddy Complex Vs.

Government of Karnataka and Another, (2013) 11 AD 258 : AIR 2014 SC 168 : (2013) 4 ARBLR 113 : (2014) 119 CLA 14 : (2013) 14 JT

228 : (2013) 13 SCALE 179 : (2014) 2 SCC 201 : (2014) 1 SCJ 367 , in which the Apex Court while interpreting Clause 29 of the agreement

referred in the said case which was similar to the Clause 23 of the present case has held that such clauses cannot be treated as arbitration clause.

Relevant part of Clause 29 of the agreement in the said case reads as under (para 10, pages 334-335 of SCACTC : pages 118-119 of Arb. LR):

29.(3) Settlement 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 hereinbefore mentioned;

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

(iii) any other question, claim, right, matter, thing, whatsoever, in anyway arising out of or relating to the contract, design:, 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,

give 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 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.

xxx xxx xxx

14. The Apex Court, after considering the various similar clauses contained in various government contracts and after considering various decisions

of the Apex Court, held in para 27 (para 22 of SCACTC and Arb. LR) as under (at pages 347-348 of SCACTC=page 131 of Arb. LR):

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 anyway 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 overall 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.

15. It is also pertinent to note that the Apex Court in case of Jagdish Chander vs. Ramesh Chander and others (supra) also, after considering

various other decisions in case of K.K. Modi Vs. K.N. Modi and Others, (1998) 1 AD 697 : AIR 1998 SC 1297 : (1998) 1 ARBLR 296 :

(1998) 92 CompCas 30 : (1998) 1 JT 407 : (1998) 1 SCALE 403 : (1998) 3 SCC 573 : (1998) 1 SCR 601 : (1998) 1 UJ 623 : (1998)

AIRSCW 1166 : (1998) 1 Supreme 484 ; in case of Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd., Kanpur, AIR 1999 SC

899 : (1999) 1 ARBLR 326 : (1999) 1 JT 97 : (1999) 1 SCALE 109 : (1999) 2 SCC 166 : (1999) 1 SCR 181 : (1999) 1 UJ 381 : (1999)

AIRSCW 571 : (1999) 1 Supreme 166 ; State of Orissa and another etc. Vs. Sri Damodar Das, (1996) 1 AD 589 : AIR 1996 SC 942 : AIR

1995 SC 942 : (1996) 1 ARBLR 221 : (1996) 82 CLT 110 : (1995) 9 JT 419 : (1996) 1 SCALE 68 : (1996) 2 SCC 216 : (1995) 6 SCR 800

Supp , had craved out the principles with regard to the attributes of an arbitration agreement. The Apex Court in the said case observed as under

in para 8 (at pages 257-258 of SCACTC : pages 306-307 of Arb. LR):

8. ....We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the

agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and the

willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration

agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going

for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes

to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words ''arbitration'' and ''arbitral tribunal (or arbitrator)'' are not used with reference to the process of settlement or with reference to

the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being

an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are--(a) The agreement should be in writing, (b) The

parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal, (c) The private tribunal

should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it.

(d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an

arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set

out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains

words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it

will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without

hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and

binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be

termed as an arbitration agreement.

16. If the aforestated principles/guidelines are applied to the facts of the present case, it appears that the Standing Committee for settlement of

disputes as mentioned in the said Clause 23 consist of the members, who are the concerned Secretaries and the Engineers of the concerned

department of the government, and, therefore, such committee could not be termed to be a private tribunal by any stretch of imagination. There is

nothing in the said Clause 23 to suggest that both the parties to the contract had any intention to be bound by the decision of the said committee.

On the contrary, Clause 51 of the said agreement states that in the event of any differences arising between the parties in respect of any matters

comprised in the agreement, the same shall be settled by the competent court having jurisdiction over the place, where the agreement is executed

and by no other court, after completion of proceedings under Clause 23 of the contract. From the bare perusal of the said Clause 51, it clearly

transpires that it was kept open for both the parties to approach the competent court having jurisdiction for settling the disputes, after the

completion of proceedings under Clause 23 of the agreement in question. The non-adjudicatory decision of the Empowered Committee under

Clause 23, was made subject to the right of the parties to seek remedy as per Clause 51. Therefore, such Clause 23 could not be termed as the

arbitration clause, as held by the Apex Court in case of P. Dasaratharama Reddy Complex.

17. It is also interesting to note that as transpiring from the said clause itself and the procedure contained in form RPWA 90, the said clause could

be invoked by the contractor alone, after making payment of the non-refundable prescribed fee, and that the same could not be invoked by the

other party, i.e. the concerned department of the government. As per the procedure prescribed in form RPWA 90 also, the application is required

to be filed by the contractor to the Chief Engineer concerned accompanied by the statement of claims and it is the concerned department who can

file statement of counterclaims. There is nothing in the said form which would enable the concerned department also to file the statement of claims

in case of dispute with the contractor. Such an in-house mechanism created in the agreement for settlement of disputes, by one of the parties, i.e.

the Government of Rajasthan, could not be termed as a private tribunal, nor its decision could be said to be binding to both the parties. Further,

there is also no provision empowering the said committee to record the evidence, let apart making its decision final and binding to the parties.

18. In order to construe a clause to be an arbitration clause, it should have the attributes of an arbitration agreement, i.e. the parties should agree to

refer the disputes, present or future, to the private tribunal; the private tribunal should be able to adjudicate upon the disputes in an impartial

manner giving due and equal opportunity to the parties to put forth their case before it; and the parties should have agreed that the decision of the

private tribunal in respect of the disputes will be binding on them. Thus, the very trappings or essentials of the arbitration agreement being missing in

the Clause 23 in question, the same cannot be treated as the arbitration clause. In that view of the matter, it is held that the Clause 23 read with

Clause 51 of the agreement in question, being not an arbitration clause or an arbitration agreement as contemplated in Section 7 of the said Act,

the provisions of the said Act could not be made applicable to the facts of the present case, and the application under Section 11 of the said Act

seeking appointment of the arbitrator could not be said to be maintainable. The application, therefore, deserves to be dismissed and is accordingly

dismissed.