IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 94 OF 2001
with
CIVIL APPLICATION NO.401 OF 2001

Ambernath Municipal Council, a body)
corporate, duly constituted under the)
provisions of Maharashtra Municipalities)
Act,1965 and having its office at near)
Railway Station, Ambernath (West),)
Tal.Ulhasnagar, District Thane.)...Appellant

versus

1.M/s.Jai Hind Contractors Pvt. Ltd.)
a Company duly registered under the)
provisions of Indian Companies Act,1956)
having its registered office at Ambika)
Apartment, K.T.Sahani Chowk, Mulund)
(West), Bombay and also at Haridwar)
Apartment Furniture Bazar, Ulhasnagar-2)
District Thane.)
)
2.Revenue Commissioner,)
Konkan Division, Konkan Bhavan,)
New Bombay – 400 614.)... Respondents

Mr.Y.S.Jahagirdar, Senior Advocate i/b. Mr.B.D.Joshi, for the Appellant.

Mr.A.Y.Sakhare, Senior Advocate I/B. Mr.K.P.Shetye, for Respondent No.1.

CORAM : **ANOOP V. MOHTA &**
G.S. KULKARNI, JJ.

Reserved on : ***30th June, 2016.***
Pronounced on : ***4th August,2016***

JUDGMENT: (Per G.S.Kulkarni, J.)

1. The Appellant judgment-debtor, the Ambernath Municipal Council, is in appeal against the judgment and order dated 22 September 2000 passed by the Joint Civil Judge, Senior Division, Kalyan, whereby an application of Respondent No.1-Jai Hind Contractors Pvt. Ltd., filed under Section 14 read with Section 17 of the Arbitration Act,1940 (for short 'the 1940 Act') was allowed, holding that a decree of the Court be drawn up in terms of award dated 26 December 1994 passed by the Learned Arbitrator being the Revenue Commissioner, Konkan Division, Government of Maharashtra. The learned Judge further directed that the Appellant shall not encash the bank guarantee of Rs.1,07,92,000/- offered by Respondent No.1 in favour of the Appellant.

2. In nutshell the facts are :-

The Appellant is a Municipal Council governed under the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short 'the Municipal Council's Act'). By virtue of the provisions of Section 143-A of the Municipal Council's Act, the Appellant was within its authority to appoint an agent for collection of octroi. In March,1994, the Appellant issued a tender for collection of octroi for a period of one year beginning with 1 April 1994 to 31 March 1995. The advertisement provided for a reserve price and the term was, any offer lower than Rs.6,74,00,000/- may not be considered and would be rejected. Another condition of relevance was that during the contract period of one year, the agent shall remit 2% of the contract amount every week to the Appellant irrespective of the actual amount of octroi collection. The other tender conditions were of earnest money of Rs.1,00,000/- in the form of call deposit and a security deposit in the form of bank guarantee of a nationalised or scheduled bank for Rs.1,07,92,000/-.

3. Respondent No.1 participated in the tender alongwith other bidders and was a successful bidder having submitted its bid for an amount of Rs.6,75,00,000/-. The Appellant accepted Respondent No.1's

bid and entered into an agreement with Respondent No.1 dated 30 March 1994 for the said octroi collection contract. The other formalities like submitting a bank guarantee etc. were also complied with by Respondent No.1.

4. As regards the controversy which falls for consideration in this appeal, two clauses in the said agreement on which the parties have placed reliance are clauses 20 and 24 which read thus:-

> *"20. Only because matter is referred to arbitration will not entitle the agent to continue the agreement and the contract shall stand terminated as per the provisions in the terms and conditions and the agreement. The agent shall not be entitled to claim any interim from the Court on the ground that the matter has been referred to arbitration.*
>
> *The agent shall not be entitled to claim any kind of interest on any of his claims as per the Interest Act or any other provisions.*
>
> ....
>
> *24. Notice inviting the offer, terms and conditions of the contract, tender form, form of acceptance, form of agreement and form of performance of guarantee, shall be part and parcel of this agreement/contract. "*

A plain reading of clause 20 thus implies that if any matter is referred to arbitration, the same will not entitle the agent to continue the agreement, and the contract would stand terminated as per the terms and conditions of the agreement. In clause 24, the parties agreed that a notice inviting the offer, terms and conditions of the contract, tender form, form of

acceptance, form of agreement and form of performance of guarantee shall be part and parcel of the said agreement.

