



SUPREME COURT REITERATES THAT HIGH COURTS POSSESS THE INHERENT JURISDICTION TO RECALL THEIR OWN ORDERS

Municipal Corporation of Greater Mumbai & Anr. v. Pratibha Industries Ltd. & Ors. ¹ (December 4, 2018)

INTRODUCTION

1. Municipal Corporation of Greater Mumbai & Anr. (“**Appellant**”) issued a Tender Notice for works relating to water meters (“**Tender Notice**”). The jurisdiction clause in the Tender Notice vested the courts at Mumbai with exclusive jurisdiction and provided for an in-house mechanism for resolution of disputes.
2. The contract was awarded to Pratibha Industries Ltd. & Ors. (“**Respondent**”). Subsequently, the parties executed the General Conditions of Contract (“**Contract**”) which also provided an in-house procedure for resolution of disputes and clarified that “*No arbitration is allowed*”. The dispute resolution provided as under:
“Disputes and Arbitration:
13.1 No Arbitration is allowed.
13.2 In case of disputes or difference of opinion arising between the Hydraulic Engineer and the bidder, the bidder can refer the matter to the Municipal Commissioner of Greater Mumbai with an advance copy to the Hydraulic Engineer and the decision of Commissioner will be final in such case.”
3. Interpreting the dispute resolution clause in the Contract as an arbitration agreement, the Respondent proceeded on the basis that the Arbitration and Conciliation Act, 1996 (the “**Act**”) stood attracted.

BACKGROUND OF PROCEEDINGS

Appointment of arbitrator in a Section 9 Application

4. Disputes arose between the parties and the Respondent filed an application under section 9 of the Act before the Bombay High Court (“**High Court**”), seeking an interim injunction against the encashment of two bank guarantees, furnished by the Respondent pursuant to the Tender Notice (“**Section 9 Application**”). The Respondent succeeded in the Section 9 Application and the injunction was granted against the Appellant.
5. On the next date of hearing in the Section 9 Application, the counsel for the Respondent expressed his willingness to refer the disputes to arbitration, and the Appellant consented to the same. Accordingly, Justice Kanade (retd.) was appointed as the Ld. Sole Arbitrator by an order dated 27 June 2017 (“**Order**”)².

Notice of Motion to recall the Order appointing the arbitrator

6. Thereafter, the Appellant filed a Notice of Motion (“**Notice of Motion**”) before the High Court for recall of the Order since there was no arbitration agreement between the parties. The counsel for the Appellant submitted that while its representative consented to arbitration before the High Court, he was unaware that the Contract expressly excluded arbitration as a mechanism for dispute resolution. Referring to the Contract and the Tender Notice, the Ld. Single Judge concluded that there was no arbitration agreement at all and therefore the Order was recalled.

Application under section 37 of the Act to challenge the order recalling the appointment

7. The Respondent filed an appeal under section 37 of the Act before the division bench of the High Court. The division bench set aside the order of the Ld. Single Judge, and concluded that since Section 5 of the Act mandated that there would be no judicial intervention as provided for in Part I of the Act and since there is no provision in Part I for any court to review its own order, the review petition filed was not maintainable. Aggrieved by the order of the division bench, the Appellant filed a petition before the Supreme Court (“**Supreme Court**”). The issue which arose for consideration before the Supreme Court was whether the high court has the power to recall its own order.

