

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

LETTERS PATENT APPEAL NO.225 OF 2011

M/s. A.B. Dongre and Company
partnership firm through its
partner Avinash s/o Bhagwanrao Dongre,
Age : 68 years, Occ.: Business
r/o Mangalwar peth, Ambajogai,
Tq. Ambajogai, Dist. Beed

... Appellant
(Ori. Plaintiff)

VERSUS

- 1) The State of Maharashtra
through the Collector, Beed
- 2) The Executive Engineer
Public Works Division,
Beed, Tq. & Dist. Beed

... Respondents
(Ori. Defendants)

Mr. V.D. Salunke, Advocate for the appellant
Mr. G.O. Wattamwar, Assistant Government Pleader for the respondent/State.

**CORAM : SUNIL P. DESHMUKH &
S.M.GAVHANE, JJ.**

DATED : 01-08-2019

ORAL JUDGMENT (PER :- SUNIL P. DESHMUKH, J.)

1. This is Letters Patent Appeal by original plaintiff in Special Civil Suit No.38 of 1993, challenging validity of order dated 08-10-2010 passed by Hon'ble learned single judge of this court in writ petition No.2662 of 2010. Learned single judge under aforesaid order had allowed the writ Petition, setting aside order referring the suit/matter to arbitrator passed by civil judge, senior division, Ambajogai under Exhibit 228.

2. There is no particular dispute in respect of factual aspects that Special Civil Suit No. 38 of 1993 had been moved by appellant-firm claiming

an amount of Rs. 78,38,300/- on account of contract work of construction of bridge across Borna river.

3. While the suit had been pending, it appears that an application had been moved by plaintiff seeking appointment of arbitrator and for reference of the same to him for resolution of the dispute. It is not the case of appellant, it appears, said request had been acceded to by trial court. It is being submitted on behalf of respondents/State, said request had been rejected around 1997-1998.

4. Thereafter, an application had been moved Exhibit 228 dated 10-07-2007 purporting the same to be under section 89 of Code of Civil Procedure for appointment of Arbitrator for adjudication of the matter. Trial court had allowed the application under its order dated 11-10-2007 appointing one Shri. Pralhad Supda Borahate, retired superintendent engineer as arbitrator. Said order had been subjected to challenge by respondent/State in appeal from order bearing No.73/2008. However, the appeal from order failed as not maintainable, leaving it open to respondents/ the State to pursue remedies as would be available in law. The high court while deciding said appeal from order on 03-08-2009 had observed that the appeal raises a question as to whether suo-motu court can appoint an arbitrator on request of one of the parties.

5. The matter had been taken to the arbitrator and representative of the State had objected to appointment of arbitrator under an application and had requested him not to proceed with the matter further. The application, it appears, had been declined by the arbitrator and he passed an award on 30-09-2009.

6. In March 2010, aforesaid writ petition bearing No.2662 of 2010 had been filed by the State praying for issue of writ of certiorari against order dated 11-10-2007 passed on Exhibit 228 by civil judge, senior division, Ambajogai and to declare award of the arbitrator dated 30-09-2009 to be null and void and *non-est*.

7. Hon'ble single judge, had quite elaborately discussed the matter and had found substance in the challenge posed to order on Exhibit 228 as well as to the efficacy of the award by the arbitrator. Learned single judge had found that in the absence of consent by one of the parties, reference of dispute for resolution to arbitrator pursuant to section 89 of Code of Civil Procedure would not be proper and legal. He had allowed the writ petition, setting aside order on Exhibit 228 as well as declared the award dated 30-09-2009 to be null and void with a direction to civil court to decide the matter expeditiously within a period of six months. It is this order dated 08-10-2010 passed by learned Single Judge in writ petition No. 2662 of 2010 is being taken exception to in present Letters Patent Appeal.

8. Learned counsel appearing for the Letters Patent Appellant Mr. V.D. Salunke, strenuously urges this court to consider that a reference to arbitrator has been made pursuant to amendment to section 89 of the Code of Civil Procedure in 2002 whereunder court is empowered to refer the dispute to arbitration pursuant to the Arbitration and Conciliation Act, 1996. He submits that while Exhibit 228 had been accordingly moved which is after amendment of 2002 to section 89 of the Code of Civil Procedure, the earlier negation of such request could not be an impediment to have consideration of such a

request afresh. Over and above, learned counsel submits that a duty has been cast on the court where government is a party to endeavour to assist the parties in arriving at settlement in respect of subject matter/suit. For said purpose he refers to order XXVII, rule 5B in the Code of Civil Procedure read in thus:

"5B. Duty of Court in suits against the Government or a public officer to assist in arriving at a settlement-

(1) In every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage, it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred under sub-rule (2) is in addition to any other power of the Court to adjourn proceedings."

