
(1993) 04 BOM CK 0002

In the Bombay High Court

Case No : Arbitration Petition No. 222 in Award No. 74 of 1990

Municipal Corporation of Gr. Bombay

APPELLANT

Vs

Associated Engineers

RESPONDENT

Date of Decision : 29-04-1993

Acts Referred:

Arbitration Act, 1940 — Section 2, 20

Bombay Municipal Corporation Act, 1888 — Section 69, 70, 71

Citation : (1994) 1 BomCR 341

Hon'ble Judges : S.M. Jhunjhunwala, J

Bench : Single Bench

Advocate : E.P. Bharucha and A.J. Bhor, instructed by B.G. Nanal, for the Appellant; Virendra V. Tulzapurkar, instructed by Gordhandas Fozdar, for the Respondent

Final Decision : Dismissed

Judgement

S.M. Jhunjhunwala, J.—By this petition, the petitioners seek to set aside and/or remit the Award dated 31st May, 1990 which has been filed in this Court and numbered as Award No. 74 of 1990.

2. Briefly stated, the facts are as under :

(i) The petitioners are a body corporate incorporated pursuant to the provisions of The Bombay Municipal Corporation Act, 1888 (for short, referred to as "the said Act"). The respondents are a partnership firm inter alia carrying on business as Engineers and Civil Contractors. Sometime in the year 1984, the petitioners invited tenders for pile foundation of the proposed Administrative Building and Drill Tower for being constructed in place of then existing building at Byculla Fire Brigade Station, Bombay (hereinafter for short referred as "the said work"). General Conditions for Civil Contracts of the petitioners (hereinafter for short referred to as "GCC") formed part of the tender documents in respect of the said work. Clauses 96 and 97 of the said GCC provide for reference of disputes to arbitration;

(ii) on 22nd November, 1984, the petitioners received respondents' Tender in respect of the said work which was sanctioned and accepted by the Standing Committee of the petitioners. By their letter dated 9th April, 1985 addressed to the respondents, the petitioners communicated to the respondents the acceptance of the said Tender by the Standing Committee of the petitioners and called upon the respondents to collect the Contract Agreement in respect thereof from the office of the Dy. City Engineer (Planning & Design) of the petitioners. By their letter dated 23rd April, 1985 addressed to the Director, Engineering Services & Projects of the petitioners, the respondents informed the petitioners that the respondents would comply with necessary formalities as required by the petitioners in the said letter dated 9th April, 1985 addressed by the petitioners. By their letter dated 30th April, 1985 addressed to the respondents, the petitioners called upon the respondents to carry out contractual formalities and to make payment of contract deposit as stated therein. Accordingly, the respondents carried out the requisite contractual formalities and paid legal charges for the Contract Agreement as also the requisite amount of contract deposit to the petitioners as per terms of the said Tender accepted by the petitioners. On 17th May, 1985, the petitioners issued to the respondents "Work Commencement Order" and requested the respondents to take in hand immediately the preliminary arrangements in connection with the said work in consultation with Dy. City Engineer (City)/Executive Engineer (Building Construction) (City) of the petitioners so as to commence the said work from 30th May, 1985.

(iii) The respondents completed the necessary preliminary arrangements mobilised their plant and personnel as required of them and amongst other things, also undertook the execution of trial pits. By their letter dated 23rd June, 1987 addressed to the respondents, the petitioners informed the respondents that the said work entrusted to the respondents was terminated and the respondents were directed to remove the shed constructed for the execution of work as also all the equipments after taking joint inventory. By their letter dated 7th August, 1987 addressed to the Dy. City Engineer (City) of the petitioners, the respondents, inter alia, informed the petitioners that the petitioners had wrongfully terminated the contract in respect of the said work and as such, were liable to pay compensation to the respondents. The site inventory was taken on 22nd August, 1987 and thereafter the respondents removed their plant and machinery which were mobilised since October, 1985.