OBSERVATIONS AND FINDINGS OF THE COURT

Interpretation of the dispute resolution clause as an arbitration agreement

8. While resisting arbitration, the Appellant contended that the only remedy available to the Respondent is to refer its disputes to the appropriate forum as per the in-house procedure prescribed in the Tender Notice and Contract. However, the Respondent interpreted the dispute resolution clause in the Contract as an arbitration agreement since it provided for disputes to be referred to a committee and thereafter to an appellate committee for final determination.
9. Upon conjointly reading the dispute resolution clause in the Contract with the jurisdiction clause in the Tender Notice, the Supreme Court interpreted the agreement between the parties as follows:
 - a. The Contract clearly states that “No arbitration is allowed” and therefore cannot be read as arbitration clause; and
 - b. Assuming, the jurisdictional clause in the Tender Notice was applicable, the said clause granted the courts in Mumbai with exclusive jurisdiction. Further, the clause provided for resolution of disputes by the in-house procedure provided therein or by the courts, as the case may be.
10. The Supreme Court reiterated settled position of law that an oral agreement between the parties to refer the disputes to arbitration, *de hors* of the Contract and Tender Notice, is not maintainable. Referring to the nature of the proceedings, the Supreme Court observed that such oral agreement was arrived at in a Section 9 Application, and not in an application under section 11 of the Act for the appointment of an arbitrator.

Power of the High Court to recall its Order in an arbitration proceeding

11. Challenging the maintainability of the application filed under section 37 of the Act, the Appellant submitted that the High Court is a court of record and vested with the inherent power to recall its own orders. The Respondent contended that the legal recourse available to the Appellant is an application under section 16 of the Act before the Ld. Sole Arbitrator to challenge the jurisdiction of the tribunal, and not by invoking the inherent power of the High Court under section 151 of the Code of Civil Procedure, 1908 (“Code”) as the Code itself was not applicable in these proceedings.
12. The Respondent submitted that the Arbitration Act is a self-contained code and therefore one cannot look outside the four corners of the Act to find the power of review.
13. Relying upon Article 215 of the Constitution of India and its rulings in *National Sewing*³, *Shivdev Singh*⁴, *M.M. Thomas*⁵ the Supreme Court concluded that the High Court is a constitutional court and being a superior court of record, it has the inherent powers to recall its

¹ CIVIL APPEAL NO. 11822 OF 2018 (Arising out of SLP(C) No.10415/2018)

² *In the case of Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Anr.*, (2018) 4 SCC 793, the Supreme Court held that “41. Referring the parties to arbitration has serious civil consequences. Once the parties are referred to arbitration, the proceedings will be in accordance with the provisions of the Arbitration and Conciliation Act and the matter will go outside the stream of the civil court. Under Section 19 of the Arbitration and Conciliation Act, the Arbitral Tribunal shall not be bound by the Code of Civil Procedure and the Evidence Act. Once the award is passed, the award shall be set aside only under limited grounds. Hence, referring the parties to arbitration has serious civil consequences procedurally and substantively. When there was no arbitration agreement between the parties, without a joint memo or a joint application of the parties, the High Court ought not to have referred the parties to arbitration.”

³ *National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd.*, 1953 SCR 1028

⁴ *Shivdev Singh & Ors. v. State of Punjab and Others*, AIR 1963 SC 1909

⁵ *M.M. Thomas v. State of Kerala and Another*, (2000) 1 SCC 666

own order. While the Supreme Court held that the High Court has the power to recall its own order in the present case, it expressly clarified that there was no arbitration agreement between the parties and therefore the Act would not apply.

CONCLUSION

14. In view of the above, the Supreme Court held in favor of the Appellant, allowed the appeal and set aside the order of the division bench. Upon the request of the Respondent, the Supreme Court allowed the injunction granted in the Section 9 Application to continue for four weeks to enable the Respondent to approach the appropriate forum. Interestingly, while the Apex Court ruled out the applicability of the Act in the absence of an arbitration agreement, it allowed the relief granted in the Section 9 Application to continue even though such an application was not maintainable in the first place. Further, while the Respondent succeeded in the Section 9 Application, the applicability of the Act in the Section 9 proceedings was questioned only after the High Court appointed an arbitrator.
15. Lastly, while the apex court through the present judgment, reconfirms and validates the inherent powers of a High Court, in the present case however, as there was no arbitration agreement between the parties, the question of whether the power of review was available in arbitration proceedings was not addressed.

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