5. Clause 22 of the "tender form" which becomes part of the agreement pertains to 'disputes' is also required to be noted and reads thus:-

> *"Clause 22 : Disputes:*
>
> *In case of any dispute, the same shall be referred to the Collector and his decision shall be final and binding on the Agent and the Council. Appeal against the decision of the Collector in case of any dispute shall lie first before the Divisional Commissioner and finally before the Government in Urban Development Department.*
>
> *If the agent is dissatisfied with this decision, the agent shall, within a period of 8 days from receipt of the decision, indicates his intention to make an appeal against the order of the Collector, failing which the decision of the Collector shall be conclusive and the same shall not be questioned.*
>
> *If no appeal is received by the Commissioner within a period of 15 days from the declaration of the decision by the Collector, no appeal after the said period is entertainable either by the Commissioner or by the Government."*

6. Respondent No.1 after execution of the agreement inter alia on the above contractual conditions, commenced the work of collection of octroi with effect from 1 April 1994. However, on 2 May 1994 Respondent No.1 addressed a letter to the Chief Officer of the Appellant requesting that amount of Rs.6,74,00,000/- fixed as a minimum reserve

price/bid amount, be reduced by Rs.40,78,517/- on the ground that the same was contrary to the norms fixed by the State Government to determine the minimum bid price. This letter/ representation of Respondent No.1 was replied by the Chief Officer of the Appellant by his letter dated 27 May 1994 informing that the minimum reserve price for the said tender was fixed as per the guidelines issued by the Government of Maharashtra and accordingly, rejected the representation of the Respondent No.1. Being aggrieved by this decision of the Appellant, Respondent No.1 approached this Court in Writ Petition No.3598 of 1994. By an order dated 26 September 1994, the Division Bench permitted Respondent No.1 to withdraw the petition. The following order was passed:-

> "2. It appears that under the Agreement dated 30-3-1994 arrived at between respondent No.1 and Petitioner, Respondent No.1 is liable to pay a sum of Rs.6,75,00,000,/- to the petitioner. It is case of the Petitioner that if the proper formula was applied, the minimum offer amount to be specified by Respondent No.1 should have been computed at Rs.5,47,31,483/- and not Rs.6,74,50,000/-. It is not possible to resolve the dispute sought to be raised in this petition under Article 226 of the Constitution of India.
>
> At this stage, Petitioner makes an application to the Court for leave to withdraw the Petition, with liberty to adopt appropriate proceedings in the matter by filing a suit or by resorting to arbitration. We express no opinion on the merits of controversy. Leave granted to the Petitioner to withdraw the Petition.
>
> No order as to costs."

It is thus clear from the above order of the Division Bench that the Respondent No.1 was granted liberty to adopt appropriate proceedings by filing a suit or resorting to arbitration. Respondent No.1 thereafter approached the Urban Development Department of the Government of Maharashtra by its letter dated 5 October 1994 purportedly on the basis of the above order passed by the Divisions Bench, requesting the State Government to appoint an arbitrator to resolve the dispute as raised by Respondent No.1 under its letter dated 2 May 1994 to reduce the minimum reserve price from Rs.6,74,00,000/- to Rs.6,33,71,483/-.

7. The State Government though unconcerned with the said contract responded favourably and by a Government Resolution dated 14 November 1994 issued under the signature of the Joint Secretary in the Urban Development Department appointed Shri.G.B.Pingulkar, Commissioner, Konkan Division, as an Arbitrator to arbitrate the said dispute. This Government Resolution records that the same was issued by the State Government in pursuance of the powers conferred under Section 143-A(3) of the said Act; and that the same was issued as a special case. Another significant aspect is that the Arbitrator so appointed was called upon to submit an arbitration report to the State Government within a

period of one month. It was also provided that the arbitration be undertaken as per the provisions of the Arbitration Act,1940. As the State Government recorded that the Government Resolution is issued in exercise of power conferred under Section 143-A(3) to appoint the learned Arbitrator, it would be useful to note the provisions of Section 143-A, which reads thus:-

> "**143A. Farming of octroi or appointment of Agent for collection thereof.**
>
> *(1) Notwithstanding anything contained in this Act, it shall be for a Council to lease by public auction the collection of octroi for any period not exceeding one year at a time or to appoint an agent for the collection thereof.*
>
> *(2) Where the collection of octroi has been so leased, or where an agent is so appointed, any person employed by the lessee or the agent shall, subject to the conditions of the lease, or as the case may be, the agreement of agency, exercise the powers and perform the duties conferred and imposed on the officers and employees of the Council authorised to collect octroi under this Act or the rules:*
>
> *Provided that, no property seized under the provisions of sub-sections (1) and (2) of Section 141 may be sold, except under the order of the Chief Officer.*
>
> *(3) Subject to the directions, if any, issued from time to time, by the State Government, by any general or special order in this behalf, the Council shall regulate the collection of octroi either through such lessee or agent in such manner and procedure as it may deem fit having regard to the provisions of the Act."*