(iv) By their letter dated 28th September, 1987 addressed to the Dy. City Engineer (BC) of the petitioners, the respondents claimed compensation of Rs. 2,73,718/- from the petitioners as per Clause 94 of the said GCC. By their letter dated 26th October, 1987 addressed to the respondents, the petitioners called upon the respondents to furnish the details as required by the petitioners in support of the claim of the respondents against the petitioners. Alongwith their letter dated 30th October, 1987 addressed to the Executive Engineer (BC) of the petitioners, the respondents furnished the necessary vouchers and information in

support of their claim against the petitioners.

(v) After exploring possibilities of amicable settlement which did not fructify and since disputes arose by and between the petitioners and the respondents touching or concerning the said work and-or the execution thereof the respondents made reference to the Municipal Commissioner of the petitioners under Condition 96 of the said GCC. Since the Municipal Commissioner failed to do anything in the matter, by their letter dated 20th September, 1988 addressed to the Municipal Commissioner of the petitioners, the respondents called upon him to refer all disputes and differences which had arisen by and between the petitioners and the respondents touching or concerning the said work and/or execution thereof to arbitration as per Condition No. 97 of the said GCC. By their further letter dated 2nd November, 1988 addressed to the Dy. City Engineer (BC) of the petitioners, the respondents again called upon the petitioners to refer all the disputes and differences to arbitration and requested him to forward the names of persons on the panel of arbitrators of the petitioners to enable the respondents to convey their agreement for appointment of an arbitrator as per Condition No. 97(i) of the said GCC. Since the petitioners failed and neglected to refer the disputes and differences to arbitration as requested by the respondents, by their advocates' letter dated 7th December, 1988 addressed to the Municipal Commissioner of the petitioners, the respondents finally called upon him to refer the disputes and differences to arbitration as per Condition No. 97 of the said GCC. On 24th January, 1989, the petitioners through their City Engineer addressed a letter to one J.D. Pradhan, the Ex. Chief Engineer of the petitioners, inter alia, informing him that on account of site conditions the said work entrusted to the respondents was required to be terminated and the respondents were relieved from the contractual obligations without carrying out any work and that since the respondents had requested the Municipal Commissioner of the petitioners to prefer the disputes to arbitration as per the GCC the Municipal Commissioner had approved his name as the sole arbitrator in the matter. By the said letter, the consent of the said P.D. Pradhan to act as sole arbitrator in the matter was sought by the petitioners. A copy of the said letter addressed to the said P.D. Pradhan was endorsed in favour of the respondents with a request to subscribe their consent for appointment of the said P.D. Pradhan as the sole Arbitrator for settlement of disputes by and between the petitioners and the respondents in respect of the said work through his arbitration. By their letter dated 30th January, 1989 addressed to the City Engineer of the petitioners in reply to the said letter dated 24th January, 1989, the respondents subscribed their consent and communicated the same to the petitioners to refer the disputes by and between the petitioners and the respondents in connection with the said work to the sole arbitration of the said P.D. Pradhan. By his letter dated 27th February, 1989 addressed to the City Engineer of the petitioners, the said P.D. Pradhan gave his consent to act as sole-arbitrator in the matter. A copy of the said letter was endorsed in favour of the respondents. By their letter dated 13th July, 1989 addressed through their Dy. Chief Engineer (BC) (City) to the said P.D.

Pradhan, the petitioners informed the said P.D. Pradhan that the respondents had consented to his appointment as sole-arbitrator and requested him to commence the proceedings of arbitration as per agreed terms and conditions. A copy of the said letter was endorsed in favour of the respondents.

