

Kavita S.J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION (L) NO.32789 OF 2023
IN
ARBITRATION PETITION NO.187 OF 2023

Shaikh Rizwan Shaikh Usman Qureshi

...Applicant /
Org. Respondent No.1

In the matter between:

Mirza Abdul Qais Sharfuddin Baig & Ors.,

...Petitioners

Versus

Shaikh Rizwan Shaikh Usman Qureshi &
Ors.,

...Respondents

Mr. Rohaan Cama a/w Sharique Nachan and Parth H. Zaveri i/b
Mussaddique Mamin for Applicant/Original Respondent No.1.

Mr. Mayur Khandeparkar a/w Mr. Laxman Jain i/b Mr. Yogesh Adhia
for the Petitioners.

CORAM : R.I. CHAGLA, J.

DATED : 16TH APRIL, 2024.

ORDER :

KAVITA
SUSHIL
JADHAV

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1. By this Interim Application, the Applicant is seeking recall
of the Order dated 25th October, 2023.

2. A preliminary objection has been raised by Mr. Mayur Khandeparkar, learned Counsel for the Petitioners on the maintainability of the present Application in view of Section 5 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”) which provides, “Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this part.”

3. Mr. Khandeparkar has referred to the decision of this Court in Madhav Structural Engineering Ltd. Mumbai Vs. Maharashtra State Road Development Corporation Ltd., Mumbai,¹ and in particular Paragraphs 14 and 15 thereof. The learned Single Judge has referred to the decision of Supreme Court in Kalabharati Advertising Vs. Hemant Vilalnath Narichania & Ors.,² wherein it has been held that it is settled legal position that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra-virus, illegal and without jurisdiction. Further, in Paragraph 15, the learned

¹ 2013(2) Mh.L.J.

² (2010) 9 SCC 437

Single Judge in ***Madhav Structural Engineering Ltd. Mumbai (supra)*** has held that the Arbitration and Conciliation Act is a self contained code and as the said Act does not provide for any remedy of review, it is manifest that review could not be made.

4. Mr. Khandeparkar has also referred to the decision of Supreme Court in ***Reserve Bank of India Vs. Jayantilal N. Mistry***,³ wherein the Supreme Court has held that the recall applications are entertained only in case the Judgment is passed without jurisdiction or without an opportunity of hearing being given to the affected party. Thus, there is a distinction between review and recall. He has submitted that in the present case, though the prayer in the Interim Application is for recall of the Order dated 25th October, 2023, it is nothing but a review of the said order.

5. Mr. Cama, learned Counsel appearing for the Applicant has submitted that this Court has inherent powers to consider whether there has been a non disclosure of material fact and that the said order is influenced by such non disclosure. He has submitted that this Court whilst hearing the Section 11 Application filed by the Respondent, for referring the disputes to Arbitration, had not been

³ (2021) 19 SCC 614

apprised of the material fact that there had been no prior Notice issued for referring the dispute to conciliation under Section 62 of the Arbitration Act. Section 62(1) provides that the party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute. It is only then that the conciliation proceeding can commence. He has submitted that the Arbitration Agreement in Clause XXI of the Partnership Deed dated 6th June, 2022 and in particular, sub Clause (a) thereof provided that the parties shall first engage in good faith negotiations to resolve the dispute and in case the dispute is not settled within 15 days, the same shall be referred to a single Conciliator / Mediator as agreed by all the partners. Thus, the parties had in the dispute resolution Clause contemplated that the matter would be referred to a Conciliator for conciliation in the event the dispute is not settled through good faith negotiation. He has submitted that the word 'Mediator' mentioned in the said Clause is nothing but the conciliation contemplated and hence, the pre-requisite of conciliation under Section 62(1) of the Arbitration Act has not been satisfied.

6. Mr. Cama has accordingly sought for this Court to exercise

inherent power in recalling the Order dated 25th October, 2023 referring the dispute to Arbitration under Section 11 of the Arbitration Act.

7. Having considered the rival submissions in my view, the Order dated 25th October, 2023 had considered the Deed of Partnership and had arrived at a finding that the proceedings contemplated under Clause XXI of the said Deed of Partnership has been duly followed by the parties. This was upon being satisfied that the clause contemplated mediation / conciliation which the parties had duly followed. It is only upon failure of mediation / conciliation that the Notice invoking arbitration had been issued.

8. This Court in passing the said order was well aware of the pre-requirement of mediation / conciliation. Further, this Court had though holding that the process under Clause XXI of the Deed of Partnership had been duly followed, kept the rights and contentions of the parties including the contentions of the Respondent as to lack of jurisdiction of the Arbitrator expressly open to be raised before the Arbitrator appointed by this Court. Thus, if the Applicant herein was at all aggrieved by the said Order dated 25th October, 2023 remedies were available to the Applicant. However, this Application for

recall / review of the said order is in my view thoroughly misconceived, particularly considering Section 5 of the Arbitration Act and the decision of this Court in ***Madhav Structural Engineering Ltd. Mumbai (supra)***. The court does not have the power to review orders passed under Section 11 of the Arbitration Act as no express power of review has been conferred on the Section 11 Court by the Arbitration Act. Further, the Application cannot be considered as one for recall of the said order, considering that the said order was passed within the jurisdiction exercised by the Court under Section 11 of the Arbitration Act for referring the dispute to arbitration and the affected party was given full opportunity of hearing.

9. Thus, I find no merit in the present Interim Application and accordingly, the same is rejected. There shall be no order as to costs.

[R.I. CHAGLA, J.]