REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11822 OF 2018
(ARISING OUT OF SPECIAL LEAVE PETITION (C) NO. 10415 OF 2018)

MUNICIPAL CORPORATION OF GREATER MUMBAI & ANR. … Appellant(s)

Versus

PRATIBHA INDUSTRIES LTD. & ORS. … Respondent(s)

J U D G M E N T

R. F. Nariman, J.

1) Leave granted.

2) The present appeal raises questions relatable to the High Court's power of recall of its orders.

3) By a Tender Notice dated 19.09.2008, supply, installation and maintenance of water meters of various sizes were called for. The Tender Notice contained Clause 22, which reads as under:-

> “22. Jurisdiction of Courts:
>
> In case of any claim, dispute or difference arising in respect of the contract, the cause of action thereof shall be deemed to have arisen in Mumbai and all legal proceedings in respect of any such claim, dispute or difference shall be instituted in a competent court in the city of Mumbai only.
>
> If any dispute, difference or claim is raised by either party relating to any matter arising out of the contract, the aggrieved party may refer such dispute within a period of 7 (seven) days to the concerned Deputy Municipal Commissioner (DMC) of Municipal Corporation of Greater Mumbai, who shall constitute a committee comprising of 3 (three) MCGM Officers i.e., concerned DMC or Director (ES & P), Chief Engineer other than the Engineer of contract & concerned C.A. the committee shall give decision in writing within 60 (sixty) days.
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> Appeal from the order of the Committee may be referred to Municipal Commissioner (M.C.) of Municipal Corporation of Greater Mumbai within 7 (seven) days. Thereafter, M.C. shall constitute the committee comprising of 3 (three) DMC including DMC in charge of finance Department. The decision given by this Committee shall be final and binding upon the parties/bidders.”

4) However, when the Tender Notice was accepted and an agreement between the parties was entered into, Clause 13 of the General Conditions of Contract was applied. This clause stated as follows:-

> “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.”

5) An application under Section 9 of the Arbitration and Conciliation Act, 1996 (in short ‘the Act’) was filed by the respondent before the High Court of Bombay, asking for an interim injunction restraining the encashment of the first and third bank guarantees that were given by the respondent in pursuance of the Tender, amounting to a sum of Rs. 16,23,400/- (Rupees Sixteen Lakhs, Twenty Three Thousand and Four Hundred only) and Rs. 6,23,00,000/- (Rupees Six Crores, Twenty Three Lakhs only) respectively. On 23.06.2017, this petition was allowed and the injunction that was prayed for was granted. On the next date of hearing, i.e., on 27.06.2017, Justice K. R. Shriram recorded what transpired as follows:-

> “1. Mr. Makhija, counsel for Petitioners, on instructions states that Petitioners are ready and willing to go for arbitration and suggest that Mr. Justice V.M. Kanade (retired) be appointed as the Sole Arbitrator. Mr. Bharucha, senior counsel for Respondent (MCGM), on instructions from Mr. Agashe, Assistant Engineer (Meter Work Shop) City-

representative of Respondent, who is present in court, states that Respondents have no objection to the suggestion made by Mr. Makhija and Mr. Justice V.M. Kanade (retired) be appointed as the Sole Arbitrator.

2. In view of the above, Mr. Justice V. M. Kanade (retired) is appointed as the Sole Arbitrator to decide on all issues between parties arising out of or in connection with or with reference to the Tender dated 19.09.2008 along with Corrigendum issued by Respondent No. 1 for supply installation and maintenance of AMR water meters of various sizes in the City area of Mumbai consisting of wards A, B, C, D, E, F/North, F/South, G/North and G/South (the Project)…"

6) A Notice of Motion was filed by the appellant before us on 03.07.2017 to recall the aforesaid order appointing Justice V.M. Kanade (retired) as a Sole Arbitrator. It was clearly stated therein that:-

"I say that the concerned officer Shri A.M. Agashe-Asst. Engineer (Meter Workshop) (City), who was present in the Court was not aware that contract has no arbitration clause which is as follows:-

"17. 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."

> I say that Shri A.M. Agashe-Asst. Engineer (Meter Workshop) (City) is not empowered to take decision regarding appointment of the Arbitrator in the above Petition."

7) By an order dated 12.09.2017, the learned single Judge referred to the recall application and the affidavit of the Commissioner, and also referred to Clause 13 of the General Conditions of Contract and Clause 22 of the Tender Notice and observed that they were not arbitration clauses at all, but in-house proceedings, which could be taken at the behest of the aggrieved party. This being so, the learned single Judge recalled the order appointing Justice V.M. Kanade (retired) as a sole Arbitrator. An appeal was filed under Section 37 of the Act by the respondent herein, which succeeded before the Division Bench. According to the Division Bench, 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. The impugned order would, therefore, have to be set aside. The appeal filed by the respondent under Section 37 was allowed.

8) Shri Ranjit Kumar, leaned senior counsel for the appellant, has argued before us that it is obvious that on a perusal of Clause 13 and

Clause 22, no arbitration is provided for and that these are only in-house procedures. He went on to state that it is always inherent in a High Court, being a court of record, to recall its own orders, and has cited certain judgments together with the High Court (Original Side) Rules. According to him, the appeal under Section 37 itself was not maintainable and for all these reasons, the impugned order should be set aside.

