

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

COMMERCIAL APPEAL NO. 177 OF 2017

Pratibha Industries Limited

.... Appellant

Vs.

Municipal Corporation of Greater
Mumbai and others

.... Respondents

Mr. Shardul Singh a/w Mr. Parag Khandhar, Mr. Sohil Shah i/b DSK
Legal for Appellants

Mr. J. F. Pochkhanwala, Sr. Advocate a/w Mr. R. Y. Sirsikar, Mr. S. T.
Gandhi, Ms. Deepali Rane, T. P. Gandhi for MCGM.

CORAM : NARESH H. PATIL AND NITIN W. SAMBRE, JJ.

RESERVED ON : JANUARY 18, 2018.

PRONOUNDED ON : FEBRUARY 7, 2018

ORDER

The present appellant preferred Commercial Arbitration
Petition (L) No. 218 of 2017 claiming that it was awarded a tender
pursuant to the bid invited by respondent no. 1 in relation to supply,
installation and maintenance of water meters of various sizes
pursuant to the specification prescribed in the tender conditions in
the city of Mumbai for wards A,B,C,D,E, F/North, F/South, G/North
and G/South.

2 While executing the contract in question, since the dispute arose between the petitioner and the respondent, proceedings under section 9 of the Arbitration and Conciliation Act, 1996 were filed seeking an injunction against the respondent from invoking bank guarantee which was granted on 23/06/2017 by the High Court.

3 In Commercial Arbitration Petition (L) no. 281 of 2017, the learned Single Judge vide order dated 27/06/2017 recording willingness of the appellant to go for the arbitration and pursuant to the consent given by the senior counsel for the respondent/corporation, upon instructions received from the official of the respondent granting no objection for such suggestion, appointed Justice V. M. Kanade (retired) as Arbitrator to decide all issues between the parties.

4 The respondent/corporation thereafter have taken out Notice of Motion (L) No. 407 of 2017 seeking recall of the order dated 27/06/2017 to the extent of appointment of Arbitrator which came to be allowed vide order dated 12/09/2017, as such this appeal.

5 The learned counsel for the appellant would strenuously urged

that the law on the power and authority to review is well settled. In absence of express powers under the Statute the order passed in the arbitration proceedings cannot be reviewed. According to him, the Arbitration Act nowhere prescribes any express power providing authority or power to review its own order. In view thereof the order passed by the learned Single Judge which is impugned in the present appeal recalling the order dated 27/06/2017 nominating the Arbitrator is without jurisdiction and as such is liable to be set aside. Support is drawn from the judgment of this Court in the matter of **Madhav Structural Eng. Ltd. V/s. Mah. State Road Development Corpn. Ltd.**¹

The learned counsel would also invite attention of this Court to the submission that an order under section 9 is appealable under section 37 of the Arbitration Act. He would then rely upon provisions of section 5 of the Arbitration Act so as to claim that under part 1 of the Arbitration Act judicial intervention but for remedy provided under section 37 is not permissible.

6 Secondly, the submission of the learned counsel for the appellant is, the order of appointment of Arbitrator is pursuant to the

¹ [2013(2)Mh.L.J.]

consent granted by the counsel for the respondent upon instructions from the official of the corporation. According to him, once there is consent order passed by the learned Arbitration Court, no powers are vested with it to recall the order. By inviting the attention of this Court to the provisions of sub section 5 of section 12 of the Arbitration Act, the learned counsel for the appellant would urge that clause 17 of the general conditions of the contract even though speaks of no arbitration is allowed, however, clause 22 of the tender notice in express terms speaks of providing of remedy of arbitration. He would then urge that clause 17 will not override the provisions of clause 22 particularly when clause 17 of the general conditions if appreciated in the backdrop of principles of statutory interpretation will be of lesser importance than that of clause 22 of the tender notice which provides for arbitration. According to him, the consent granted by the learned counsel for the respondent upon instructions of the officer is just and proper for proceeding with the appointment of the Arbitrator.

