31.07.2019
S/L No.02
Court No.37
(gc)

CAN 7354 of 2019
In
R.V.W. 171 of 2019

Accord Advertising Pvt. Ltd.
Vs.
Airports Director, The Airports Authority of India

Mr. Ratnanko Banerjee,
Ms. Sarvapriya Mukherjee,
Ms. Sristi Barman Roy,
Mr. Meghajit Mukherjee,
Mr. Varun Pradhan,
...for the Appellant.

Mr. Prabal Kr. Mukherjee,
Mr. Suhrid Sur,
...for the Respondent.

This application for review appears to have been necessitated by reason of the fact that we had directed the appellant to deposit a sum of Rs.84,08,000/- by bank draft and/or banker's cheque on or before 31st July, 2019 instead of bank guarantee as security deposit in terms of Article 7 of the Contract which has since been terminated.

The said order of termination is under challenge.

Mr. Prabal Kumar Mukherjee, the learned Senior Counsel in support of the submission, has relied upon the decision of the apex Court in ***Kalabharati Advertising vs. Hemant Vimalnath Narichania and Ors.*** reported at ***(2010) 9 SCC 437*** and a Single Bench judgment in Bombay High Court in ***Madhaw Structural Engineering Ltd. Vs Maharashtra State Road Development***

Corporation Ltd reported at ***2013 SCC Online Bom 134: (2013) 2 Mah LJ 372***. In ***Kalabharati*** (supra) in paragraph 12 the Hon'ble Supreme Court has stated that review in absence of statutory provisions are impermissible. The Hon'ble Supreme Court was deciding the power of the Municipal Corporation to recall or review its earlier order. It was held that the corporation could not pass an order recalling the order passed by it earlier and reviewing the same without assining any reason. It was noticed that no provision for review under the statute could be placed before the Supreme court. The ratio of the decision appears to be that the court cannot confer the jurisdiction upon the authority which it does not possess. Conferring jurisdiction upon a court/tribunal/ authority is a legislative function and the same cannot be conferred either by the court or by the consent of the parties. Moreover, it is trite law that a tribunal or a statutory body cannot act beyond the power conferred upon it by a statute unlike a civil court as a tribunal does not possess any plenary power in relation to civil matters.

The argument proceeds on the basis that the Arbitration and Conciliation Act, 1996 does not permit review of an order passed in an appeal by the appellate court.

The provision of Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure according to the learned Senior

Counsel is not available to the Appellate Court in absence of any such power being expressly conferred upon us in an appeal arising out of Section 37 of the Arbitration and Conciliation Act.

The Arbitration and Conciliation Act, 1996 is a special statute having limited application relating to matters governed by the said Act. The Act provides for remedies. Section 37 of the Arbitration and Conciliation Act 1996 adumbrates the orders that an appellable under section 37. However, it does not lay down the procedure to be followed in the appeal. It may happen that while hearing the appeal the appellant or the respondent wants to file certain additional evidence. The power to file such additional evidence in the appeal would be governed by order 41 Rule 27 of the Code of Civil Procedure. The Act contains both substantive and procedural law and in matters of procedure, one as to follwo the Code of Civil Procedure. Similarly, the right to file cross objection against any of the orders mentioning 37(1) (a) to (c) shall also be governed by the provision of Code of Civil Procedure. The scheme of the Act shows that the arbitral tribunal although may not be bound by the Code of Civil Procedure or the Indian Evidence Act but nothing excludes the right of the Tribunal to exercise powers under the Code of Civil Procedure, 1908 if such occasion arises. In a recent decision the Hon'ble Supreme Court in ***Srei Infrastructure Finance Limited vs. Tuff Drilling Private***

Limited reported at ***(2018) 11 SCC 470*** considered whether arbitral tribunal which had terminated proceeding under Section 25(a) due to non-filing of claim by claimant had jurisdiction to consider application for recall of order terminating proceeding on sufficient cause being shown by claimant. In deciding the said issue the Hon'ble Supreme Court in paragraph 25 observed :

> *"25. There cannot be a dispute that the power exercised by the arbitral tribunal is a quasi-judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the arbitral tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution in so far as the power of procedural review is concerned. We have already noticed that Section 19 provides that arbitral tribunal shall not be bound by the rules of procedure as contained in Civil Procedure Code. Section 19 cannot be read to mean that arbitral tribunal is incapacitated in drawing sustenance from any provisions of Code of Civil Procedure. This was clearly laid down in Nahar Industrial Enterprises Limited Vs. Hong Kong and Shanghai Banking Corporation, (2009) 8 SCC 646. In Paragraph 98(n), following was stated:-*
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> > *"(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. "Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the*

principles of natural justice." (See Industrial Credit and Investment Corpn. of India Ltd. v. Grapco Industries Ltd.)"

In paragraphs 26 and 27 of the judgment, the Hon'ble Supreme Court had approved the view of the Patna High Court in ***M/s. Senbo Engineering Ltd. Vs. State of Bihar and Ors.*** reported at ***AIR 2004 Patna 33*** that the arbitral tribunal has power to review on sufficient cause being shown. The power of procedural review and the authority to recall on sufficient cause being shown is not being curtailed. In our view the power of the High Court to review its earlier order on sufficient cause being shown is not curtailed by the Arbitration and Conciliation Act 1996. We have noticed a contrary view of the Bombay High Court in ***Madhav Structural Engineering*** (supra) that since the right of review is not provided in the Arbitration and Conciliation Act, the Court dealing with arbitration matters under the Arbitration and Conciliation Act, 1996 cannot review its own orders but for the reasons we have indicated above we are unable to accept the said view. Once the Tribunal has the power to review or recall its order as held in **Tuff Drilling Private Limited** (supra), there is no reason for the High Court not to review its order if circumstances exist.

