

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**REVIEW APPLICATION NO. 25 OF 2015
IN
ARBITRATION APPEAL NO. 6 OF 2011**

M/s. Pawar & Company (Engineers & .. Applicant
Contractors, through its partner
Mr. Vilas s/o. Yadavrao pawar,
Age. 49 years, Occ. Contractorship,
R/o. Gera Green Ville, Plot No.58,
Paradise, Kharadi, Pune – 15 (M.S.)
(S.P.) Post Ghanegaon, Tq. Gangapur,
Dist. Aurangabad.

Versus

Godawari Marathwada Irrigation .. Respondent
Development Corporation, Aurangabad,
Through its Executive Engineer,
Majalgaon Canal Division No.7,
Gangakhed, Dist. Parbhani.

Mr. Ankul Pradhan, Sr. Counsel with Mr. J.N. Singh,
Advocate for the applicant.
Mr. Ashutosh C. Dharmadhikari h/f. Mr. B.R. Surwase,
Advocate for sole respondent.

CORAM : A.V. NIRGUDE, J.
RESERVED ON : 15.07.2015
PRONOUNCED ON : 03.08.2015

J U D G M E N T :-

1. Heard learned Counsel for the parties. The question that arises in this review application is in respect of maintainability of the review application.

2. Learned Counsel for the respondent (for short "the Department") asserted that the review application filed under Order 47 of Code of Civil Procedure is not a regular remedy available to the applicant. He pointed out that the proceeding before this Court arose from the provisions of the Arbitration and Conciliation Act, 1996. (for short "the Act"). He also argued and rightly so that the Act is a code in itself, where parties are given remedies for redressal of the grievances. The first forum provided by the Act is the Arbitral Tribunal, which is defined under section 2(d) of the Act. Under section 34 of the Act, an aggrieved party may approach the Principal Civil Court of original jurisdiction. The application under section 34 is again not a full-fledged appeal. There are limitations provided. In other words, only limited aspects of arbitral award can be challenged before the Principal Civil Court. The judgment passed by the Principal Civil Court is specifically made appealable under section 37 of the Act. The Act does not provide remedy of "review" at all.

3. Similar question arose before the learned Single Judge of this Court [Coram : R.D. Dhanuka,J.] in the case of Madhav Structural Engineering Ltd., Mumbai Vs. Maharashtra State Road Development Corporation Ltd., Mumbai, 2013(2) Mh.L.J.372. In the said judgment, the learned Single Judge held that in view of express bar provided under section 5, no judicial authority can interfere in the proceeding governed by the Act, except where provisions are made in the Act. So, since the review is not provided in the Act, it is not maintainable.

4. On the other hand, the learned Sr. counsel for the applicant (for short "the Contractor") also placed reliance on two more judgments. The first judgment is of our Court delivered by Justice Shri R.D. Dhanuka in the case of Hindustan Construction Co. Ltd. Vs Hindustan Construction Co. Ltd, in Review Petition No. 2 of 2013, delivered on 4th April, 2013. This judgment was delivered by Justice Shri R.D. Dhanuka after he delivered judgment in the case of Madhav Structural Engineering Ltd., Mumbai [referred to above]. In the earlier judgment, Justice Shri R.D. Dhanuka held that the review petition is not maintainable. In subsequent judgment, Justice Shri R.D. Dhanuka changed his view and held that

the review is maintainable. Justice Shri R.D. Dhanuka then went on discussing the Law on this point by referring to Article 215 of the Constitution. He also placed reliance on the judgment of Supreme Court in the case of M.M. Thomas Versus State of Kerala and another, reported in [2000] 1 Supreme Court Cases 666, and held that the High Court as a Court of record has envisaged in Article 215 of the Constitution, must have inherent power to correct it's record. The Supreme Court in the above referred case held that the High Court as a Court of record has a duty itself to keep its record correctly and in accordance with law. So, if any apparent error is noticed by the High Court in respect of any order passed by it, it has not only power but has duty to correct it. The High Court's power in that regard is plenary.

5. On the point of maintainability of the Review Application, besides the law discussed above, the learned counsel for the contractor also placed reliance on the judgment in the case of Kunhayammed and others Versus State of Kerala and another [2000] 6 Supreme Court Cases 359. In this judgment, the Supreme Court held that if the Supreme Court while rejecting the Special Leave Petition makes a statement other than on point of law, such statement would be binding on the

parties, on the principle of judicial discipline. In other words what is stated by the Supreme Court while dismissing the Special Leave Petition should be treated with utmost reverence. In this case, following statement is made by the Supreme Court at the time of rejection of Special Leave Petition:-

"We are satisfied that the order impugned does not call for our interference."

