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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

**APPEAL NO.106 OF 1999 IN
ARBITRATION PETITION NO.298 OF 1996**

Municipal Corporation of
Greater Mumbai & another ...Appellants
vs.
M/s.Kulkarni & Co. & anr. ...Respondents

**ALONG WITH
APPEAL NO.264 OF 1999 IN
ARBITRATION PETITION NO.298 OF 1996**

M/s.Kulkarni & Co. & anr. ...Appellants
vs.
Municipal Corporation of
Greater Mumbai & another ...Respondents

None for the appellants in Appeal No.264 of 1999
Mr.Kevin Setalvad, Senior Counsel a/w Mr.Sadeep
Patil and Mr.Anupak Surve and Mr.R.V.Sirsekar for
the appellants in Appeal No.106 of 1999 and for the
first respondent in Appeal No.264 of 1999

CORAM : A.S.OKA, &
SMT.ANUJA PRABHUDESSAI,JJ.
DATE : DECEMBER 2, 2016

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 These appeals were called out for final hearing day before yesterday, when submissions of the learned senior counsel for the appellant in Appeal No.106 of 1999 were heard. However, none appeared for the respondent in the said appeal as well as appellants in Cross Appeal No.264 of 1999. The

controversy in Appeal No.106 of 1999 very narrow. Before we go into the actual controversy, a brief reference to the facts of the case will be necessary. The first appellant in Appeal No.106 of 1999 is the Municipal Corporation of Greater Mumbai (for short 'Municipal Corporation') and the first respondent is a contractor appointed by the Municipal Corporation. The second respondent is the learned Arbitrator.

2 The Municipal Corporation entrusted the work of construction of a school building at Malvani, Malad to the contractor. The case is that the work was entrusted without calling for tenders. By a letter dated 6th May 1985, the Municipal Corporation called upon the contractor to take possession of the plot for commencing the work. Formally, the date for commencing of the work was fixed as 11th July 1985. According to the case of the Municipal Corporation, the time fixed for completion of work was 30 months. The value of the work was Rs.1,23,20,500/-. On 8th May 1985, the contractor addressed a letter to the Municipal Corporation for releasing payment for steel work. In the said letter, the contractor stated that it will be necessary to permit his own RCC consultant to do the work of RCC design for the entire school building. It was pointed out that the lay out of the building proposed to be constructed is similar to the lay out of another municipal building i.e at Gandhi Gram School at Juhu which was subsequently approved. Various details of R.C.C Design of the said school

at Juhu were set out. A request was made to approve the said proposal. The additional Municipal Commissioner gave approval to the said proposal. The date of commencement of the work was fixed and on 11th July 1985, the construction commenced. On 31st July 1985 the Municipal Corporation stopped the work. Thereafter, on 6th August 1985 according to the case made out by the contractor, the Municipal Engineer accepted the proposal for designing the structure along with basement on IS 456-1978 and also approved RCC design after obtaining sanction of the Accounts Department and the Additional Municipal Commissioner which was validated by the Education Committee of the Municipal Corporation. On 24th October 1985, the Municipal Corporation informed the contractor to commence the work. Admittedly, on 7th March 1986 a formal work order was issued by the Municipal Corporation to the contractor calling upon the contractor to deposit a sum of Rs.2,46,401/-. On 6th May 1986, the work was again ordered to be stopped by the Municipal Corporation. The Contractor claimed that on 3rd July 1986, a resolution was passed by the General Body of the Municipal Corporation bearing No. 203 by which it was resolved to award the contract to the said contractor. Accordingly, the contractor allegedly forwarded one copy of the formal contract document duly signed to the Municipal Corporation.

3 The contractor submitted Adhoc bill in the sum of Rs.15,18,360/- which led to a dispute. The case is that on 15th March 1987, the Municipal Corporation

issued a notice of termination. It is alleged that there were negotiations between the parties and somewhere in January 1991, the contractor vacated the site.

4 The contractor filed a suit for injunction against the Municipal Corporation restraining the Municipal Corporation from getting the work carried out through the another contractor. As temporary injunction was denied, an appeal was preferred by the contractor before this Court. In the said Appeal from Order, the learned Single Judge passed an order on 17th December 1992 referring the dispute to an independent expert. On 7th March 1993, the Municipal Corporation addressed a letter to the contractor suggesting the names of five Arbitrators calling upon the contractor to communicate in writing a consent for any one of the five suggested arbitrators within a period of seven days.

5 By a letter dated 29th October 1993 addressed by the contractor to the City Engineer of the Municipal Corporation, the contractor consented for appointing Shri M.D.Tambekar as the sole arbitrator whose name was at serial no.5 of letter dated 7th June 1993. Accordingly, a reference was made to the arbitration of Shri Tambekar. Ultimately, on 14th June 1996 an Award was made by the Arbitrator by allowing some of the claims of the contractor. An amount of Rs.1,29,57,362/- was awarded to the Contractor. Interest at the rate of 18% per annum was ordered to be paid on the said amount.

