

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10978 OF 2021

City And Industrial Development Corporation
Of Maharashtra Ltd Through
The Chief Engineer And Another ...Petitioners

Versus

Ellora Construction Private Ltd Through
Its Managing Director And Another ...Respondents

Mr. S.S. Deshmukh, Advocate for the petitioners.
Mr. Ranbir Chhabada, Advocate i/by. M/s. Legal United Law Firm
for Respondent No. 1.
Mr. A.D. Kasliwal, Advocate for respondent No. 2.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 25th APRIL, 2023

ORDER :

1. The petitioners are aggrieved by the order passed by learned District Judge-2, Aurangabad, below Exhibit-105 in Commercial Suit No. 03/2019, thereby rejecting the application filed by petitioners/defendants for framing additional issue of jurisdiction.

2. Suit is filed by respondents/original plaintiffs for declaration that order of termination of tender of contract by the petitioner is illegal, order of blacklisting of plaintiff-company by defendant is illegal, for mandatory injunction and claiming

compensation and damages of Rs. 2511.97 Lakhs along with interest and for other consequential reliefs.

3. Petitioners/original defendants by filing written statement opposed the prayers of the plaintiffs.

4. Trial Court framed issues and defendant thereafter filed application Exhibit-105 for framing additional issue of jurisdiction. Said application is rejected. Hence, the present petition.

5. Heard the learned advocate for the petitioners, learned advocate for respondent No. 1 and learned advocate for respondent No. 2. Perused the memo of petition, annexures thereto and the impugned order.

6. Learned advocate for the petitioners by relying on the averments made in para 53 of the written statement submits that the Trial Court ought to have framed issue of jurisdiction as the same being legal issue can be raised at any point of time. The Trial Court has erred in rejecting the prayer of the petitioners.

7. Learned advocates for the respondents raised a

preliminary objection as to the maintainability of the present petition by relying on Section 8 of the Commercial Courts Act, 2015 (for short 'said Act'). They contended that section 8 of said Act creates a bar against revision application or petition against interlocutory order and challenge to the jurisdiction of the Commercial Court has to be raised by the petitioner in appeal against the decree of Commercial Court. They further claimed that there is no pleading in the written statement specifically questioning the jurisdiction of the Commercial Court. Therefore, this petition may not be entertained.

8. In reply to the objection of maintainability of the present petition in view of section 8 of the said Act, learned advocate for the petitioners by relying on *State of Gujarat vs. Union of India*, R/Special Civil Application No. 737/2018, *Black Diamond Trackparts vs. Black Diamond Motors*, 2021 (87) PTC 480, *State of Maharashtra vs. M/s. Jaykumar Fulchand*, Writ Petition No. 8266/2021 and *Visa International Limited vs. Continental Resources (USA) Limited*, (2009) 2 SCC 55, submits that it is held by the Division Bench of the Gujarat High Court that bar contained under section 8 of the said Act shall not affect the jurisdiction of High Court under Article 227 of the

Constitution of India.

9. Division Bench of Gujarat High Court in State of Gujarat (supra) had held:

"9. Considering the law laid down by the Hon'ble Supreme Court in the aforesaid decisions, we are of the opinion that bar contained under Section 8 of the Commercial Courts Act shall not affect the jurisdiction of the High Court under Article 227 of the Constitution of India. If the contention on behalf of the respondents that considering Section 8 of the Commercial Courts Act, even the writ jurisdiction under Article 227 of the Constitution of India is barred, in that case, such a provision would suffer from the vice of unconstitutionality as observed by the Hon'ble Supreme Court in the aforesaid decisions. The power vested in the High Courts to exercise judicial superintendence over the decisions of the courts and Tribunals within their respective jurisdictions is part of the basic structure of the Constitution and no legislature can take away such power of superintendence conferred under Article 227 of the Constitution of India. It is required to be noted that therefore, even the legislature, while enacting Section 8 of the Commercial Courts Act, seems to have wisely not used the word "maintainable" but has used the word "entertained". At this stage, it is also required to be noted that where the statute specifically

provided that against the decision of the Tribunal, only an appeal under Article 136 of the Constitution before the Hon'ble Supreme Court would be maintainable, the Hon'ble Supreme Court in the case of L. Chandra Kumar v. Union of India (supra) has specifically observed and held that the powers of the supervisory jurisdiction of the High Court under Article 227 of the Constitution against the decision of the Tribunals shall still be available and the aggrieved party can approach the High Court under Article 227 of the Constitution. Therefore, it is observed and held that Section 8 of the Commercial Courts Act shall not affect the powers of the High Court under Article 227 of the Constitution of India against the order passed by the Commercial Court. However, at the same time, the powers under Article 227 of the Constitution of India must be exercised sparingly and in exceptional cases only, more particularly, looking to the object and purpose of Section 8 of the Commercial Courts Act, i.e. speedy disposal of commercial disputes."

10. The Apex Court in several decisions has held that, High Court's power under Article 227 of the Constitution of India cannot be said to be affected by such clauses.

11. Coming to the facts of the present case, the

petitioners have urged the Commercial Court to frame additional issue of jurisdiction on the basis of averments in para 53 of the written statement, which reads thus:

"53. The contents of para no. 67 of plaint are not tenable in eyes of law. In view of clause no. 67 in the contract the suit of the plaintiff is hit by section 41(h) of Specific relief act read with section 9 of CPC. There is implied bar to the entertainment of present suit in light of clause 67 of the tender. As far as the allegation in the para under reply that said clause has no statutory sanctity and is against provision of law is concerned, same cannot lay in the mouth of the plaintiff in absence of challenge to the contract. It is pertinent to note that the contract is not challenged by the plaintiff and it is signatory to it. As such the plaintiff is bound by said clause."

12. It is a settled legal position that *"objection to the maintainability of a proceeding must be raised at the earliest but an objection that the authority did not have the jurisdiction to entertain the proceedings over the subject-matter goes to the root of the proceeding. A defect with respect to the lack of inherent jurisdiction is basic and fundamental and validity of such an order can be challenged at any stage, even in execution or in collateral proceedings."* [Vide **Cantonment Board and Another vs. Church of North India**, (2012) 12 SCC 573].

13. In the light of aforesaid ratio, this Court is of the opinion that the Commercial Court has erred in rejecting the request of the petitioners to frame additional issue of jurisdiction. Since the issue of jurisdiction goes to the root of the proceedings and it can be raised at any stage, even in execution or in collateral proceedings, the Commercial Court ought to have framed the issue of jurisdiction. No prejudice is likely to be caused to the respondents, if said issue is framed.

Keeping in mind the object of Commercial Courts Act, 2015, appropriate directions can be issued to the Commercial Court.

14. In the result, writ petition is allowed.

15. Impugned order dated 17/08/2021, passed by learned District Judge-2, Aurangabad, below Exhibit-105 in Commercial Suit No. 03/2019, is quashed and set aside. Application Exhibit-105 is allowed.

16. It is further directed that the Commercial Court shall frame issue of jurisdiction and decide it along with other issues at the time of final adjudication of suit. Suit is expedited.

[NITIN B. SURYAWANSHI, J.]