8. At the relevant time the Appellant Municipal Council was functioning under an "Administrator" appointed by the State Government. After the appointment of the learned Arbitrator, immediately on 3 December 1994 an intimation came to be issued to the Appellant addressed to its Administrator, calling upon him to attend a hearing fixed by the learned Arbitrator on 9 December 1994. It was recorded that a reply be filed by 9 December 1994 and a hearing would be held before the learned Arbitrator on 14 December 1994 at 2.30 p.m. The Administrator submitted a reply vide his letter dated 8 December 1994, disputing the claim of Respondent No.1. It was interalia stated that proper tender process was initiated by the Appellant wherein Respondent No.1 had participated submitting its bid at Rs.6,75,00,000/- which was Rs.1 lakh above minimum reserve price of Rs.6,74,00,000/-. Respondent No.1's highest bid was accepted and accordingly the contract came to be awarded to Respondent No.1. It was stated that Respondent No.1 having accepted the contractual amount of Rs.6,75,00,000/- it was not permissible for the Respondent No.1 to dispute the same after the award of the contract. It was stated that the reserve price was fixed as per the guidelines of Government of Maharashtra.

9. The learned Arbitrator accordingly heard the parties on 14

December 1994 and closed the matter for passing of an Award on the same day. The learned Arbitrator thereafter on 26 December 1994 delivered an award and for the reasons as set out in the Award, held that the minimum reserve price of Rs.6,74,00,000/- as fixed by the Appellant was not correct and that minimum reserve price ought to be Rs.6,20,089,843/-. The Award was thereafter communicated to the Administrator of the Appellant by a letter dated 9 March 1995 of the Desk Officer, Urban Development Department, Government of Maharashtra.

10. Respondent No.1 having received a copy of the award on 13 March 1995 and being beneficiary of the Award on 31 March 1995 filed Miscellaneous Application No.292 of 1995 before the Court of Civil Judge Senior Division, Thane, under Section 14 read with 17 of the 1940 Act, seeking a direction to the Arbitrator to file before the Court a copy of the Award and the record of arbitration, and prayed that proceedings be taken up in accordance with law for a judgment and decree in terms of the said award dated 26 December 1994.

11. The Appellant however at that stage by a letter dated 10 April 1995 addressed to the Hon'ble Minister, Urban Development Department inter alia complained that the Government Resolution dated 14 November

1994 appointing the learned Arbitrator was unilaterally issued. It was pointed out that there was no provision under the contract where the State Government can appoint an Arbitrator to resolve the dispute between the parties. It was stated that also none of the parties to the contract could approach the State Government to resolve the dispute by arbitration under the terms and conditions of the contract. The Appellant also approached the Collector requesting that appointment of the Arbitrator be cancelled.

12. The Appellant having received service of the Miscellaneous Application on 31 March 1995 filed by Respondent No.1, appeared before the learned Civil Judge by filing their objections dated 27 April 1995 (Exhibit 21) to the Miscellaneous Application of Respondent No.1 under Section 30 and 33 of the Arbitration Act,1940. Paragraphs 2 to 6 of this say/objections of the Appellant are relevant to the controversy which read as follows:-

> "2. That before dealing with the parawise contentions raised in the above Petition by the Petitioner, Respondent No.1 raise following preliminary objections and contentions, which go to the root of the matter, dis-entitling the Petitioner from getting and/or seeking any relief in this Petition either for the alleged decree in terms of Award or any other relief.
>
> 3. That in fact and as a matter of fact, the so called Award dated 26-12-1994 delivered by Respondent No.2

is "NON-EST" and is null and void, and is unenforceable in law in any manner whatsoever, and on this count itself the same is liable to ignored and discarded.

4. That the State of Maharashtra had no jurisdiction of any kind whatsoever under any of the provisions of Arbitration Act and/or in any other clauses of contract under which such an Arbitrator could have been appointed by the State of Maharashtra in relation to the alleged dispute between the Petitioner and the Respondent No.1 in relation to the Octroi Contract for the period from 1.4.1994 to 31.3.1995.

5. That in fact and as a matter of fact there was no Arbitration Agreement as contemplated under Section 2(1)(a) of the Arbitration Act, which is the condition precedent without which no Award could have been passed and in absence of the same the entire proceedings are rendered null and void, and are NON-EST. In fact and as a matter of fact the entire proceedings are void ab-initio, and in that view of the matter, Award passed by the Respondent No.2 based upon the alleged resolution of the State of Maharashtra, dated 14-11-1994, is rendered non-est.

6. That the order appointing the Award from the State of Maharashtra by the Petitioner is procured by an unfair mean, as is evident from the very content of the said resolution dated 14-11-1994, which clearly recites that the said resolution was passed "as a Special Case" . This itself goes to show that by an extraneous consideration and in an unauthorised and illegal manner such an order is passed which is liable to be ignored, being without authority of law and without there being any arbitration agreement as contemplated under section 2(1)(a) of the Arbitration Act."