6 Being aggrieved by the said award, the Municipal Corporation filed a petition under section 30 of the Arbitration Act, 1940 for setting aside the Award. By a Judgment and Order passed by the learned Single Judge on 5th November 1998, the said petition was partly allowed by modifying the Award to a certain extent. Even a direction regarding payment of interest on certain claims was modified. Being aggrieved by the said Judgment and Order, these cross appeals have been preferred.

7 Only one main submission has been canvassed by the learned senior counsel for the Municipal Corporation. His submission is based on sections 69 to 71 of the Mumbai Municipal Corporation Act, 1888 (for short "the said Act of 1888"). The submission is that unless a contract is executed in accordance with sub-section 1 of section 70 of the said Act of 1888, there is no valid contract entered into by the Municipal Corporation. Relying upon section 71 of the said Act of 1888, he submitted that unless the contract is executed in the manner provided under sub-section 2 of section 70, the same will not be binding on the Municipal Corporation. In support of this contention, he relied upon the decision of the Apex Court in the case of *Piloo Dhunjishaw Sidhwa vs. Municipal Corporation for the city of Poona*¹. He submitted that the said decision of the Apex Court as well as the decision of the learned Single Judge in the case of *Jayant Dharshi Shah Vs. Municipal*

1 1970 (1) SCC 213

Corporation of Greater Bombay² hold that unless a contract is executed and sealed in accordance with sub-section 2 of section 70, the same does not become a valid contract. He submitted that *pari materia* provision of section 74 of the Bombay Provincial Municipal Corporations Act, 1949 has been interpreted by the Apex Court in the case of Piloo Sidhwa. He also relied upon decision of a Division bench of this Court in the case of Municipal Corporation vs. Ramadevi Shrinivas Ruia and another³. He submitted that the said decision holds in so many words that no contract of a nature specified in sub-section 2 of section 70 can be valid and binding on the Municipal Corporation unless it is executed in accordance with sub-section 2 of section 70. He urged that plea of estoppel is not available against the Municipal Corporation. He relied upon the decision of the Apex Court in the case of Bhikraj Jaipuria vs. Union of India⁴ and the Bihar Eastern Gangetic Fishermen Co-operative Society Limited Vs. Sipahi Singh and others⁵ in this behalf. No other submission has been canvassed on merits except a submission attempted to be made on the basis of alleged variation of contract.

8 We have carefully considered the submissions. Firstly, it is pertinent to note that admittedly arbitration clause is contained in the form of contract provided by the Municipal Corporation which

2 1990 Mh.L.J. 649

3 1982 Mah LJ 377

4 AIR 1962 SC 113

5 (1977) 4 SCC 145

was not executed in accordance with sub-section 2 of section 70 of the said Act of 1888. There is no dispute that the work order was issued by the Municipal Corporation to the contractor. In terms of the Judgment and order of this Court dated 17th December 1992 in Appeal from Order No.1312 of 1992 preferred by the contractor, the Deputy City Engineer, Building Construction, (Suburban) of the Municipal Corporation addressed a letter dated 7th July 1993 to the contractor. The names of five arbitrators were set out in the said letter and a request was made to the contractor to communicate in writing his consent for appointment of one of the five arbitrators named therein within a period of seven days. Thus, the arbitration clause was invoked by the Municipal Corporation itself. Perusal of the annexures to both the appeals show that the contractor responded and by a letter dated 29th October 1993 consented for appointment of Shri M.D.Tambekar as the sole arbitrator. That is how the learned Arbitrator entered arbitration and proceeded further. Thus, the Municipal Corporation itself invoked the arbitration clause provided in its own form of contract.

9 It appears that in the proceedings before the learned Arbitrator certain claims were permitted to be raised by the contractor to which an objection was raised by the Municipal Corporation. Therefore, an Arbitration Petition was filed by the Municipal Corporation being Arbitration Petition No.26 of 1995 which was heard and disposed of an order dated 24th

March 1995. The learned Single Judge came to the conclusion that the Arbitrator had jurisdiction to decide certain claims which are specified therein. It was clarified that if the parties are entitled to do so in law, they may invoke the Arbitration Clause under the contract in respect of other disputes and differences. Relevant portion of the said order read thus:

"With this clarification, the Arbitrator to proceed. Also clarified that the Respondents, if they are entitled to do so in law, may invoke the Arbitration Clause under the Contract, in respect of the other disputes and differences and ask for a separate Arbitration. The question whether they can do so or not is not decided in this petition."

10 The reference to the contract in the said order is to the contract which was to be signed by the Municipal Corporation but was not signed. It appears that the said order of the learned Single Judge was challenged by the contractor by filing an Appeal No.286 of 1995. The consent minutes of order were filed by the Municipal Corporation and the contractor in the Appeal. The Appeal was disposed of on 24th July 1996 by passing an order in terms of the minutes of order. Under the minutes of order, the parties agreed to appoint a sole Arbitrator to decide the claims which were excluded under the orders of the learned Single Judge and that is how in respect of the excluded claims, a separate

arbitration proceeding commenced.