9. He submits that conjoint reading of section 89 and order XXVII, rule 5B(2) of Code of Civil Procedure would be a pointer to that it is obligatory for a court to make efforts to have settlement in respect of the subject matter. He submits that section 89 of the code empowers the court to refer a dispute for alternate dispute resolution mechanism viz; arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. He submits that the provisions no way even by semblance suggest that parties' concurrence is inevitable for reference of a dispute to resolution through alternate mechanism. In such a case, after amendment in 2002, reference to arbitrator for supposed want of concurrence of one of the parties shall not

hamper exercise of power and no fault shall be found with the same.

10. Learned counsel Mr. Salunke vehemently submits that after order had been passed by learned single judge of this high court in appeal from order referred to above, the respondents had participated in arbitration proceedings and had submitted to his jurisdiction, consequently had waived their right to object to the arbitration proceedings. In such a case, learned counsel submits, if at all respondents are aggrieved by award passed by the Arbitrator the only course open to them, having regard to provisions of Arbitration and Conciliation Act, 1996 was pursuant to section 34 according to its categorisation. He submits that the provisions are strict and stipulate that the only way to question arbitrator's award is as referred to under section 34 of the Arbitration and Conciliation Act, 1996 and no challenge can be posed to such an award in a writ petition.

11. In support of aforesaid proposition he relies on a citation *Cicily Kallarackal Versus Vehicle Factory, 2012 DGLS (SC)380 (Supreme Court)* referring to head note 'A' emphasizes paragraph No.7 thereunder' reading thus,

"7. While declining to interfere in the present Special Leave Petition preferred against the order passed by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, we make it clear that the order of the Commission are incapable of being questioned under the writ jurisdiction of the High Court, as a statutory appeal in terms of Section 27A(1)(c) lies to the Court. Therefore, we have no hesitation in issuing a direction of caution that it will not be proper exercise of jurisdiction by the High Courts to entertain writ petitions against such orders of the Commission."

12. In addition to aforesaid he also refers to *Nivedita Sharma Vs. Cellular Operators Assn. of India, (2011)14 Supreme Court Cases 337* pointing out head note 'A' and paragraphs No.11, 25 and 26 thereunder; reading thus,

“A. Constitution of India- Arts. 226 and 227 – Maintainability- Alternate Remedy/ Exhaustion of Remedies- Remedy of appeal available under S. 19 of Consumer Protection Act, 1986 to National Consumer Commission against orders of State Consumer Commission – Entertaining writ petition in spite of – Rule of self-imposed restraint in entertaining writ petition on availability of alternative remedy- Held, although power of High Courts to issue directions, orders or writs under Art. 226 is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation, however, not every such petition must be entertained by High Court as a matter of course ignoring the fact and aggrieved person has an effective alternative remedy – When statutory forum is created by law for redressal of grievances, writ petition should not be entertained ignoring statutory dispensation – High Court did not even refer to Ss. 17 and 19 of 1986 Act and declared that directions given by State Commission were without jurisdiction – After having noticed that some petitioners were inclined to avail remedy of appeal against order passed by State Commission, High Court should not have entertained writ petition and directed them to avail remedy of appeal under S. 19 of 1986 Act instead – Hence impugned order; set aside – Further, liberty given to respondents to challenge State Commission’s order by availing alternative remedy of appeal under S. 19 of 1986 Act – Consumer Protection Act, 1986, Ss. 11, 17, 19 and 21.

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation- L. Chandra Kumar V. Union of India. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy or appeal to the respondents.

26. We also find that the High Court has taken cognizance of the statement made on behalf of the counsel for the petitioners that their clients would challenge Clause (iii) of para 38 of the State Commission's order by filing an appeal under Section 19 of the Act and the fact that one of the aggrieved parties, namely, American Express Bank Ltd. has already filed an appeal questioning para 38(iii) of the order of the State Commission. After having noticed that some of the petitioners were inclined to avail the remedy of appeal against the particular portion of the order passed by the State Commission, the High Court should not have entertained the writ petition filed under Article 226 of the Constitution and the miscellaneous petitions filed under Article 227 of the Constitution and directed them to avail remedy to appeal under Section 19 of the Act 1986 Act. The appeal is accordingly allowed and the impugned order is set aside."