Accordingly, a prayer was made that the application of Respondent No.1 for a decree in terms of the award be dismissed. This

application of the Appellants was duly verified and signed on affirmation. The Miscellaneous Application thereafter remained pending before the learned Civil Judge, during this pendency the Appellant filed another reply raising similar objections as also dealing with the merits of the matter which came to be filed on 6 October 1997 (Exh.37). The Appellant inter alia justified the Appellant's case that the Award was liable to be set aside. Thereafter, written arguments were also filed on behalf of the Appellant.

13. The learned Civil Judge by the impugned judgment and order dated 22 September 2000 allowed Respondent No.1's Miscellaneous Application directing that a decree be drawn up in terms of the Award of the learned Arbitrator as also restraining the Appellant to encash the bank guarantee of Rs.1,07,92,000/-. The Appellant has preferred this appeal against the said judgment and decree passed by the learned Single Judge.

14. In assailing the impugned judgment, Mr.Jahagirdar, learned Senior Counsel for the Appellant has made the following submissions:-

(i) The Trial Court has overlooked that there was no arbitration agreement between the Appellant and Respondent No.1 to arbitrate the dispute arising under the contract in question;

(ii) None of the clauses and more particularly clause No.20 and Clause No.22 (supra) of the agreement can be said to be an arbitration agreement to mean that the parties had agreed for arbitration of the dispute at the hands of the Commissioner, Konkan Division, Government of Maharashtra.

(iii) Appointment of the Arbitrator was by the Government of Maharashtra in its Urban Development Department was completely a unilateral act and in no manner can be considered as a voluntary act on the part of the parties to refer the dispute for arbitration.

(iv) In the absence of an arbitration agreement, the Award was a nullity.

(v) The learned Judge has completely overlooked its jurisdiction as conferred under Section 30 to 33 of the 1940's Act wherein it was an obligation on the Court to decide on the question of validity of the arbitration agreement.

(vi) The finding of the learned Trial Judge on the issue of existence of an arbitration agreement and arbitrability of dispute at the hands of the learned Arbitrator are legally and factually perverse.

(vii) Without prejudice to the legal submissions on existence of an arbitration agreement and arbitrability of the dispute, even on merits the learned Trial Judge has erred in confirming the Award so as to make it as

a decree of the court inasmuch as once the Respondent had agreed to the price of Rs.6,75,00,000/- as a contractual price to be paid to the Appellants in an open tender, then, Respondent No.1 had no reason to reduce the contractual amount.

(viii) In any event, there was an estoppel against Respondent No.1 having agreed to accept the tender amount, to take a reverse position and seek reduction of the tender amount quoted by it. Such a contention could not have been accepted by the learned Arbitrator as on a complete knowledge of the documents of the contractual work, the Respondent had submitted its bid in participating in the tender.

(ix) The State Government was in a dominating position and had foisted arbitration on the Appellant's showing that at the relevant time the Appellant Council was functioning under the Administrator appointed by the State Government. The Appellants in this situation could in the real sense had no effective representation/participation at the solitary hearing before the learned Arbitrator.

(x) It is lastly submitted, the impugned judgment and order cannot be sustained on law and facts. In support of his submissions Mr.Jahagirdar has placed reliance on the following decisions:-

(i) Dharma Prathishthanam Vs. Madhok Construction (P) Ltd.[1]

(ii) State of Orissa & Ors. Vs. Narain Prasad & Ors.[2]

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1 (2005)9 SCC 686

2 (1996)5 SCC 740

(iii) Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his LRS.[3]

15. On the other hand Mr.Sakhare, learned Senior Counsel for Respondent No.1, supporting the impugned judgment would urge as under:-

(i) The application of the Appellants before the Trial Court under Section 33 of the 1940 Act raising the objection to the arbitration agreement was time barred as held by the learned Trial Judge. Thus, the contention as urged on behalf of the Appellant as regards existence of arbitration agreement and appointment of arbitrator cannot be gone into in this appeal. There is no ground in the appeal memo to challenge the finding on limitation as arrived at by the learned Trial Court.

(ii) It was permissible for the Respondent to approach the Government in the Urban Development Department and seek appointment of an Arbitrator.

(iii) Without prejudice to the above contentions, it is submitted the learned Arbitrator had jurisdiction to arbitrate on the dispute as the Appellant did not raise any objection before the learned Arbitrator on its jurisdiction and participated in the same.

(iv) The ground as set out in paragraph (11) of the Appeal Memo that the Revenue Commissioner of Konkan Division (Arbitrator) being a

[3] (1990)1 SCC 193

person higher in rank than the Administrator who was incharge of the Appellant- Municipal Council and, therefore, the Administrator could not raise objection to the jurisdiction of the Arbitrator, can be no ground to challenge the jurisdiction of the Arbitrator.