(vi) By his letter dated 18th July, 1989 addressed to the respondents, the said P.D. Pradhan while acting as sole-arbitrator gave notice that he would hold preliminary meeting to decide the terms of reference on 22nd July, 1989 as mentioned therein. Accordingly, a preliminary meeting before the Arbitrator was held on 22nd July, 1989 when both the petitioners and the respondents were represented and the terms of reference as recorded in the minutes of the said meeting were agreed by and between the petitioners and the respondents. The Arbitrator gave directions to the respondents to file their Statement of claims and to the petitioners to file their reply to the Statement of Claims of the respondents alongwith counter-claim, if any. Directions were also given to the respondents to file rejoinder to the Counter-claim of the petitioners by a specified date. Further directions as to furnishing copies of the original contract in matter under reference, inspection and verification of the original Contract and statement of inventory and payment of certain amounts as and by way of initial fees were also given by the Arbitrator in that meeting.

(vii) In pursuance of directions given by the Arbitrator, the respondents filed their Statement of Claims with relevant annexures in the arbitration proceedings before the Arbitrator and furnished a copy thereof to the petitioners. By their letter dated 6th October, 1989 addressed through the Dy. City Engineer (BC) City to the Arbitrator, the petitioners informed him that due to certain technical and legal difficulties, delay was caused in finalising reply of the petitioners to the Statement of Claims of the respondents and requested the Arbitrator to condone the delay in filing the reply. A copy of the said letter was endorsed in favour of the respondents.

(viii) By their advocate's letter dated 7th November, 1989 the petitioners communicated to the Arbitrator that on going through relevant records, it was observed that the original contract copy was not signed by the authorised signatories of the petitioners and that it did not bear the seal of the petitioners. The petitioners, inter alia, contended that in the absence of the contract documents duly executed, legally and technically there was no contract and no agreement for referring the matter to the Arbitrator. The petitioners communicated to the Arbitrator that in view of they having consented to arbitration in absence of contract documents, they were seeking legal advice in the matter and requested for grant of 15 days time to the petitioners. A copy of the said letter was endorsed in favour of the respondents. The second meeting in the said arbitration proceedings before the Arbitrator was held on 22nd November, 1989 where at both the petitioners and the respondents were present through their representatives. The petitioners agreed to file their reply by 4th December, 1989. By consent of the petitioners and the respondents, time for the

Arbitrator to make the award was extended till 22nd March, 1990.

(ix) In the meeting held before the Arbitrator on 24th January, 1990, the learned Counsel appearing for the petitioners submitted that since the contract between the petitioners and the respondents was not executed, the arbitration could not be proceeded with. He assured to file the legal submissions in this regard before the Arbitrator on 31st January, 1990. On behalf of the petitioners, legal submissions raising the issue of jurisdiction of the Arbitrator to arbitrate in the matter in want of due execution of contract on behalf of the petitioners were filed. After considering the submissions made before him, in the matter held on 8th February, 1990, the Arbitrator decided that he had the jurisdiction to arbitrate in the disputes and differences referred to him for arbitration. In the meeting held on 26th March, 1990, time for the Arbitrator to make the award was extended by consent till 22nd July, 1990. At the request of the petitioners, further hearing of the reference was adjourned to 11th April, 1990.

(x) On 5th April, 1990, the petitioners filed an Arbitration Petition No. 99 of 1990 against the respondents and the Arbitrator in this Court for declaration that there did not exist a valid, subsisting and binding arbitration agreement between the petitioners and the respondents for stay of the arbitration proceedings before the Arbitrator. The said petition was accepted by the learned Chamber Judge on 6th April, 1990 and notice to the respondents therein returnable on 9th July, 1990 was ordered to be issued. On 11th April, 1990, the petitioners applied before the Arbitrator to adjourn the hearing fixed before him on 11th April, 1990. Since no stay of arbitration proceeding before the Arbitrator was obtained by the petitioners from this Court, the respondents requested the Arbitrator to proceed with hearing of the arbitration reference. The hearing of the said reference before the Arbitrator proceeded with on 11th April, 1990. On 19th April, 1990, the application made on behalf of the petitioners in the said Arbitration Petition No. 99 of 1990 for grant of ad-interim stay of the arbitration proceedings pending before the Arbitrator was rejected by this Court. No appeal therefrom was preferred by the petitioners.