We may refer to a fairly recent decision of the Supreme Court in ***Municipal Corporation of Greater Mumbai v. Pratibha***

Industries Ltd. reported at ***(2019) 3 SCC 203*** in which questions arose as regard to the power of the High Court to recall its orders. The case has its genesis in an order passed by a learned Single Judge recalling its earlier order of appointment of arbitrator on the ground that the appointment made on Clause 13 of the General Conditions of Contract and Clause 22 of the Tender Notice, in effect, were not arbitration clauses at all, but in-house proceedings which could be taken at the behest of the aggreived party. An appeal was filed under section 37 of the Act by the respondent. The Supreme Court has summarized the findings of the Division Bench as follows –

> *"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."*

Thereafter, the Hon'ble Supreme Court, in paragraphs 11 to 14 of the judgment in ***Pratibha Industries*** (supra) discussed the power of the High Court to recall its order. The said paragraphs read –

> *"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:-

> *"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."*

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:-

> *"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 HighCourt as a court of plenary jurisdiction being a court of record."*

Moreover the nature of the dispute is a commercial dispute within Section 2(c)(ix) and Section 13 of the Commercial Courts Act, 2015 and appeal shall lie from such orders passed by Commercial Division or a Commercial Court, inter alia, under Section 37 of the Arbitration and Conciliation Act, 1996. Section 16(2) provides that the commercial division and the Commercial Court shall follow the provision of Code of Civil Procedure as amended by the Commercial Courts Act, 2015. Irrespective of the

fact whether we treat this appeal as an appeal under the Commercial Courts Act, 2015, we feel that the scheme of the Arbitration and Conciliation Act, 1996 does not prevent an appellate court to review its own order if it conforms to the requirement of Section 114 read with order 47 Rule 1 of the Code of Civil Procedure.

The court which passes an order in relation to an appeal under section 37 of the Act in its civil appellate jurisdiction can also review its own order. This power is not expressly excluded in the Act. All courts, unlike Tribunals, inheres the power of review of its own order, unless such power is expressly excluded.

In view thereof we are unable to accept the objection raised by Mr. Mukherjee.

It is an admitted fact that at the time when we passed the interim order, Article 7 was not adverted to nor we have noticed the said Article.

It is submitted on behalf of the appellant that it is an error apparent on the face of the record inasmuch as there are other sufficient reasons to pray for review of the order. Article 7 was not brought to our attention when the order was passed and, accordingly, we did not have the benefit to look into the said article. Had the contract operated till this date, the appellant would have been required to furnish security deposit by way of

bank guarantee. We accept this to be a mistake inasmuch as we feel that there are sufficient reasons for permitting us the appellant to furnish bank guarantee of Rs.84,08,000/- within 9th August, 2019 along with a confirmation from the issuing bank that the appellant would have the required margin money for the bank guarantee if it is enforced.

The said direction is peremptory.

It is needless to mention that in the event the bank guarantee is not furnished in terms of the order, the interim order shall stand automatically vacated.

The appellant shall serve a copy of the application under Section 9 of the Arbitration and Conciliation Act, 1996 upon the Advocate-on-record of the respondents by tomorrow. The Airport Authority shall file their affidavit-in-opposition within 10 days from the date of service, reply thereto, if any, shall be filed within a week thereafter.

The said direction is peremptory.

The learned District Judge is requested to fix the matter soon after the completion of the pleading and dispose of the matter in accordance with law as expeditiously as possible.

In view of the modification of the order dated 25th July, 2019, the interim order is extended till 15th August, 2019 and, in the event, the learned District Judge is unable to dispose of the matter

by that time and if he feels it necessary to extend the time beyond the aforesaid period, the learned District Judge may extend the same for reasons to be recorded by him for such extension.

We have been informed that a request has been sent to the competent authority to constitute an arbitral tribunal.

Mr. Prabal Kr. Mukherjee, the learned Counsel appearing on behalf of the respondent has submitted that review application is not maintainable as the Arbitration and Conciliation Act, 1996 does not contemplate review of an order passed by the Court having the determination and jurisdiction to hear the appeal.

The Arbitration and Conciliation Act, 1996 although is a Code in itself but the power of review an order passed by a Court is not restricted by the provisions of the said Act. The order can be reviewed provided it conforms to the requirements of Order 47 Rule 1 of the Code of Civil Procedure. The judgement cited by Mr. Mukherjee, namely, **Kalabharati Advertising** (supra) relates to a statutory power conferred upon a Tribunal and it is trite law that unless a Tribunal is vested with the power to review its own order, there is no plenary power to the Tribunal to review its own order. The Tribunal is a creature of a statute. In the instant case, the appeal has been filed in exercise of power under Section 37 of the Arbitration and Conciliation Act, 1996. Section 37 does not exclude the power of a Court to review its own order if it conforms

to the requirement of Order 47 Rule 1 of the Code of Civil Procedure. For the similar reason, the judgment cited by Mr. Mukherjee of Bombay High Court in **Madhav Structural Engineering** (supra) is not applicable in the given facts and circumstances of the case.

The review application being R.V.W. 171 of 2019 is disposed of.

In view of disposal of the review petition, the connected application being CAN 7354 of 2019 is also disposed of.

(Soumen Sen, J.)

(Ravi Krishan Kapur, J.)