(v) Once the Appellant has participated in the arbitration proceedings through the Administrator, the Appellant thereafter cannot challenge the jurisdiction of the Arbitator to arbitrate the dispute under the contract in question.

(vi) Clause 22 of the terms and conditions of the tender provides a mechanism whereby the Government in the Urban Development Department would have jurisdiction to appoint an arbitrator and, thus, the appointment of the learned Arbitrator is legal and valid.

(vii) In any event the objection to the jurisdiction of the Arbitrator was raised by the Appellant for the first time before the learned Trial Judge and thus was wholly not maintainable.

(viii) On merits it is submitted that the Respondent no.1 was correct in its approach to raise a dispute on the contractual price of Rs.6,74,50,000/- as fixed as a minimum bid amount as the same was contrary to the Government Resolution dated 28 February 1994 which ought to have been followed by Respondent No.1.

(ix) In fixing the minimum reserve price at Rs.6,74,50,000/-, there was

a clear misrepresentation in the tender.

(x) Accordingly, the finding as arrived at by the learned Trial Court thus, does not call for any interference.

In support of the above submissions Mr.Sakhare has placed reliance on the following decisions:-

(i) N.Chellappan Vs. Secretary, Kerala State Electricity Board[4]

(ii) State of Himachal Pradesh vs. Smt.Lila Devi[5]

16. Having noted the above submissions as urged on behalf of the parties as advanced during the course of arguments, the issues which would arise for our consideration in this appeal are :-

(i) Whether there was a valid arbitration agreement existing between the parties ?

(ii) Whether the appointment of the learned Arbitrator by the Government of Maharashtra under Government Resolution dated 14 November 1994 can be said to be legal and valid and permissible under the contractual terms ?

(iii) Whether on merits the award made by the learned Arbitrator and the impugned judgment confirming the award can be sustained ?

17. We first examine the principal issue, as to whether there is an

[4] 1975 AIR 230
[5] AIR 1987 HP 46

arbitration agreement between the parties within the meaning of 1940 Act. At the outset, it would be necessary to note the relevant provisions under 1940 Act when a dispute as to the appointment of Arbitrator and the validity of an arbitration agreement is put in question. The provisions of the 1940 Act relevant for the present proceedings are as under:-

> "**Section 2.Definitions.-** *In this Act, unless there is anything repugnant in the subject or context,-*
>
> ***(a) "arbitration agreement"*** *means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;*
> **.. ... ...**
>
> ***Section 8. Power of Court to appoint arbitrator or umpire.-*** *(1) In any of the following cases,-*
>
> *(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or*
>
> *(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or*
>
> *(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.*
>
> *(2) If the appointment is not made within fifteen clear*

days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

Section 30- Grounds for setting aside award.- *An award shall not be set aside except on one or more of the following grounds, namely:-*

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid.

20. Application to file in Court arbitration agreement.

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the

agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

Section 31. Jurisdiction- *(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.*

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement- or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings-, and all subsequent applications arising, out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court.

> ***Section 33. Arbitration agreement or award to be contested by application.-*** *Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:*
>
> *Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."*

18. From the scheme of the above provisions of the 1940 Act, it is clear that to constitute an arbitration agreement within the meaning of Section 2(a) of the 1940 Act, it is necessary that there is a written agreement between the parties to submit the present or future differences to arbitration, whether the arbitrator is named or not, that is to mean that the parties are required to be ad idem. It is well settled that mutuality is the very essence of arbitration and, therefore, Section 2(a) provides for a written agreement to submit a dispute to an arbitration. Once the terms for reference to arbitration are reduced in writing, the agreement of the parties for such reference then stands established. The purpose being the parties mutually bind themselves for the award to be delivered by the arbitrator. Further, it is the arbitration agreement which will confer jurisdiction on the arbitrator. A party to an arbitration agreement can also take recourse to Section 8 and Section 20 and seek arbitration under these

provisions if the terms and conditions so warrant. Thus, the relevant scheme of the 1940 Act which we have noted provides a complete remedy to a party to an arbitration agreement to approach the Court and get a reference of the dispute for arbitration.

19. The above requirement of law would be required to be applied to the facts of the present case to examine whether the parties under the contract had an arbitration agreement under the contract in question. Respondent No.1 has placed reliance on clause 20 (supra) of the agreement and clause 22 (supra) of the tender form, to contend that there is an arbitration agreement. A perusal of clause 20 of the agreement in our view cannot be construed to be an arbitration agreement and satisfying the requirement of Section 2(a) of the 1940 Act. Clause 20 is in the nature of a eventuality and recites that only because the matter is referred to arbitration, it will not entitle the agent to continue the agreement and the contract stands terminated as per the provisions and terms and conditions in the agreement. It further refers that the agent shall not be entitled to claim any interim relief from the Court on the ground that the matter has been referred to arbitration. Thus, this clause only refers to an eventuality or a consequence if the parties themselves refer any dispute to arbitration. A plain reading of this clause cannot, in

our opinion, be construed to be an arbitration agreement.