(xi) The arbitration proceedings before the Arbitrator proceeded with and culminated into an Award dated 31st May, 1990 directing the petitioners to pay to the respondents the sum of Rs. 5,75,645.74 with interest thereon as provided therein. The said Award dated 31st May, 1990 has been filed in this Court and numbered as Award No. 74 of 1990 (hereinafter for short referred as "the said Award"). As aforesaid, the present petition has been filed to set aside and-or remit the said Award.

3. In view of the present petition filed by the petitioners to challenge the said Award on the ground that there did not exist any valid, legal, subsisting and binding arbitration agreement by and between the petitioners and the respondents in respect of the disputes and differences touching, concerning and/or in connection with the said work and/or execution thereof for want of legal and binding contract between the petitioners and the respondents in respect of

the said work, the said Arbitration Petition No. 99 of 1990 filed by the petitioners for declaration that there did not exist legal, subsisting and binding arbitration agreement between the petitioners and respondents became infructuous and as such has been disposed off.

4. Mr. Bharucha, the learned Counsel appearing for the petitioners, has stated that the petitioners were confining their challenge to the said Award only to want of jurisdiction of the Arbitrator to arbitrate as according to the petitioners there did not exist any valid, legal, subsisting and binding arbitration agreement by and between the petitioners and the respondents for want of legal and binding contract in respect of the said work. Since the challenge to the said Award is confined to want of existence of valid, legal, subsisting and binding arbitration agreement as aforesaid, the hearing of this petition has proceeded on the basis of the affidavits and compilation of documents filed in the said Arbitration Petition No. 99 of 1990 which have, by consent of the parties, been taken on record in the present proceedings.

5. Mr. Bharucha, has submitted that the provisions of sections 69, 70 and 71 of the said Act are mandatory and as such, contract involving expenditure in excess of Rs. 10,000/- is required to be in writing and is to be sealed by common seal of the petitioners in the presence of two members of Standing Committee of the petitioners who should sign the contract. Mr. Bharucha has further submitted that though the contract in the instant case involved expenditure of more than Rs. 10,000/-, the same has not been executed by the petitioners in the manner required by section 70 of the said Act in as much as neither the common seal of the petitioners has been affixed nor it is signed by two members of the Standing Committee of the petitioners. Mr. Bharucha has further submitted that as per section 71 of the said Act, no contract not executed in consonance with section 70 of the said Act is binding on the petitioners. In the submission of Mr. Bharucha, since no valid, legal and binding contract as per requirements of section 70 of the said Act came into existence in respect of the said work, no valid, legal, subsisting and binding arbitration agreement by and between the petitioners and the respondents came into existence to refer any dispute arising out of or in relation thereto or in connection therewith to arbitration and as such, the Arbitrator had no jurisdiction to arbitrate in respect of the claims of the respondents against the petitioners filed before him. In support of his submissions, Mr. Bharucha has put reliance on the cases reported in *Piloo Dhunjishaw Sidhwa Vs. Municipal Corporation of The City of Poona*, and also on unreported judgment of this Court delivered by Pendse, J., being the judgment dated 18th February, 1983 in Arbitration Suit No. 1079 of 1974.

6. Mr. Tulzapurkar, the learned Counsel for the respondents, has submitted that legal, valid and binding contract by and between the petitioners and the respondents incorporating therein the said GCC had come into existence in respect of the said work. Mr. Tulzapurkar has further submitted that Condition No. 97 of the said GCC incorporated in the said Contract constituted valid, legal