13. He submits, aforesaid judgments are exposition on that in the face of alternate remedy, resort to Articles 226 and 227 would stand precluded.

14. The learned single judge has been in error in entertaining writ petition against the order passed under Exhibit 228.

15. He also purports to refer to a division bench decision dated 27-08-2012 in writ petition No. 11351 of 2010 wherein it had been observed that a remedy under Consumer Protection Act, 1986 is a remedy in addition to remedy provided under section 91 of Maharashtra Co-operative Societies Act, 1960.

16. Learned counsel has further referred to a decision in the case of *Dhanaraji Baburam Yadav & another Versus Ramakant K. Dhanawade & others, 2002 (Supp.2) Bom.C.R.189 (Bombay High Court)* to support his contention that while the respondents were aware of their defence and had not taken up proper measures at relevant time and had preferred and have participated in arbitration proceedings, the doctrine of waiver as observed by division bench of this court would be operative and respondents would be estopped from raising objection to the order on Exhibit 228. He submits that all these aspects have not been properly looked into and the hon'ble single judge got swayed away by considerations which, in the facts and circumstances, would not be germane from point of view of decision in the matter.

17. He purports to take this court through the impugned order in present Letters Patent Appeal and submits, though at lot of places learned single judge has purported to refer to the submissions on behalf of appellant, yet has not properly appreciated its effect and consequences and as such erred in the passing impugned order.

18. On the other hand learned Assistant Government Pleader Mr. Wattamwar vehemently submits, it is not the case at all of the appellant that there had ever been any consent or concurrence of respondents here in for reference of dispute to arbitration. As a matter of fact, learned AGP submits, on all occasions, time and again respondents had been making vividly clear that dispute is not at all amenable to its reference to arbitration. He submits that in the absence of concurrence or consent of one of the parties, power under section 89 of Code of the Civil Procedure would seldom be available to refer dispute to arbitration.

19. In addition to aforesaid he submits that once having such request been declined by civil court during pendency of the very suit, a subsequent application under Exhibit 228 is not maintainable and it would be hit by principles of *res-judicata*.

Learned counsel continues to submit doctrine of waiver is wholly inapplicable in present case in the face of situation that the arbitrator had no jurisdiction and as such his award would seldom have any validity. Appearance of party before arbitrator would not be said to enable him to pass award. In the present matter, he submits that, the arbitrator absolutely had no jurisdiction, power or authority to decide on the dispute, the respondents

having declined the request for appointment of arbitrator.

He submits that principally resort to arbitration can had only through an agreement not otherwise. He submits that even scheme of the Arbitration and Conciliation Act, 1996 would reflect upon the same.

20. Mr. Wattamwar, learned AGP refers to a decision of *Food Corporation of India and Another Vs. A. Mohammed Yunus* reported in *Kerala High Court reported in AIR 1987 Ker 231* and relies on paragraphs No. 6, 7 and 8 thereunder; reading thus,

"6. If an arbitrator enters upon consideration of a matter when he has no jurisdiction to do so the award passed by him cannot have any validity. Entering appearance of a party before the arbitrator cannot enable him to pass the award if the agreement does not contain the necessary arbitration clause. In *Chetandas Daga V. Radhakisson Ramchandra* AIR 1927 Bom 553 it is held as follows:

"If arbitrators enter upon the consideration of a matter when they have no jurisdiction to do so by the arbitration clause or submission between the parties, then they cannot be given jurisdiction under that submission by a mere appearance of the parties before them at a preliminary meeting followed by a protest against their jurisdiction before they have entered upon a consideration of the matters upon which they subsequently purport to make an award.

Even if a party under protest continues to attend before arbitrators and cross-examines witnesses, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter."