20. Similar is the position with clause 22 of the terms and conditions of the tender which provides that in case of any dispute, the same shall be referred to the Collector and his decision shall be final and binding on the Agent and the Council. It provides that appeal against the decision of the Collector shall lie first before the Divisional Commissioner and finally before the Government in Urban Development Department. It further provides that if the agent (respondent no.1) is dissatisfied with this decision, the agent shall, within a period of eight days from the receipt of the decision, indicate his intention to make an appeal against the order of the Collector, failing which decision of the Collector shall be conclusive and the same shall not be questioned. It further provides that if no appeal is received by the Commissioner within a period of 15 days from the declaration of the decision by the Collector, no appeal after the said period is entertainable either by the Commissioner or by the Government.

21. Thus, from a plain reading of clause 22 which we have elaborately dissected at the most it can be considered as a dispute resolution mechanism first by approaching before the Collector and thereafter, in an appeal before the Divisional Commissioner and thereafter

before the Government in the Urban Development Department. This clause would thus also not satisfy the test of an arbitration agreement under Section 2(a) of the 1940 Act.

22. Furthermore, it is not a case that the Respondent had invoked Clause 22 and/or as Clause 22 would require, the Collector was not called upon to enter resolution of the dispute. The facts are quite different. As noted above in view of the letter of Chief Officer of the Appellant dated 27 May 1994 refusing to change the reserved price, Respondent No.1 had approached this Court in Writ Petition No.3598 of 1994, which was permitted to be withdrawn with a liberty to adopt appropriate proceedings, by filing a suit or by resorting to arbitration. Considering the High Court's order to mean that it has permitted arbitration, Respondent No.1 approached the State Government by its letter dated 5 October 1994 with a request to appoint an arbitrator to resolve the dispute as regards the minimum reserve price to be lowered from Rs.6,74,00,000/- to Rs.6,33,71,483/-. Favourably responding to this representation of Respondent No.1, the Government in its Urban Development Department issued a Government Resolution dated 14 November 1994 under the signature of the Joint Secretary in the Urban Development Department appointing the Commissioner, Konkan Division, as an Arbitrator to

arbitrate the said dispute. Moreover, as noted above the Government Resolution specifies that the same has been issued in pursuance of the power under Section 143-A(3) (supra) of the Municipal Council Act and that the arbitrator is being appointed as a special case. On a perusal of the said provision as we have noted above, we do not find that any such power is vested in the State Government under sub-section (3) of Section 143-A, to foist arbitration on parties who are governed by a concluded contract between them. What is significant is that in this entire process of appointing an arbitrator it is solely at the instance of Respondent No.1, there is not a slightest role played by the Appellant. There is nothing on record to show that the Government had taken concurrence of the Appellant or to stretch it little further, that a particular clause in the agreement / contract between the Appellant and the Respondents permitted the Government to make an appointment of an arbitrator. Thus, the basic requirement of an arbitration agreement namely of mutuality and/or the parties being ad-idem for reference of the disputes to arbitration is completely absent. We have therefore no hesitation to observe that neither any of the clauses of the agreement much less clause 20 and 22 as referred above constitute an arbitration agreement nor the State Government had any jurisdiction to appoint an arbitrator in terms of the agreement entered between the parties. In the absence of an

arbitration agreement, the learned Arbitrator had no jurisdiction to enter the arbitration and conduct the arbitration proceedings in question.

23. Despite the above legal position, Respondent No.1 would contend that as the Appellant participated in the proceedings before the learned Arbitrator the award is valid and cannot be set aside. We do not agree. In our opinion considering the facts and circumstances of the case and more particularly clause 22, it was wholly impermissible for Respondent No.1 to approach the State Government directly and make a unilateral request to make an appointment of an arbitrator. In taking all these steps, Respondent No.2 (Arbitrator) was not oblivious of the fact that the Appellant-Municipal Council was working under the Administrator appointed by the Government of Maharashtra and that certainly the Administrator was the officer subordinate firstly to the State Government as also to the Revenue Commissioner, Konkan Division who came to be appointed as Arbitrator. Interestingly the facts relating to the conduct of the arbitration proceedings are writ large. The learned Arbitrator called upon the Appellant to submit a reply by 9 December 1994 and to appear before the learned Arbitrator on 14 December 1994 at 2.30 p.m. Accordingly, on 14 December 1994 the learned Arbitrator heard the parties and closed the matter for an award to be passed and soon