and binding arbitration agreement by and between the petitioners and the respondents for reference of disputes touching or concerning the said work or execution thereof or the said contract or the construction, meaning, operation or effect thereof or to the rights or liabilities of the petitioners and the respondents or arising out of or in relation thereto to the arbitration as provided therein and as such, the Arbitrator had the jurisdiction to arbitrate in respect of the claims of the respondents filed against the petitioners before him. Mr. Tulzapurkar has further submitted that the provisions of sections 70 and 71 of the said Act are not mandatory but have been enacted to safeguard and protect the petitioners against the mischief that may be committed by the contracting party or petitioners' officers executing unauthorised contracts. He has further submitted that in the instant case, the said Tender of the respondents having been sanctioned and accepted by the Standing Committee of the petitioners and such acceptance having been duly communicated to the respondents, a valid, legal and binding contract in respect of the said work came into existence and the petitioners can not take advantage of their own default and/or negligence in not affixing common seal of the petitioners thereon in presence of two members of the Standing Committee of the petitioners. Mr. Tulzapurkar has also submitted that although an arbitration agreement may be an integral part of a contract, nonetheless it is distinct and separate contract between the parties thereto. What is required in law for a valid, legal and binding arbitration agreement is that the same must be in writing though it need not be signed by the parties. In the submission of Mr. Tulzapurkar, the said Tender incorporating, inter alia, the said GCC including the said Condition No. 97 and acceptance thereof by the petitioners being in writing, a valid, legal, subsisting and binding arbitration agreement by and between the petitioners and the respondents came to exist in respect of and/or in connection with or relation to the said work and as such, the Arbitrator had the jurisdiction to arbitrate in respect of claims of the respondents against the petitioners filed before him. Mr. Tulzapurkar has submitted in alternative that in the facts of the case, a valid, legal, subsisting and binding arbitration agreement between the petitioners and the respondents in respect of and/or in connection with or in relation to the said work existed de hors the said Tender documents and as such, the Arbitrator had the jurisdiction to arbitrate in respect of claims of the respondents against the petitioners filed before him. Mr. Tulzapurkar has further submitted that the petitioners having agreed to refer the disputes touching or concerning the said work or execution thereof and/or arising out of or in relation to the said contract to the arbitration of the said P.D. Pradhan, the said Arbitrator and having referred to him a specific question of law touching his jurisdiction for his decision having participated in the arbitration proceeding and invited the arbitrator to decide the specific question, can not now be permitted to turn around and contend that the Arbitrator had no jurisdiction to arbitrate in respect of claims of the respondents against the petitioners filed before him. In support of his submissions, Mr. Tulzapurkar has put reliance on the cases reported in Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, .

7. On 22nd November, 1984 the petitioners received respondents' said Tender in writing which was admittedly sanctioned and accepted by the Standing Committee of the petitioners. The acceptance of the said Tender of the respondents by the Standing Committee of the petitioners was duly communicated in writing by the petitioners to the respondents. The offer of the respondents to the petitioners in respect of the said work in the form of the said Tender and the acceptance thereof by the Standing Committee of the petitioners and the intimation of the acceptance by the petitioners to the respondents has resulted into a valid and legal contract in writing by and between the petitioners and the respondents in respect of the said work on the terms and conditions contained in the said Tender document under the provisions of the Indian Contract Act, 1872. Moreover, the definition of contract given in the said GCC reads as under:

"The contract shall mean the Tender and acceptance thereof and the formal agreement, if any, executed between the Contractor Commissioner and the Corporation together with the documents referred to therein including these conditions and appendix and any special conditions, the specifications, designs, drawings, price schedules, bills of quantities and schedule of rates. All these documents taken together be complementary to one another".

Hence no formal agreement is necessary to be executed to enter into a contract under the said GCC. Even Clause 18 of the General Directions to Tenderers of the petitioners which also forms part of the said Tender Documents reads as under :

"18. Successful tenderer shall be required to execute the contract within one month after receipt of intimation to execute the contract failing which the Corporation will be entitled to claim discount in respect of non-payment of bills within stipulated time, if such non-payment is the result of non-execution of the contract by the tenderer."