11 Thus, it is the Municipal Corporation which invoked arbitration clause in the contract and started the process of appointment of an arbitrator. Both the orders dated 24th March 1995 (of the learned Single Judge) and the order dated 24th July 1996 (of the Division Bench in Appeal) reveal that not only that the parties including the Municipal Corporation relied upon the arbitration clause in the contract but in fact acted upon the arbitration clause.

12 At this stage, we may make useful reference to the impugned order and the findings recorded by the learned Single Judge in the impugned order. Paragraph 4 of the impugned order refers to the argument canvassed on behalf of the Municipal Corporation that there was no concluded contract between the parties and there could not have been an arbitration proceedings. Argument was that in absence of the concluded contract and arbitration clause, the Award was invalid. In the same paragraph, the learned Single Judge observed and in our view rightly that the aforesaid orders were passed by this Court practically by consent of the parties. Some of the claims (further part of the claims) were referred to another learned Arbitrator- a retired Chief Justice of this Court. In fact, a finding of fact has been recorded in paragraph 4 of the impugned Judgment by the learned Single Judge that further part of the claim was arbitrated and the Municipal Corporation made payment to the

contractor in terms of the Award. In short, after having acted upon the arbitration clause in the contract, and after having consented to the appointment of two arbitrators to adjudicate upon the claims arising out of the contract, it was not open for the Municipal Corporation to raise a technical contention that there was no concluded contract between the parties.

13 The learned Single Judge has dealt with the argument based on sections 69 to 71 of the said Act of 1888. In paragraph 7 of the impugned Judgment, the learned Single Judge noted that the proposal made by the contractor was approved by the Additional Commissioner of the Municipal Corporation. By resolution dated 12th October 1985, the Education Committee of the Municipal Corporation approved the grant of contract to the said contractor. There is a finding recorded that the General Body of the Municipal Corporation approved grant of contract as per the said resolution of the Education Committee. We may note that the work order was issued on 7th March 1986 by the Municipal Corporation to the contractor. Thus, what remained to be done was the execution of the contract in terms of sub-section 2 of section 70. As stated earlier, it is the Municipal Corporation which invoked arbitration clause in the contract. At least in two proceedings before this Court, not only that the Municipal Corporation did not dispute the existence of an arbitration clause in the contract between the parties but also agreed to proceed on

the basis of the arbitration clause in the contract without raising a contention that the contract was not binding.

14 As pointed out earlier, the arbitration clause was in the contract which is relied upon by the contractor which was duly forwarded to the Municipal Corporation for execution. The Contract was in terms of the draft provided by the Municipal Corporation. The arbitration clause was invoked by the Municipal Corporation itself and at various stages of different proceedings, not only before two different Arbitrators but before this Court, accepted and acted upon the arbitration clause in the contract. After having done so, it was not open for the Municipal Corporation to raise a contention that the contract on the basis of which the Municipal Corporation itself acted was not a valid contract. What is held by the learned Single Judge in substance is that the issue of invalidity of contract was not available to the Municipal Corporation after having acted upon the contract.

15 The Apex Court has repeatedly held that the Government and Public Authorities should not take up technical plea to invalidate the contracts. The Public Authorities should be transparent, fair and just to the citizens and public. The Municipal Corporation ought not to have raised the plea of invalidity of contract as the same is unfair to the Contractor.

16 We, therefore, agree with the view taken by the learned Single Judge that there was no merit in the objection raised by the Municipal Corporation on the basis of the plea of invalidity of the contract.

17 Another contention tried to be raised by the Municipal Corporation was that on the basis of the proposal of 8th May 1995, there was a variation of contract. As stated earlier, the proposal made by the letter dated 8th May 1995 was approved by various Departments of the Municipal Corporation and ultimately on 12th December 1995, a resolution was passed by the Education Committee approving grant of contract. This resolution was ratified by the General Body of the Municipal Corporation. The Work order was issued on 7th March 1996. Hence, the said contention has no merit.

18 The decisions relied upon by the Municipal Corporation as regards interpretation of section 69 to 71 of the said Act of 1888 are of no assistance as in the present case, the Municipal Corporation never disputed the existence of the contract containing the arbitration clause. Thus, decisions relied upon about the plea of estoppel are not relevant in the present case as all along the Municipal Corporation proceeded on the footing that there was a contract executed in which there was an arbitration clause. Hence, there is no merit in the contentions raised by the Municipal Corporation and therefore, its appeal must fail.

19 Hence, we pass the following order:

- (I) Appeal No.106 of 1999 is hereby dismissed.
We refrain ourselves from ordering costs as the
the respondent has not appeared;
- (II) Appeal No.264 of 1999 is dismissed for non
prosecution;
- (III) If there is any interim relief operative in
Appeal No.106 of 1999, the same will continue
to operate for a period of twelve weeks from
today.

(ANUJA PRABHUDESSAI,J.)

(A.S.OKA,J.)