7. The authority of the arbitrator is confined to the matters lawfully submitted to him. If there is no lawful submission the award by the arbitrator would consequently suffer. Invalidity of the award can be urged under Section 30(c) of the Arbitration Act and when such a challenge is made **it is no answer to contend that the appointment of the arbitrator even if it lacked jurisdiction was not successfully challenged at the appropriate time. The question is not one of waiver but of the authority and a party continuing to attend the arbitration proceedings after protest does not confer authority on the arbitrator. Once parties appearing before the arbitrator object to his jurisdiction, they do not waive their right merely by participating in the arbitration.** As protest was made by the appellants regarding the very jurisdiction of the Court in appointing the arbitrator their right to challenge the award under Section 30(c) of the Act cannot be Said to be lost. The argument that appellants have waived their objection by participating in the arbitration proceedings is without any merit. It is apposite to refer to *Rambaksh Lachamandas V. Bombay cotton company* AIR 1931 Bom 81n at p.82 wherein it is stated as follows:

"I think it is well established by authority that once parties appearing

before arbitrators object to the jurisdiction they do not waive their rights by proceeding with the case before the arbitrators and defending themselves as best they may: see Russell on Arbitration and Award, Edn.11, at Pp.431 and 432, and the authorities there collected. In particular I would refer to the remarks of Lord Selborne L.C. in Hamlyn v. Bettley where he said:

"....in arbitrations where a protest is made against jurisdiction the party protesting is not bound to retire; he may go through the whole case subject to the protest he had made."

8. ***As objection has been filed by the appellants questioning the very jurisdiction of the Court in appointing the arbitrator it is not possible to hold that the appellants took part in the proceedings before the arbitrator on the assumption that proceedings were before a competent authority. That would not be the position if the appellants did not raise objection to the jurisdiction of the Court in appointing the arbitrator. It is settled position that if a party takes part in the proceedings before the arbitrator on the assumption that the proceedings were before a competent authority he cannot later turn around and contend that the whole of the proceedings were coram non judice. In AIR 1965 Cal 42 (New India Assurance Company Ltd. V. Dalmia Iron and Steel Ltd) it is held as follows"***
"If a party allowed an arbitrator to proceed with the reference without objecting to his jurisdiction or competence, it would not be subsequently heard to say that the award should be set aside on the ground that the arbitrator was not competent to decide the dispute in question."

It is useful to quote the following passage at P.174 of Russel on Arbitration (17th Edition).

"In cases where an arbitrator enters into consideration of matters which are not referred to him, or which he has no jurisdiction to try, "the question is not one of waiver or estoppel, but of authority" and a party continuing to attend the reference after objection taken and protest made does not give arbitrator authority to make an award."

Thus the position is that if the dispute is with regard to the very appointment of arbitrator and yet the arbitrator had proceeded to make the award, the court can still intervene when the award is sought to be enforced."

21. He submits aforesaid paragraphs No. 6, 7 and 8 reveal a lucid exposition of position law in this respect. He submits, position is that while there is dispute with regard to very appointment of arbitrator and if the Arbitrator has proceeded with and passed award, the court would intervene when the award is sought to be enforced.

22. In support of his submission that resort to an arbitration under 89 of the Code of Civil Procedure cannot be had without concurrence or consent

of the parties to the dispute, Mr. Wattamwar, learned AGP refers to a decision of the Apex Court in the case of *Kerla State Electricity Board and Another Versus Kurien E. Kalathil and Another*, dtd. 09.03.2018, 2018(4)SCC 793, wherein it has been observed thus in paragraphs No. 35 & 36 thereunder;

"35. Jurisdictional pre-condition for reference to arbitration under Section 7 of the Arbitration and Conciliation Act is that the parties should seek a reference or submission to arbitration. So far as reference of a dispute to arbitration under Section 89 CPC, the same can be done only when parties agree for settlement of their dispute through arbitration in contradistinction to other methods of alternative dispute resolution mechanism stipulated in Section 89 CPC. Insofar reference of the parties to arbitration, oral consent given by the counsel without a written memo of instructions does not fulfill the requirement under Section 89 CPC. Since referring the parties to arbitration has serious consequences of taking them away from the stream of civil courts and subject them to the rigour of arbitration proceedings, in the absence of arbitration agreement, the court can refer them to arbitration only with written consent of parties either by way of joint memo or joint applications; more so, when government or statutory body like the appellant Board is involved.

