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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION NO.316 OF 2022
IN
ARBITRATION APPLICATION NO. 11 OF 2021

Sunil Uttamrao Bhosle
Age – 36 years, Occ – Business
R/o Near Vitthal Rukhmini Temple
Mantri Nagar, Latur
Taluka and District - Latur

PETITIONER

VERSUS

1. Haribai Bajirao Somwanshi
Age – 75 years, Occ – Business
R/o Near Ramdev Baba Mandir
Ganesh Nagar, AUSA Road, Latur
Taluka and District – Latur
2. Pandurang Namdev Chaudhari,
Age – 55 years, Occ – Business
R/o Vinayak Apartment
Near Shrishri Ravi Shankar School
Gopal Nagar, Latur
Taluka and District - Latur

RESPONDENTS

Mr. V. D. Sapkal, Senior Advocate i/b Mr. Pavan Uttarwar,
Advocate for the petitioner

Mr. Ameya Sabnis, Advocate for respondent No.1

Mr. P. V. Gole h/f Mr. V. D. Gunale, Advocate for respondent No.2

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON _____ : 13th MARCH, 2023
PRONOUNCED ON _____ : 18th APRIL, 2023

ORDER :

1. This application is filed by original respondent No.1 in Arbitration Application No. 11 of 2021, seeking review of the order dated 11th November, 2022 passed by this Court under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short "the said Act"), thereby appointing arbitrator to decide dispute between the review petitioner and respondent No.1 – original applicant.

2. Respondent No.1 / original applicant filed application under section 11 of the said Act seeking appointment of arbitrator. By relying on the partnership deed executed on 14th November, 2006, he contended that in clause 4 of the partnership deed, there is provision for appointing arbitrator. He also referred to the legal notices exchanged between the parties.

3. In support of his case, respondent No.1 relied on ***"Food Corporation of India V/s Indian Council of Arbitration and Others"* (2003) 6 SCC 564** and ***"Konkan Railway Corporation Ltd V/s Rani Construction Pvt. Ltd.," (2002) 2 SCC 388.***

4. This Court, after hearing the parties, considering the reply and the citations relied on by both the sides, allowed the

application and with consent of the parties appointed advocate Shri. Shahaji Laxman Chavan as Arbitrator to decide the dispute between the parties and directed the parties to appear before the Arbitrator on 5th December, 2022.

5. On 1st December, 2022, present review is filed on the ground that decisions in **"Konkan Railway"** and **"Food Corporation of India"** (*supra*) are overruled by the Constitution Bench of the Supreme Court in **"S. B.P. and Co. V/s Patel Engineering Ltd and Others"** 2005 (8) SCC 618.

6. Learned Senior Advocate appearing for the review petitioner has also placed reliance on the observations of the Apex Court in **"Vidya Drolia and Others V/s Durga Trading Corporation"** (2021) 2 SCC 1. Contention is, this Court has failed to consider the correct legal position while appointing the Arbitrator. The claim of respondent No.1 is based on fraudulent and fabricated partnership deed and the review petitioner has denied execution of the said partnership deed and, therefore, claim of respondent No.1 is non arbitrable, as there is no valid arbitration agreement. This Court, therefore, ought not to have appointed the Arbitrator. Further reliance is placed on **"Municipal Corporation of Greater Mumbai and Others V/s Pratibha**

Industries Ltd. And Others” (2019) 3 SCC 203 and decision of learned Single Judge of Delhi High Court in *“Always Remember Properties Private Limited V/s Reliance Home Finance Limited and Another”* dated 7th December, 2022 in ARB.P. 305/2020, to contend that since High Court is a Court of Record, as per Article 215 of the Constitution of India, this Court has jurisdiction to recall its own order.