8. These provisions make it clear that non-execution of formal agreement by tenderer does not vitiate the contract or does not invalidate the contract. In the instant case, the respondents had after acceptance of the said Tender by the Standing Committee of the petitioners, collected the contract agreement from the office of the Dy. City Engineer (Planning and Design) of the petitioners as per the petitioners' said letter dated 7th April, 1985 addressed to the respondents, carried out contractual formalities, paid legal charges for the contract agreement, made payments of contract deposit with the petitioners and returned the contract agreement duly executed by them to the petitioners in compliance of the necessary formalities as required by the petitioners. The petitioners did issue work commencement order to the respondents and had requested the respondents to take in hand forthwith the preliminary arrangements in connection with the execution of the said work so as to commence the said work from 30th May, 1985. To perform the said contract, the respondents had completed the necessary preliminary arrangements, mobilized their plant and personnel as required of them and also undertook execution of the trial pits. All

throughout since acceptance of the said Tender till the petitioners addressing the said letter dated 7th November, 1989 through their advocate to the Arbitrator, the petitioners have proceeded on the basis that a valid, legal and binding contract in respect of the said work as per requirements of the said Act did exist by and between the petitioners and the respondents. The termination of the said Contract by the petitioners presupposes existence thereof. Even in the correspondence which ensued by and between the petitioners and the respondents after termination of the said contract by the petitioners, the respondents have invariably made reference to the said contract and the terms thereof including the said Condition No. 97 for reference of disputes to arbitration which the petitioners did not deny or controvert. On the contrary, there is explicit admission on the part of the petitioners as to existence of contractual relationship between the petitioners and the respondents in respect of the said work in the letter dated 24th January, 1990 addressed by the petitioners to the Arbitrator wherein it has been stated as under :

"The above work for pile foundation was entrusted to the contractors M/s. Associated Engineers. On account of site conditions the work was required to be terminated and the contractors were relieved from the contractual obligations without carrying out any work."

9. Pursuant to the said Condition 97, the petitioners had appointed Ex. Chief Engineer as Sole Arbitrator to arbitrate in the matter, requested him to commence arbitration proceedings, did appear before him and participated in the proceedings before him. It is only when the said letter dated 7th November, 1989 was addressed by the advocate for the petitioners to the Arbitrator, the petitioners for the first time contended that on going through their relevant records, it was observed that the original contract copy was not signed by the authorised signatories of the petitioners and did not bear the seal of the petitioners and as such since no contract is duly executed by the petitioners as per the requirement of section 70 of the said Act there did not exist a valid, legal, subsisting and binding arbitration agreement between the petitioners and the respondents vesting jurisdiction in the Arbitrator to arbitrate in the matter. Though a valid and legal contract by and between the petitioners and the respondents in respect of the said work did come into existence as a result of acceptance by the petitioner of the offer made by the respondents, as aforesaid the question still arise for consideration is whether the said Award is liable to be set aside on the ground that there was in existence no valid arbitration agreement since according to the petitioners the said contract was not executed in compliance with the requirements of section 70 of the said Act and as such not binding on the petitioners as per section 71 of the said Act. Sections 70 and 71 of the said Act read as under :

"70. Mode of executing contracts.

(i) Every contract entered into by the Commissioner on behalf of the Corporation shall be entered into in such manner and form as would bind the Commissioner if

such contracts were on his own behalf, and may in the like manner and form be varied on discharged; Provided that -

(a) Where any such contract, if entered into by the Commissioner, would require to be under seal, the same shall be sealed with the common seal of the Corporation; and

(b) every contract for the execution of any work or the supply of any work or the supply of any materials or goods which will involve an expenditure exceeding (ten thousand rupees) shall be in writing and shall be sealed with the common seal of the Corporation (in the manner prescribed in sub-section (2)) and shall specify the work to be done or the materials or goods to be supplied, as the case may be, the price to be paid for such work, materials or goods, and, in the case of a contract for work, the time or times within which the same or specified portions thereof shall be completed.

(1-A) Notwithstanding anything contained in proviso (b) to sub-section (i) it shall be lawful for the Commissioner in the case of contracts relating to the execution of any work or the supply of any materials or goods to dispense, by an order in writing, with the execution of a written instrument, if such work has already been performed or the materials or goods have already been supplied to his satisfaction.

