

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

**CIVIL APPLICATION NO. 6423 OF 2015
IN
ARBITRATION APPLICATION NO. 6 OF 2011**

- 1] The General Manager,
South Central Railway,
Rail Nilayam,
Secunderabad
- 2] The Senior Divisional Engineer,
[Co-ordination], Nanded Division,
SC Railway at Nanded

APPLICANTS

VERSUS

Sanjay B. Jawalekar,
Age 42 Years, Occ: Contractor,
R/o. Shop No.14, Govindraj Complex,
Vivek Nagar, Nanded.

RESPONDENT

...
Mr. P.G.Godhamgaonkar, Advocate for the Applicants
Mr. G.S.Naik Thigale, Advocate for respondent
...

**CORAM: S.S.SHINDE,J.
DATE: 21.03.2016**

PER COURT:

1] This Application is filed with following prayer
clauses:

- B) The Arbitrator Shri. Malte, Ex. J be substituted
with another Arbitrator from the list of
arbitrators appointed by Hon'ble Chief Justice.

- C) The arbitration fee levied by Shri. Malte, Ex. J be quashed and set aside and further directions may be issued to levy arbitration fees as prescribed by the Chief Justice of Bombay High Court.

2] The learned counsel appearing for the review applicants submits that, the fees charged by the Arbitrator is anomalous to the prescription made under the Circular issued by the Hon'ble Chief Justice of the Bombay High Court which prescribes charging of arbitration fees at the prescribed rate thereunder. The outer limit is Rs.75,000/-. The applicants moved an application before the Hon'ble Arbitration Tribunal for such revision. However, the learned Arbitration Tribunal declined to revise the fees. It is submitted that, it was brought to the notice of the Arbitrator that, there is Circular issued by the Hon'ble Chief Justice of Bombay High Court, and therefore, the Arbitration Tribunal shall revise the arbitration fees.

3] It is submitted that, in spite of two Circulars, which is brought to the notice of the Arbitrator, he is not acceding for revision of arbitration fees, and therefore, the applicants apprehend that, bias will be nourished. Therefore, the learned counsel appearing for the review

applicants submits that, the application deserves consideration. He further submits that, in view of the Chapter XXX Rule 3 of the Bombay High Court Appellate Side Rules, this Court can review the order dated 8th April, 2013, passed by this Court. It is submitted that, even in case the parties have consented for paying fees, when the parties appeared before the Arbitrator, in that case also subsequently, the parties can apply for revision of the fees. In support of this afore-mentioned contention, the learned counsel appearing for the review applicants placed reliance in the case of *Hakam Singh Vs. M/s. Gammon [India] Ltd.*¹ The review applicants relying upon the Judgment of the Supreme Court in the case of *Union of India Vs. M/s. Singh Builders Syndicate*² submits that, in case the fees is prescribed by the High Court, it is not open for the Arbitrator Tribunal to charge different fees. The said aspect has been considered by the Hon'ble Supreme Court in the afore-mentioned Judgment.

4] The learned counsel appearing for the review applicants relying upon the averments in the affidavit in rejoinder submits that, the application is filed, invoking the

1 AIR 1971 SC 740

2 2009 [4] SCC 523

provisions of Section 12 [1] [a] r/w. Section 12 [3] [a] of the Arbitration Act. He invited my attention to the provisions of the Section 12 and 13 of the said Act, and submits that, the said provisions relates to substitution in the contingencies provided therein. It is submitted that, the Hon'ble Supreme Court in the case of *G.N.Nayak Vs. Goa University and others*³ ruled that, reasonable possibility of bias or circumstances leading to inference of operation of influence affecting a fair assessment of merits of the case sufficient to vitiate the action. It is further submitted that, in the case of *Board of Cricket for Control, India and another Vs. Netaji Cricket Club and others*⁴ the Hon'ble Supreme Court held that, doctrine of fairness and good faith is applicable while considering the application of review. Therefore, relying upon the grounds taken in the review application, rejoinder affidavit, the provisions of Arbitration Act and the Bombay High Court Appellate Side Rules, and also the judgments cited supra, the learned counsel appearing for the review applicants submits that, the review application deserves to be allowed.

5] On the other hand, the learned counsel

3 [2002] 2 SCC 712

4 AIR 2005 SC 592

appearing for the respondent i.e. non-applicant submits that, the order appointing an Arbitrator was challenged before the Hon'ble Supreme Court by the review applicants by way of filing Petition[s] for Special Leave to Appeal [Civil] CC No.19398/2013 [Union of India Vs. M/s. Sanjay B. Jawlekar], however, the same was dismissed by the Hon'ble Supreme Court on 11th November, 2013. He further submits that, the review applicants earlier filed Civil Application No.2311/2015 in Arbitration Application No. 6/2011, same came to be disposed off. Upon hearing the parties, the application was dismissed with liberty to place all material before the Arbitrator Tribunal. It is submitted that, when the first meeting was held after appointment of the Arbitrator, for fixing the fees, review applicants were present in the said meeting, and they agreed for paying fees as stated by the Arbitrator, and therefore, now it is not open for the review applicants to take different stand. It is submitted that, after appointment of the arbitrator, the proceedings before him proceeded further. The respondents did examine three witnesses, and also same were cross examined by the review applicants. Thereafter, review applicants have also examined one witness, and when he was under cross examination, at that stage, the

review applicants filed application before the High Court for modification of order appointing the arbitrator. It is submitted that, if the fees charged by the Arbitrator is compared with Schedule of fees given in the Schedule IV of the Act, it cannot be said that, the arbitrator is charging exorbitant fees. The learned counsel relying upon the unreported Judgment of the Bombay High Court Bench at Aurangabad in Review Application [Civil] No.220 of 2012, in Arbitration Application No.7/2011 submits that, there is no provision under the Act to entertain the prayer to review the order on merits. Therefore, relying upon the averments in the affidavit in reply, he submits that, the review application may be rejected.