thereafter on 26 December 1994 delivered his award holding that the minimum reserve price was required to be fixed at Rs.6.20,89,843/- which was surprisingly lesser than the demand of Respondent No.1 which was Rs.6,33,21,483/- (i.e. Rs.6,74,50,000 minus Rs.40,78,517/-). Admittedly, it was the administrator who represented on behalf of the Appellant and justified the fixation of the minimum reserve price of Rs.6,74,50,000/-. This was the nature of participation of the administrator as the record reveals. We thus cannot agree with the submission as made on behalf of Respondent No.1 that the Administrator having purportedly participated, there is estoppel against the Appellant to challenge the validity of the arbitration agreement and the jurisdiction of the arbitrator to pass the award. This contention also cannot be accepted in the teeth of express provision of Section 30, 31 and 33 of the 1940 Act. Sub-section (2) of Section 31 which is a non obstante clause which provides that *"notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court."* This intention of the legislature is further amplified by the provisions of Section 33 of 1940 Act, which entitles a

party to challenge the existence/validity of an arbitration agreement or an award. Considering this clear position in law, the submission on behalf of Respondent No.1 that the Appellants could not have challenged the arbitration agreement and consequently the Award for the first time before the learned Civil Judge is wholly unfounded and deserves to be rejected.

24. In any event in the above context the law is well settled that a decree passed by a Court without jurisdiction over the subject matter or on the ground which goes to the root of its jurisdiction or lacks inherent jurisdiction is a ***coram non judice***. Therefore, a decree passed by such a Court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon, as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party. (Re. ***Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his LRS (supra)***)

25. Thus, the reliance on behalf of Respondent No.1 on the decision of the Supreme Court in the case of "***N.Chellappan Vs. Secretary, Kerala State Electricity Board"*** (supra) and more particularly paragraph 7 of the decision, in our opinion, is not appropriate. This was a

case where there was no dispute with regard to existence of an arbitration agreement and the parties willingly appointed arbitrators as also an umpire. As the arbitrators had not made an award within the time limit, the Appellant in the case had thus approached the Court seeking revoking of the authority of the arbitrators, a further prayer that the Umpire may be directed to enter reference and proceed with the arbitration. The Court revoked the authority of the arbitrators and directed that the Umpire to enter upon the reference in his capacity as an umpire by allowing the application of the applicant. Thereafter both the appellant and the respondent therein participated in the proceedings before the Umpire without demur and the Umpire made an Award in favour of the Appellant which was thereafter filed in the Court. The Respondent Board filed an application challenging the Award under Section 16, 30 and 33 of the 1940 Act and prayed for setting aside the same which came to be rejected. However, in an appeal filed by the Respondent, the High Court came to the conclusion that the umpire as a sole arbitrator had no jurisdiction to pass an award as the orders revoking the authority to pass an award and appointing the umpire as a sole arbitrator were bad in law and that sufficient opportunity was not given to the Respondent-Board to substantiate its objection to the Award. This finding of the High Court was repelled by the Supreme Court holding that the Court had passed the

order on consent of the appellant and the Respondent-Board authorising the Umpire to enter reference so also Rule 4 of the first Schedule to the Arbitration Act authorised the umpire to enter upon the reference in case the arbitrators failed to make an Award within the time specified.

The facts in the present case are completely different. In the present case there is basically no arbitration agreement and, therefore, the entire edifice of the arbitration exercise was lacking foundation. When the defect was so fatal the contention on behalf of Respondent No.1 that the award is required to be held valid, on the ground of the so called participation on behalf of the appellant, cannot be accepted for the reasons as we have noted above.

26. We may usefully refer to the decision of the learned Single Judge of this Court (Coyajee, J.) in the case "***Varadam Shetty Jambulanna & Anr. vs. Messrs.Narshi Mulji & Co.***"[6] which holds that if ab-initio the arbitrators had no jurisdiction, appearance before the arbitrators cannot confer jurisdiction on arbitrators who had no jurisdiction at all. The observations as made by His Lordship in para. 4 of the decision read thus:

> *"(4) If ab initio the arbitrators had no jurisdiction, appearance before the arbitrators and undertaking in the event*

[6] AIR 1956 BOMBAY 720

of a finding that they had jurisdiction to file a defence on merits cannot confer jurisdiction on arbitrators who had no jurisdiction at all."

27. Now coming to the contention as urged on behalf of Respondent No.1 that the application as filed on behalf of the Appellant raising objection to the the validity of the agreement and jurisdiction of the arbitrator to pass an Award, was time barred, also cannot be sustained. This is for the reason that on receiving a notice of the petition (Miscellaneous Application No.292 of 1995 (renumbered as 196 of 1996)), filed by Respondent No.1 on 31 March 1995, praying for a decree in terms of the award, the Appellant submitted its say/ objections dated 27 April 1995 below Exhibit 21 under Section 30 and 33 of the 1940 Act. By this the Appellant raised categorical objections which we have noted above interalia to the effect that there was no arbitration agreement between the parties, that a reference to the arbitration by the State Government at the behest of Respondent No.1 was unilateral and the whole arbitration proceedings were non-est.