(2) The common seal of the Corporation which shall remain in the custody of the Municipal Secretary, shall be affixed in the presence of two members of the Standing Committee to every contract or other instrument (other than contract relating to the acquisition of immovable property or interest therein or a right thereto, require to be under seal) and such contract or instrument shall be signed by the said two members of the Standing Committee in token that the same was sealed in their presence. The signatures of the said members shall be distinct from the signatures of any witness to the execution of any such contract or instrument.

(Provided that in the case of any contract entered into for the purposes of Clause (q) of section 61, the seal shall be so affixed in the presence of, and the contract shall be signed by, two members of the Education Committee in lieu of two members of the Standing Committee).

All the section 70(b) of city of Bombay Municipal Act requires is that the price has got to be specified in the contract or in the other words perusing the contract, it should be clear as to what the price is which the Municipality has to pay the contractors for carrying out the contract. The statute does not say that the contract must state a fixed price or a price ascertainable in rupees, annas and pies at the date when the contract is entered into. Nor is there any prohibition in the statute which precludes the Municipality from fixing a price which may be ascertained at a future date or may be ascertained by some person specially nominated by the parties in the contract. Although a fixed amount may not appear in a contract, the price may nevertheless be specified

which would be fixed in the manner agreed to by the parties under the contract itself. Where a price is fixed, but the parties agree that it is subject to certain variation to be determined by the Commissioner of the Municipality, under certain eventualities, it is as much a price as a fix price in terms of rupees, annas and pies. The price must therefore be regarded as specified as required by section 70(b).

Section 71. Contract not binding on the Corporation unless executed as prescribed as in section 70.

No contract (of the nature specified in sub-section (2) of the last preceding section) not executed as in the (said) section provided shall be binding on the Corporation".

10. Since, in the instant case the said contract involved an expenditure exceeding Rs. 10,000/-, as per section 70 (b) of the said Act it was required to be in writing. If formal contract agreement was to be executed, it was required to be sealed with the commence seal of the petitioners in the manner prescribed by sub-section (2) of the said section. The contract was also required to specify the work to be done, the price to be paid for such work and the time within which it was to be completed. In the instant case, the said contract, as aforesaid, was in writing. It did specify the work required to be done by the respondents as also the price required to be paid by the petitioners for the said work and the time within which the said work was to be completed. No formal contract Agreement was executed and the said contract entered by and between the petitioners and the respondents as a result of sanction and acceptance of respondents" said Tender by the Standing Committee of the petitioners and intimation of such acceptance by the petitioners to the respondent was not sealed with the common seal of the petitioners. The object for incorporating the provisions of section 70(b) of the said Act being a safeguard and protect the petitioners against the mischief that may be committed by the contracting party or petitioners" officer executing unauthorised contracts has been achieved in the instant case since the said offer of the respondents has been sanctioned and accepted by the Standing Committee of the petitioners. The Tenders were invited under the authority of the Municipal Commissioner of the petitioners and the said Tender of the respondents was sanctioned and accepted by the Standing Committee of the petitioners which acceptance, as aforesaid, has been duly communicated by the petitioners to the respondents and as such, there is no unauthorised execution of the said contract on behalf of the petitioners. Even where formal contract agreement is required to be executed, u/s 70(1-A) of the said Act, in the given circumstances, the Municipal Commissioner has been empowered to dispense with execution of such formal contract agreement in the manner provided in section 70(b) of the said Act. Hence, even where formal contract agreement is required to be executed, it is not absolutely mandatory that it must be executed in the manner provided in section 70(b) of the said Act so as to be binding on the Municipal Commissioner of the petitioners u/s 71 of

the said Act.