36. Emphasizing that under Section 89 CPC, referring the parties to arbitration could be made only when the parties agree for settlement of the dispute through arbitration by a joint application or a joint affidavit before the court, in Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Ors. (2010) 8 SCC 24, this Court held as under:-

"33. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under Section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the order-sheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under Section 89 of the Code; and on such reference, the provisions of the AC Act will apply to the arbitration, and as noticed in Salem Bar Bar Association, T.N. v. Union of India (I) (2003) 1 SCC 49, the case will go outside the stream of the court permanently and will not come back to the court."
[Underlining added] The same view was reiterated in Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619 which is as under:-

*"28. It has been noticed by this Court in some earlier judgments that Section 89 CPC is not very happily worded. Be that as it may, Section 89 provides for alternate methods of dispute resolution i.e. those methods which are alternate to the court and are outside the adjudicatory function of the court. One of them with which we are concerned is the settlement of dispute through arbitration. Insofar as reference of dispute to arbitration is concerned, **it has been interpreted by this Court that resort to arbitration in a pending suit by the orders of the court would be only when parties agree for settlement of their dispute through arbitration, in contradistinction to the Alternate Dispute Resolution mechanism (for short ADR) through the process of mediation where the Judge has the discretion to send the parties for mediation, without even obtaining the consent of the parties. Thus, reference to arbitration is by means of agreement between the parties. It is not in dispute that there was an agreement between the parties for reference of dispute to the arbitration and it was so referred.**"*

23. He further reinforces said submissions referring to yet another decision of Supreme Court in the case of *Jagdish Chander Versus Ramesh Chander & Ors.* 2007(5) SCC 719 and draws attention to following observations of Supreme Court, paragraphs No. 9 and 10 thereunder:

"9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they 'shall be referred to arbitration', it would have been an arbitration agreement. But the use of the words 'shall be referred for arbitration if the parties so determine' completely changes the complexion of the provision. The expression 'determine' indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words 'the dispute shall be referred for arbitration if the parties so determine', it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under section 11 of the Act to appoint an Arbitrator does not arise.

*10. Learned counsel for the first respondent next contended that clause 16 of the deed of partnership discloses a clear intention on the part of the partners to settle their dispute relating to partnership by an alternative dispute resolution process. He pointed out that clause 16 required the partners to 'mutually decide the disputes' or 'refer the disputes to arbitration'. This, according to him, is in the nature of a 'con-arb' agreement, that is, it requires the parties to settle the disputes by negotiations (conciliation and mediation), and failing settlement by such negotiations, refer the disputes to arbitration for settlement. He submitted that the clause provides what section 89 CPC now statutorily requires. It is contended that if under section 89 of CPC, parties can be mandated to have recourse to alternative dispute resolution processes to settle their disputes, there is no reason why the disputes between the parties in this case should not be referred to ADR process including arbitration under clause 16. This contention, though attractive, has no merit. The object and scope of section 11 of the Act is specific and narrow. Though the power exercised under section 11 of the Act has been held to be a judicial power [see *SBP & Co. vs. Patel Engineering Ltd* - 2005 (8) SCC 618], the proceedings relate only to appointment of Arbitral Tribunal. The disputes as such are not before the Chief Justice or his designate for adjudication. **Therefore, section 89 CPC has no application. It should not also be overlooked that even though section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution***

processes mentioned therein, there cannot be a reference to arbitration even under section 89 CPC, unless there is a mutual consent of all parties, for such reference. Be that as it may. "

(Emphasis supplied)

24. Having regard to the categorical observations as aforesaid and when it appears to be undisputable position that there had all along been resistance by the respondents for reference to resolution of dispute through arbitration, we do not find that submissions canvassed on behalf of appellants would carry with them any water. Perusal of the order passed by the learned single judge, would show that he had quite elaborately discussed the matter and has taken in to account all the relevant aspects including the submissions on either side and to cited decision of the Supreme Court had decided the matter.

25. In view of aforesaid, the Letters Patent Appeal fails and is dismissed. Learned counsel for appellant has an apprehension that since there is no specific reference to restoration of the suit for further prosecution, the same would be hindered upon objection by respondents. We do not see any substance in the same since as a consequence of the order and observations in the paragraph No. 20 of the impugned order, it would appear that the suit stands restored for further prosecution to be decided on within a stipulated period thereunder. The suit, which gets restored in the process, be proceeded with expeditiously and the civil court may dispose of the same within a period of six months from the date of receipt of writ of this order.

[S.M.GAVHANE,J.]

[SUNIL P. DESHMUKH,J.]