6. It means that the Supreme Court did not consider it necessary to re-examine the correctness of the impugned judgment. This would certainly not mean that while exercising inherent/plenary jurisdiction of this Court, it cannot examine the correctness of the judgment.

7. The first question that is to be decided in this review application is, whether the finding which I recorded that the claim is time barred is based on an error apparent on record or wrong presumption. I must re-capitulate the fact of the case. In 1988 or so, the work of contract in question was over. During the contract period, the contractor was required to use different quarry for stones than the one which was agreed between the parties earlier. He, therefore, made demand before

the final bill was settled that he would be entitled to additional payment on account of 'lead charges' [additional cost of transportation]. He made demand of Rs.24 lakhs and odd on this count. It appears that in 1989 it was agreed between the Contractor and the Executive Engineer [Engineer In-charge] that this claim towards lead charges should be referred to the competent authority. This claim then apparently was referred to the Chief Engineer. The Chief Engineer vide his letter dated 26.11.1990 apparently held that the claim of the contractor could be partially allowed. He recommended to the Government payment of Rs.3.19 lakh towards 'lead charges'. Admittedly, the Chief Engineer did not hear the Contractor before deciding this claim. Nonetheless, despite recommendation, no payment was made to the Contractor. The Contractor then kept demanding the 'lead charges', but in-vain. It has come on record that on 06.08.2014, about 14 years after the incident of demand of lead charges, the Executive Engineer informed the Contractor that his demand, which was 14 years old, was stale and cannot be considered. Soon thereafter the Contractor took a stand that he would refer the case to the Arbitrator. It appears that the Contractor took this letter as denial of his claim and took a clear stand that he would refer the dispute to the Arbitrator. Vide letter dated 10.02.2005, the Executive Engineer informed the

Contractor that his claim is still pending with the Government and that the cause of action for taking a case to Arbitrator, had not arisen. He requested the Contractor not to refer the case to the Arbitrator. After this letter, things went quite swiftly between the parties and Arbitrator was appointed in 2007. The department raised question of limitation before the Arbitrator and the same was rejected. Even the learned District Judge rejected this objection based on limitation. He on this point held in paragraph No.22, as under:-

"22. The next important point argued is about limitation. It is the contention of the Corporation that after payment of final bill in May-1989, the Contractor kept quiet for long 15 years and suddenly invoked arbitral jurisdiction for his other claims which were clearly time barred. This argument is ex-facie contrary to record. It is a matter of record that, even before the payment of final bill in 1989 the Contractor had been agitating and corresponding with the Corporation for claim for additional work since 1987. The letter dated 06.01.1987 and recommendation letter dated 10.03.1987 are the starting points for the claim of the additional work. The correspondence thereafter continuous with letters dated 21.07.1987, 29.07.1987 and ultimately rests with letter dated 10.02.2005 by the Corporation asking the Contractor not to go for arbitration as his additional claim was under consideration. In this Scenario, the contention of the Corporation that within three year from the accrual of the cause of action the Contractor should have made his claims for additional work and the claims as made now are time barred can not be accepted both on law as well as in facts. Various

contentions have been raised before the Arbitrator to persuade that the claim was time barred and the same are sought to be canvassed even before this Court. The reliance placed by the learned Advocate for Corporation on the ratios in Panchu Gopal Bose Vs Board of Trustees for Port of Calcutta [(1993) 4 **Supreme Court Cases** 338], Indabrador Limited Vs Board of Trustees of the Madras Port Trust and another [(1998)(1) **Mah LR 850 Bombay**], M/s. Vishnidas Bhagchand Vs The Chairman, Maharashtra State Electricity Board and Others [(2001)(4) **ALL MR 763**], Mr. Jagmohan Singh Gujral Vs Mr. Satish Ashok Sabnis & Anr [2003(3) **ALL MR 488**] and Minu F.D. Mehta Vs Ratnasale Madavrao Vakil [2001(1)**Mh.L.J.881**] do not support the case of the Corporation regarding applicability of Article 18 of the Limitation Act in view of ratio in 2006(2) **Arbitration Law Reporter Page 1 Supreme Court** [Harishankar Singhaniya & Ors. Vs Gaurishankar Singhaniya & Ors] relied upon by learned Advocate for the Contractor. In the judgment cited supra, the dispute was between the partners and there was correspondence exchanged between them wherein some issues had arisen and remained to be resolved. As stated earlier, in the instant case as well right since 1987 till the year 2005 the Contractor had been corresponding and the Corporation responding to the said correspondence about the claim for additional work and in that view it was Article 137 of the Limitation Act that became applicable to the present case."