6] I have given careful consideration to the submissions of the learned counsel appearing for the review applicants and the learned counsel appearing for the respondent. With their able assistance, perused the grounds taken in the Review Application, annexure thereto, averments in the affidavit in rejoinder and also the affidavit in reply filed by the respondent. Admittedly, the Special Leave to Appeal [Civil] CC No.19398/2013 [Union of India Vs. M/s. Sanjay B. Jawlekar], which was filed by the review

applicants challenging the order dated 8th April, 2013, passed in Arbitration Application No.6/2011, before the Hon'ble Supreme Court, has been rejected by the Hon'ble Supreme Court.

7] Admittedly, the Legislatures have not provided specific remedy for filing review application before the High Court under the said Act, and therefore, in absence of specific remedy provided by the Legislature in the said Act to review the order on merits, it is not possible for this Court to consider the review application on merits. It is not in dispute that, even the review applicants filed Civil Application No.2311/2015 before this Court in Arbitration Application No.6/2011, which came to be dismissed on 20th February, 2015, with liberty to the parties to place all the material before the Arbitrator Tribunal.

This Court in the case of *Vijaykumar Dashrath Wani and others Vs. Dungersing Hiralal Rajpurohit and others* in Review Application [Civil] No.220/2012, in Arbitration Application No.7/2011, decided on 15th February, 2013, for the reasons stated in para 7 to 10 in the said Judgment has taken a view that, there is no remedy provided by the Legislatures to entertain review application

on merits, once arbitration application is disposed of by the nominee of the Chief Justice of High Court. While deciding the said application, this Court has relied upon the Judgment of the Supreme Court in the case of *M/s. S.B.P. & Co. Vs. M/s. Patel Engineering Ltd. and anr*⁵. Para 7 to 9 of the said Judgments reads thus:

7. I have given careful consideration to the rival submissions of the parties. At the outset, it would be appropriate to decide whether the review application is maintainable or not. Upon careful perusal of the provisions of the Arbitration and Conciliation Act, 1996, it is abundantly clear that remedy of review is not provided by the legislatures. If remedy is not provided by the legislatures, it is not possible to accept the contention of the review applicants that this review application is maintainable. Though the learned Counsel for the review applicants placed reliance upon the judgment of the Supreme Court in the case of Jain Studios Ltd. (supra), in the said judgment, the Supreme Court has taken a view that review application for review of an order passed by the Chief Justice of India or his nominee is maintainable under Article 137 of the Constitution of India. The Supreme Court, in para 8 observed, thus:

8. An order passed by the Chief Justice of India or his nominee under Section 11 (6) of

⁵ AIR 2006 SC 450

the Act is indeed an 'order' within the meaning of Article 137 of the Constitution and is subject to review under the aforesaid provision."

Upon careful reading of paragraph 8 of the judgment of the Supreme Court in case of Jain Studios Ltd. (supra), it is held that the order passed by the Chief Justice of India or his nominee u/s 11 of the said Act is an order within the meaning of Article 137 of the Constitution and subject to review. But, in the said judgment, there is no clear opinion expressed by the Supreme Court in respect of maintainability of review application so far as the order passed by the Chief Justice of High Court or his nominee u/s 11 (6) of the said Act is concerned.

8. *The Supreme Court in the case of M/s. S.B.P. & Co. vs. M/s Patel Engineering Ltd. and Anr [AIR 2006 SC 450] in para 43 of the judgment has held, thus:*

43. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11 (6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution of

India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.”

In the said judgment, it is further held in clause (vii) of para 46:

“46. We, therefore, sum up our conclusions as follows:

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against

that order only under Article 136 of the Constitution of India to the Supreme Court.”

Upon careful reading of para 43 and clause (vii) of para 46 of the judgment of Supreme Court in case of M/s. S.B.P. (supra), it is crystal clear that as the order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court. Therefore, an aggrieved party will have to take recourse to the remedy under Article 136 of the Constitution of India.

9. As observed earlier, there is no remedy provided by the legislatures to entertain review application once arbitration application is disposed of by the nominee of the Chief Justice of High Court.

8] Therefore, I am of the considered view that, this review application is not maintainable and secondly, the parties to the original arbitration application agreed before the Arbitrator during their initial meeting for paying fees, prescribed by the Arbitrator, and the arbitration proceedings proceeded further, and those are at the stage of examining the witnesses by the parties. For the reasons afore-stated, I am not inclined to entertain this Application, hence, application stands rejected. However, it is made

clear that, this Court has not expressed any opinion on the merits of the subject matter pending before the Arbitrator.

9] Parties to act upon authenticated copy of this order.

Sd/-
[S.S.SHINDE]
JUDGE

DDC