

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH : NAGPUR

Civil Application (O) No. 1669 of 2017

In

Misc. Civil Application No. 1074 of 2017

Applicant : M/s Visweswaraiah Constructions, a Proprietorship concern, having its Head Office at Flat No. 18, Biyani Nagar, Tukum Road, Chandrapur, through its Proprietor, Venkataramarao Mastanaiah Naidu Nambori, aged about 49 years, Occupation: Business, resident of 3448/10, Sahyadri Apartments, Biyani Nagar, Tukum, Chandrapur

Versus

Respondent: M/s D. P. Jain & Co. Infrastructure Pvt. Ltd., through its Director, a Company registered under Companies Act, having its registered office at U-6, Himalaya Accord Apartment, Opposite Law College, Amravati Road, Nagpur

Shri R. L. Khapre, Advocate for original applicant
Shri Shyam Dewani, Advocate and Shri H. I. Kothari, Advocate with him
for original respondent/present applicant

Coram : S. B. Shukre, J

Dated : 22nd March 2018

Order

1. Heard Shri Shyam Dewani, learned counsel for the present applicant (original respondent) and Shri R. L. Khapre, learned counsel for

the original applicant (present non-applicant). Perused the documents placed on record.

2. Applicant is seeking recall of the order dated 13th October 2017 mainly on three grounds. First is about bar of invoking arbitration clause, because memo of understanding containing arbitration clause, though compulsorily registrable, has not been registered in this case. Second objection is in respect of the fact that there is no debt in existence, because all the accounts have been settled and as such, nothing is recoverable from the present applicant. The third one relates to the fraud played upon the present applicant as well as the Court by the original applicant.

3. Shri R. L. Khapre submits that there is no substance in any of these objections and there is also an opportunity for the applicant to raise all these objections before the learned Arbitrator.

4. Sofar as the first objection is concerned, prima facie, I find that it could have been accepted only when the contract evidenced by the document of Memorandum of Understanding was itself registrable. As of now, I could not come across any circumstance which would convince me at this stage to accept the submission made in this regard by learned

counsel for the applicant. Nevertheless, the applicant can raise this point before the Arbitrator and try to convince him by placing adequate material in support of such contention.

5. Sofar as the second objection is concerned, I find that the same is disputed and it would make the dispute as arbitrable.

6. As regards third objection, I find that this issue involves so many disputed questions of facts which, in my considered opinion, cannot be gone into at the stage of deciding on application for recall of the order. The same could be raised by the applicant before the learned Arbitrator.

7 There is also an objection about insufficiency of the stamp duty paid on the document containing an arbitral clause. Reliance has been placed by learned counsel for the applicant in the case of **Jayraj Devidas & ors v. Nilesh Shantilal Tank & anr** reported in 2014 (6) *Mh. L. J.* 156. There is no quarrel about the proposition of law laid down in the case of **Jayraj**. But, the facts which obtained at the time when the order sought to be recalled was passed, were different. At that time, no objection was taken or was available as regards sufficiency or otherwise of the stamp duty. This being the situation, Section 35 of the Bombay Stamp Act would have its role in the present case. However, if any

objection is to be raised in this regard, it shall be open for the applicant to do so before the learned Arbitrator.

8. It is seen that the notice of original application was received by the present applicant on 10th October 2017 and the application was taken up for final disposal and disposed of finally on 13th October 2017. But, just because the application was processed for hearing about three days thereafter would not by itself vitiate the order passed by this Court. Once it is accepted that the notice has been received, it is for the parties to respond to it timely and see that opportunity given to it is not wasted. There is no point in putting blame on the advocate.

9. In this view of the matter, I find that there is no merit in the application and it is accordingly dismissed. All contentions are kept open and it is made clear that the observations made hereinabove are for the purposes of deciding the present application and learned arbitrator shall not be influenced by any of the observations made by this Court.

S. B. SHUKRE, J