8. The learned District Judge in view of the discussion above came to a conclusion that the dispute arose because of correspondence between the parties. He opined that the letter dated 10.02.2005 is a clear indication where the department assured the Contractor that his claim is under consideration and he should not

specify the issue by referring the same to the Arbitrator. In other words, the department took conciliatory stand that without going to the arbitration, the claim could still be settled. As against this, in my judgment I doubted correctness of this finding. I assumed that letter dated 26.11.1990 was sent to the Contractor and so the cause of action arose for him. This finding was incorrect because I wrongly assumed that the letter dated 26.11.1990 was served on the Contractor. In fact, it was not. It was internal correspondence and came to light only after it was placed before the arbitrator during the proceedings.

9. This letter cannot be equated to an adverse order against which a contractor can prefer a claim to arbitral forum.

10. So, I must re-examine the facts to record finding on the question as to whether the claim was time barred, stale?

11. A similar situation arose in the case of National Aluminium Company Limited and another v. G.C. Kanungo [2009] 14 Supreme Court Cases 365, where the Supreme Court held that similar letter would amount to keeping the dispute alive. The Supreme Court also

mentioned that such correspondence indicated desire of the parties not to take confrontative stands, but to try and settle the dispute amicably. In the judgment of Supreme Court in the case of Harishankar Singhaniya [cited supra], it is held that till such time the settlement talks are going on directly or by way of correspondence, no dispute arises.

12. Coming back to facts, it is seen that in 1995, a letter was sent by the Executive Engineer to the Superintending Engineer suggesting that the claim of the Contractor was pending since long and same should be settled. This letter is not a part of correspondence between the parties, but it is certainly an indication that the officers of the department were seriously considering in 1995 that the claim of the Contractor should be settled by this or that way.

13. As indicated above, the question of staleness of the claim arose for the first time in 2004 when the Executive Engineer pointblank told the Contractor by letter dated 06.08.2004 that his claim was stale and would not be considered at all. It is from this point of time, the Contractor also took belligerent stand. Until then, probably he thought that the claim was still under consideration. His belief came true when he

received letter in February, 2005, assuring him that the claim would be settled after the Government approved the payment. So, the facts clearly indicate that till 2005, the claim was alive.

14. My earlier conclusion appears to be erroneous and based on an error which is apparent on record. I mentioned in my judgment that the letter of the year 1990 was sent to the Contractor. This was a conclusion I drew on facts. This conclusion was grossly erroneous because apparently this letter was not sent to the Contractor. Neither it was meant to be a piece of information for the Contractor. As said above, it was recommendation.

15. Other finding which I recorded earlier is about the Arbitrator's eligibility. I recorded finding that since the Arbitrator, at one point of time, was Officer of the Department and since he passed certain orders, he was not qualified to be an Arbitrator. This finding is patently erroneous for two reasons. The parties went to the Supreme Court at one point of time of this litigation where the parties agreed to the name of the Arbitrator amicably. In view of such amicable settlement between the parties, the Arbitrator started his work. In such situation, the Department could not have raised

issue of Arbitrator's competence. Secondly, the Arbitrator was not connected to the work of contract. At the relevant time, he was not the Engineer In-charge, the Executive Engineer or the Superintending Engineer, who could have decided the disputes arising from the Contract as per Clause 52 of the Contract. The Arbitrator in this case was quite competent to decide the claim.

O R D E R

- A] The Review Application is allowed.
- B] The order under Review is set aside.
- C] The Arbitration Appeal bearing No.06 of 2011 stands dismissed.
- D] The judgment and order of the learned Principal District Judge, Beed, dated 24.12.2010, in Misc. Civil Application (Requiring Judicial Inquiry) No.16 of 2009, is hereby confirmed.
- E] There shall be no order as to costs.

[A.V. NIRGUDE,J.]

. After the judgment is pronounced, learned Counsel for the respondent orally prays that the effect

and operation of this judgment be stayed for a period of six weeks.

. As the decree under challenge was a money decree, the prayer, as sought for is rejected.

[A.V. NIRGUDE,J.]