7. Learned Counsel for the Appellant would urge that just because in house mechanism is provided pursuant to clause 17 of the general terms of the tender, same will not operate as an embargo on the right of the Appellant to seek arbitration. He submits that the law on the subject issue is well settled in the wake of the judgment of this

Court in the matter of **S. Kumar Construction Co., Vs. Municipal Corporation of Greater Mumbai** reported in 2017 (2) Mh. L.J. 718.

7 The learned counsel for the appellant then would urge, whether there exists arbitration agreement or not is an issue which can be even raised and gone into before the learned Arbitrator. So as to substantiate this contention, he would rely upon the judgment of the Apex Court in the matter of **Municipal Corporation of Greater Mumbai V/s. Tatva Global Environment (Deonar) Ltd.** decided on 28/10/2016, the order of the learned Single Judge in **Tatva Global Environment (Deonar) Ltd. V/s. The Municipal Corporation of Gr. Mumbai.**² He submits that the order impugned is not sustainable.

8 Per contra, Mr. Pochkhanwala, the learned senior counsel appearing for the respondents would urge that the order of recall which is subject matter of challenge in the appeal cannot be termed to be one amounting to seeking review of the earlier order dated 27/06/2017. According to him, once having noticed that there is no arbitration agreement, the learned Single Judge was right in ordering recalling appointment of arbitrator. He submits that the officer who instructed the learned senior counsel to consent for appointment of

2 [2015 SCC ONLINE BOM 4144]

Arbitrator was not authorized or empowered to extend such consent and in view thereof the order impugned does not call for any interference.

9 Learned Senior Counsel submits that the Officer was consented for appointment of Arbitrator since in law was not authorized to extend concession or consent for appointment of Arbitrator, such act on the part of the Respondent/Officer cannot bound the Respondent/Corporation. Mr. Pochkhanwala, learned Senior Counsel would rely upon the judgment of the Apex Court in the matter of **Chandra Prakash Shahi Vs. State of U. P and others reported in (2000) 5 Supreme Court Cases 152** so as to claim that the object derived from the terms of agreement should be taken into account of not providing any arbitration remedy. Mr. Pochakhanwala then would urge that reliance placed by the appellant on the judgment in the matter of **MCGM Vs. Tatva Global Enviornment** cannot be attracted in the facts of the present case as law laid down therein has to be considered and applied in the backdrop of the facts of that case. So as to substantiate his contentions, he would draw support from the judgment of the Apex Court in the matter of **Deepak Bajaj Vs. State of Maharashtra & Anr, reported in AIR 2009 Supreme Court 628**, particularly paragraphs 18 and 24. Mr. Pochakhanwla as such submits that the present appeal is devoid of merits and as such is liable to be rejected.

10. Considered the rival submissions.

11. The foremost issue which needs to be answered in the

present appeal is whether the learned Single Judge was right in recalling his order dated June 27, 2017 to the extent of appointment of arbitrator by way of the impugned order when Part-I of the Arbitration Act does not provide for any judicial intervention.

12. Though Mr. Pochakhanwala had tried to impress upon us by making a strong submission that the order in question in the present appeal cannot be termed to be one amounting to review of the earlier order dated 27th February, 2017, however, this Court is required to appreciate the source of power of learned Single Judge, particularly under the provisions of the Arbitration Act to pass such order.

13. If the provisions of Part-I of the Arbitration Act, particularly Section 5 are appreciated, in clear terms provides for *non obstante* clause and further speaks of no intervention by judicial authority. The Apex Court had an occasion to interpret the provisions of Section 5 of the said Act in the backdrop of the object with which the Arbitration Act of 1996 is enacted. Considering the object of encouraging resolution of disputes expeditiously and less expensive mode speaks of minimal intervention by the Courts.