9) On the other hand, Shri Shekhar Naphade, learned senior counsel argued on behalf of the respondent, stating that the Arbitration Act is a self-contained Code, and, this being so, it is not possible to look outside the four corners of the Act to find a review power. This may apply even to Article 215 of the Constitution of India. He argued that Clause 13 and Clause 22 are clearly arbitration clauses inasmuch as a dispute has to be referred for decision to a Committee and thereafter to an Appellate Committee, after which, the decision rendered by the Appellate Committee is final and binding. According to Shri Naphade, the correct course could only have been to apply to Justice V.M. Kanade (retired) under Section 16 of the Act on whether an arbitration clause does or does not exist. He added that since the Code of Civil Procedure (in short 'the Code') will not apply, therefore, there is no question of inherent power contained in Section 151 of the Code applying either.

10) The clauses which Shri Naphade has referred to as arbitration clauses cannot, *prima facie,* be regarded as such. Sub-clause 13.1 clearly states, “No Arbitration is allowed”. Sub-clause 13.2 cannot then be read as an arbitration clause. Also, on the assumption that Clause 22 would be the applicable clause, it is clear that the said clause has a marginal note which reads: Jurisdiction of Courts. The first paragraph of Clause 22 specifically deals with competent courts in the city of Mumbai only having exclusive jurisdiction in respect of claims, disputes etc. arising in respect of the contract. The second paragraph and the third paragraph, according to Shri Naphade, would amount to an arbitration clause as the Committee mentioned therein is to give a decision, which is appealed again before another Committee which gives a decision which shall be final and binding upon both the parties. We are of the view that Clause 22 deals with disputes that may arise under the agreement which can either be dealt with by an in-house procedure or by courts, as the case may be. By no stretch of imagination could this in-house procedure be stated to be an agreement to arbitrate between the parties. In any case, what is important on the facts of this case, is that neither of these clauses has been invoked. The Court’s order dated 27.06.2017, clearly shows that Justice Kanade was appointed as Sole Arbitrator thanks to Mr. Agashe, Assistant Engineer, having no

objection to the same. As has been stated in the recall application and the affidavit of the Commissioner, Mr. Agashe was not empowered to take any decision regarding appointment of an Arbitrator. This being the undisputed position before the Court, it is clear that an oral agreement between the parties *de hors* Clause 13 and Clause 22 could not have been arrived at. We must also remind ourselves that this agreement was arrived at during the course of hearing of a Section 9 petition. In the present case, nobody has applied under Section 11 to appoint an Arbitrator in accordance with either Clause 13 or Clause 22.

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 orders is inherent by virtue of the fact that they are superior courts of record. This has been recognized in several of our judgments.

12) In **National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd.**, 1953 SCR 1028, this Court has held as under:-

> "……The Trade Marks Act does not provide or lay down any procedure for the future conduct or career of that appeal in the High Court, indeed Section 77 of the Act provides that the High Court can if it likes make rules in the matter. Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court. This rule was very succinctly stated by Viscount Haldane L.C. in *National Telephone Co. Ltd. v. Postmaster-General*, [1913] A.C. 546 in these terms:-
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> > "When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches."
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> The same view was expressed by their Lordships of the Privy Council in *R.M.A.R.A. Adaikappa Chettiar v. Ra. Chandrasekhara Thevar*, (1947) 74 I.A. 264, wherein it was said:-
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> > "Where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the

> ordinary rules of procedure, applicable thereto and an appeal lies if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not, in terms confer a right of appeal."

Again in *Secretary of State for India v. Chellikani Rama Rao*, (1916) I.L.R. 39 Mad. 617, when dealing with the case under the Madras Forest Act their Lordships observed as follows:-

> "It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute just quoted. In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply."

Though the facts of the cases laying down the above rule were not exactly similar to the facts of the present case, the principle enunciated therein is one of general application and has an apposite application to the facts and circumstances of the present case. Section 76 of the Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by section 76 it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under Clause 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act."

13) To similar effect is our judgment in **Shivdev Singh & Ors. v. State of Punjab and Others**, AIR 1963 SC 1909, wherein this Court has stated as under:

> "**10.** … It is sufficient to say that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it…"

14) Also, in **M.M. Thomas v. State of Kerala and Another**, (2000) 1 SCC 666, this Court has held as follows:-

> "**14.** The High Court as a court of record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A court of record envelops all such powers whose acts and proceedings are to be enrolled in a perpetual memorial and testimony. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regard is plenary. In *Naresh Shridhar Mirajkar & Ors. v. State of Maharashtra*, AIR 1967 SC 1 : [1966] 3 SCR 744, a nine-Judge Bench of this Court has recognised the aforesaid superior status of the High

Court as a court of plenary jurisdiction being a court of record."

15) Insofar as Shri Naphade's arguments that the Act is a self-contained Code, Section 5 of which interdicts a review or recall application, suffice it to state that having held that there is no arbitration agreement pursuant to the order dated 27.06.2017, the Act will not apply.

16) This being the case, the impugned judgment of the Division Bench of the High Court is set aside. Shri Naphade urges us to continue the order dated 23.06.2017 for a period of four weeks from today so that he may approach the appropriate forum. We continue the said order for a period of four weeks from today. The appeal is disposed of accordingly.

……J.
(R.F. NARIMAN)

……J.
(M.R. SHAH)

New Delhi,
Dated: December 4, 2018.