7. Learned advocate for respondent No.1 – original applicant vehemently opposed the review petition contending that there is no provision of review in the said Act. Therefore, this review petition is not maintainable. Further, by relying on *“Umesh Goel V/s Himachal Pradesh Cooperative Group Housing Society Limited” (2016) 11 SCC 313* and *“Pravin Electricals Private Limited V/s Galaxy Infra and Engineering Private Limited” (2021) 5 SCC 671*, he submits that, the review petition may not be entertained. He submits that the jurisdiction and arbitrability of the dispute can be gone into by the Arbitrator and the review petitioner is entitled to raise said ground before the Arbitrator, under section 16 of the said Act. He, therefore, submits that no case is made out by the review petitioner to review the order passed by this Court in the Arbitration Application. Hence, the review petition be dismissed with heavy cost.

8. In **"Konkan Railway"**, (*supra*) it was held that appointment of Arbitrator is purely an administrative function. In **"S. B.P. and Co."** (*supra*), the Constitution Bench of the Supreme Court has overruled the decisions in **"Konkan Railway"** and **"Food Corporation of India"** (*supra*). While overruling **"Konkan Railway"** and **"Food Corporation of India"** (*supra*), it is held that power exercised by the Chief Justice of High Court or Chief Justice of India, under section 11 (6) of the said Act, is not an administrative power, but it is a judicial power. Relevant conclusions, for our case, are as follows :

"46. We, therefore, sum up our conclusions as follows:

i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11 (6) of the Act is not an administrative power. It is a judicial power.

ii) ,,,.....

(iii)

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the

qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11 (8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v)

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

9. In the case in hand, it is the contention of the review petitioner that the partnership deed is a fraudulent document and it lacks of core contractual ingredients qua arbitration application and, therefore, there is no *prima facie* valid arbitration agreement.

10. Copy of partnership deed executed on 14th November, 2006 by the review petitioner and respondent No.1 was placed on record, which contains their signatures. A public notice issued by

respondent No.1 in daily "Punya Nagari" dated 14th February, 2021 refers to the said partnership deed. In the notices, exchanged between the parties for appointment of Arbitrator, said partnership deed is specifically referred. Though execution of the partnership deed is denied by the review petitioner, however, from the record, it *prima faice*, appears that there was a partnership agreement, which contains arbitration clause.

11. Whether the partnership deed is executed by the review petitioner or not, will be considered after the parties lead their respective evidence. At this stage, merely on the basis of contention of the review petitioner that he has not executed the said partnership deed, a finding cannot be recorded that there is no existing arbitration agreement. These aspects can be considered by the Arbitrator under section 16 of the said Act.

12. In "**Vidya Drolia**" (*supra*), Constitution Bench of the Apex Court has held "*The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. 'when in doubt, do refer'.*"

13. While allowing the application of the respondent, this Court had exercised jurisdiction under section 11 of the said Act. There is no provision of review in the said Act. The jurisdiction and

arbitrability of the dispute can be gone into by the Arbitrator under section 16 of the said Act.

14. In ***Municipal Corporation of Greater Mumbai***" (*supra*), the Apex Court has held that :

"11. Insofar as the High Courts' jurisdiction to recall its own order is concerned, High Courts are courts of record, set up Under Article 215 of the Constitution of India, Article 215 of the Constitution of India reads as under :

Article 215. High Courts to be courts of record.--

Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

It is clear that these constitutional courts, being courts of record, the jurisdiction to recall their own order is inherent by virtue of the fact that they are superior courts of record. This has been recognized in several of our judgments."

15. The said observations of the Apex Court will have to be read in the context of facts of that matter, since there was no arbitration agreement, it was held by the Apex Court that said Act would not apply.

16. It needs to be mentioned here that when respondent No.1 – review petitioner contested the Arbitration Application, another advocate represented him and the present review petition is filed

through a different advocate. This practice is deprecated by the Apex Court in "*T. N. Electricity Board and Another V/s V. N. Raju Reddiar and Another*" AIR 1997 SC 1005.

17. In view of the aforesaid, review petitioner has failed to make out a case for review. Review application being devoid of merit, is dismissed.

[NITIN B. SURYAWANSHI]
JUDGE

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