This Court had an occasion to consider the power of the Court to entertain and review, particularly in the light of embargo u/s 5 of the Arbitration Act. In the matter of **Madhav Structural Engineering Ltd.** cited (supra), this Court in para 10 & 15 of the said judgment has observed thus:

“10. On perusal of the judgment in case of Shyam Sunder Agarwal & Co. vs. Union of India (supra) it is clear that the Supreme Court was considering the provisions under section 39

of the Arbitration Act 1940 and took a view that there was embargo of filing second appeal from the appellate order passed under section 39 of the Act. It was held that the revisional jurisdiction of the High Court under Code therefore shall not stand superseded under the Arbitration Act if the Act does not contain any express bar against exercise of revisional power by the High Court provided exercise of such revisional power does not mitigate against giving effect to the Provisions of the Arbitration Act. This judgment of the Supreme Court is delivered under the provisions of the Arbitration Act, 1940. This judgment does not decide whether review petition is maintainable under the provisions of the Arbitration Act, 1940 or not. In my view, in view of the express bar provided under section 5 that notwithstanding contained any other law for the time being in force, matters which are governed by part I, no judicial authority shall intervene except where so provided in that part. As the review is not having been provided in any of the provisions of Part I of the Arbitration and Conciliation Act, 1996, in my view review petition is not maintainable. In my view the judgment of the Supreme Court in case of *Shyam Sunder Agarwal & Co. vs. Union of India* (supra) is thus not applicable to the facts of this case and is of no assistance to the petitioner.”

15 In my view, the Arbitration and Conciliation Act is a self contained code and as the said Act does not provide any remedy of review, it is manifest that review could not be made. In my view, remedy of review is substantive remedy and would not be maintainable unless the statute/rules permits. If, the right of review is not provided and is allowed to be exercised, any order if passed would be ultra-virus and without jurisdiction. In my view, the present proceedings filed by the petitioner are totally without jurisdiction. I, therefore, pas the following order:-
 (a) Review petition is dismissed as not maintainable.

(b) No order as to costs.”

14 Arbitration Act creates an embargo on filing and entertaining an application for review, particularly on the issues which are dealt with in Para-I of the Statute. Looking to the Aims and

Objects with which the Arbitration Act is enacted, same gets status of a special Statute having limited application relating to matters governed and dealt with under the said Act. The application of such special Statute, has to be in strict sense in accordance with the provisions of the said Statute. That being so, remedy of review can be inferred to be available to the parties.

15 In the backdrop of above position of law, only conclusion that can be drawn is a review in a matter of provisions of Part-I of the Arbitration Act is not maintainable.

16 In the wake of aforesaid observations if the order impugned in the Appeal is appreciated, even though the learned Single Judge has not referred to the word “Review” in the said order, however, fact remains that what has been done by the learned Single Judge by the impugned order is, recalled the earlier order dated 27th June, 2017 whereby the Arbitrator came to be appointed. In our opinion, the order impugned is nothing more than the one amounting to reviewing the earlier order dated 27th June, 2017.

In the light of the judgment cited supra in the matter of **Madhav Structural Engineering Limited**, once this Court having agreed with the view expressed therein on non maintainability of Review Petition, it is really difficult to appreciate and entertain the contention of Senior Counsel Mr. Pochkhanwala that the order impugned cannot be termed as a one passed in exercise of powers of review. On this count alone, in our opinion, the order impugned dated 12th September, 2017 is not sustainable in law.

17 The order impugned dated 12th September, 2017 as such is quashed and set aside and it is declared that the parties will be governed by the order dated 27th June, 2017 passed in common Arbitration Petition (L) No. 281 of 2017.

18. So far as other submissions are concerned this Court has not gone into and appreciated the same, particularly in the wake of the finding recorded. As such, those contentions are kept open.

19. However, this will not preclude the Respondent-Corporation from raising a plea of non existence of arbitration agreement before the learned Arbitrator pursuant to section 16 and other legal provisions of the Arbitration and Conciliation Act, 1996.

20. With above observations, the present appeal stands allowed.

[NITIN W. SAMBRE, J.]

[NARESH H. PATIL, J.]