28. After raising these objections below Exhibit 21 (dated 27 April 1995) another application/reply came to be filed below Exhibit 37 dated 6 October 1997 whereby similar objections were raised challenging

the validity of the agreement and making similar prayers that the Miscellaneous application for decree in terms of the Award be rejected. In our opinion, the objections raised by the Appellant in their say dated 27 April 1994 below Exhibit 21 were within limitation as Article 119(b) of the Limitation Act would provide, namely a period of thirty days from the date of service of the notice of the filing of the award. The award /application was admittedly filed on 31 March 1995, thus the objections at Exhibit 21 dated 27 April 1995 filed by the Appellant were well within the prescribed limitation. Further the contents of Exhibit 21 if perused would indicate sufficient compliance of the Appellants obligation to raise objections to the arbitration agreement and the Award, as Sections 30, 31 and 33 would provide. One cannot be unmindful that neither Section 30, Section 33 nor the 1940 Act provide for any specific form to raise an objection on the ground of validity, effect or existence of an arbitration agreement between the parties. The learned Jt.Civil Judge (S.D), Kalyan, in our opinion, though having noted the provisions of Section 30, 31 and 33 and having noted that there were first set of objections filed on 26 April 1994 below Exhibit 21, completely discarded the objections which were raised by the Appellant below Exhibit 21. This approach of the learned Civil Judge, in our opinion, was wholly improper, as there is not only complete non application of mind to the law but a patent perversity

in not taking into consideration the objections dated 26 April 1994 to adjudicate on the issue of validity of the arbitration agreement and consequently the award. Thus, findings of the learned Single Judge on limitation, that the objections cannot be considered in view of Exhibit 37 being filed beyond the period of 30 days, are perverse and illegal.

29. In view of our above conclusion that the reference to Arbitration itself was illegal and consequently the award, there may not be any necessity to dwell on the merits of the matter. The parties having advanced their submissions on merits albeit what we have observed above, however for completeness of the record we deal with the same. We may observe that even on merits the things are equally disheartening. The contention as urged on behalf of the Appellant is that Respondent No.1 with open eyes accepted the tender conditions and more particularly of a minimum reserve price being fixed at Rs.6,74,00,000/- and accordingly submitting its bid at Rs.6,75,00,000/-, having done so Respondent No.1 could not have taken a reverse position to assail this tender condition after the award of the contract and commencement of the contractual work. In this regard we may observe that admittedly the tender in question was a public tender which notified a minimum reserve price of Rs.6,74,00,000/- on the basis of which Respondent No.1 as also the other bidders submitted their bids. Respondent No.1 however after

the contract was awarded, assailed the tender condition as noted above through this process of arbitration seeking to reduce the reserve price by Rs.40,78,517/-. In our opinion, it was wholly impermissible, for Respondent No.1 to turn around and challenge the reserve price fixed in the tender advertisement, when Respondent No.1 with complete awareness of the minimum reserve price had participated in the tender process. Respondent No.1 was clearly estopped in doing so. By such action of Respondent No.1 surprisingly supported by learned Arbitrator and the State Government, the fundamental character and sanctity of a public tender process is rendered meaningless, leaving a dangerous precedent that after the award of a tender by a municipal body, by such a back door method the basic tender conditions can be tinkered. In our clear opinion, it was wholly impermissible for the State Government to issue Government Resolution dated 11 November 1994 in purported exercise of powers under Section 143-A(3) of the Municipal Council Act and destroying the very solemnity of a concluded contract. Section 143-A(3) certainly cannot be stretched to this extent. This approach on the part of the State Government was nothing, but providing an aid to the back door methods resorted to by Respondent No.1 to nullify the basic tender conditions. The action on the part of the State Government was egregiously unfair and arbitrary. In this regard, the Appellants are

appropriate in relying on the decision of the Supreme Court in the case "State of ***State of Orissa & Ors. Vs. Narain Prasad & Ors. (supra)*** wherein their Lordships have held that a person who enters into certain contractual obligation with his eyes open and works the entire contract, cannot be allowed to turn around and question the validity of those obligations or the validity of the Rules which constitute the terms of the contract. In such a situation neither justice nor equity can be said to be in favour of such a party. Respondent No.1, in our opinion, had found out a novel approach by taking unilateral recourse to arbitration when Respondent No.1 was bound by contractual terms to make payment of an amount of Rs.6,75,00,000/-.

30. As a result of the above discussion, the appeal is required to be allowed. The Impugned judgment and order dated 22.9.2000 passed by the learned Single Judge is quashed and set aside. Appeal is allowed with costs.

(G.S.KULKARNI, J.) **(ANOOP V. MOHTA*, J.)***