11. Mr. Tulzapurkar has submitted that to determine whether a particular provision in a Statute is mandatory or directory, the broad purpose of the Statute is to be considered since it is important. The object of the broad provision must also be considered. In the submission of Mr. Tulzapurkar, where the effect of non-compliance of the provisions of section 70(d) of the said Act was such as to wholly deprive the petitioners of their rights, there might be just cause for complaint as prejudice would then be writ large. However, in the instant case, since the offer of the respondents was sanctioned and accepted by the Standing Committee of the petitioners, no prejudice was caused to the petitioners and as such, there could be no cause for the petitioners for complaint and the said provisions should be held to be directory and not mandatory. In support of his this submission, Mr. Tulzapurkar has relied upon the case of Dalchand v. Municipal Corporation of Bhopal and another, decided by the Apex Court of this Country and reported in Dalchand Vs. Municipal Corporation, Bhopal and Another, . In support of his submission that the word "shall" appearing in section 70(b) after the words "in writing and" and before the words "be sealed with the common seal of the Corporation" and in section 71 of the said Act need not be given connotation of being obligatory but be interpreted as directory. Mr. Tulzapurkar has put reliance on the case of Rubber House v. Excelsior Needle Industries Pvt. Ltd., decided by the Apex Court of this country and reported at Rubber House Vs. Excellsior Needle Industries Pvt. Ltd., . In that case Rules 4(c), 5(1) and (6) of Haryana Urban (Control of Rent and Eviction) Rules, 1976 came for interpretation before the Supreme Court. In that case the Supreme Court has held as under:

"The word "shall" in its ordinary import is obligatory. Nevertheless, the word "shall" need not be given that connotation in each and every case and the provisions can be interpreted as directory instead of mandatory depending upon the purpose which the legislature intended to achieve as disclosed by the object, design, purpose and scope of the statute. While interpreting the concerned provisions, regard must be had to the context, subject matter and object of the statute in question".

12. Taking into consideration the purpose which the legislature intended to achieve by enacting the said provisions of section 70(b) and section 71 of the said Act in the form in which the same are enacted and having regard to the context, subject matter and object of the Statute in question and more particularly in view of the fact that in the instant case the offer of the respondents was sanctioned and accepted by the Standing Committee of the peetitioners, I am of the view that the object underlying in enacting the said provisions has been achieved as the interest of the petitioners has been safeguarded and protected. It is not that the provisions of section 69 of the said Act have not been complied with. No formal contract agreement other than the said contract was, in the facts of the case, required to be executed. Even if it is

assumed that a formal contract agreement was required to be executed in the manner as mentioned in section 70(b) of the said Act, in the instant case, the default and/or negligence for the petitioners not executing such formal contract agreement lies with the petitioners alone and not with the respondents and a person cannot set up an illegal or fraudulent act of his own in order to avoid his own deed. No person can and should be permitted to set up his own fraud as a defence otherwise it would amount to putting premium on dishonesty of such person.

13. However, in cases where formal contract agreement is to be executed, the question as to whether sections 69, 70 and 71 of the said Act are mandatory or not is no longer *res integra*. In the case of *Jayant Dharshi Shah Vs. Municipal Corporation of Greater Bombay and Another*, , on which reliance has been placed by Mr. Bharucha, unreported judgment of Kantawala, J., in O.O.C.J. Suit No. 241 of 1964 delivered on 2nd March, 1971 in the matter of *Messrs Machine Tools Traders v. Municipal Corporation of Greater Bombay*, as also on the judgment of the Division Bench of this Court in the case of *Municipal Corporation of Greater Bombay v. Ramadevi*, reported in 1982 Bom.L.R. 391 , have been cited and it has been held that the provisions of said sections 69, 70 and 71 of the said Act are mandatory. Reliance has also been placed by Mr. Bharucha on the case of *Piloo Dhunjshaw Sidhwa Vs. Municipal Corporation of The City of Poona*, . In the case of *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others*, , on which also reliance has been placed by Mr. Bharucha, where it has been held by the Supreme Court that where formal contract agreement is required to be executed, the execution of such formal contract agreement is required to be in the manner mentioned in section 70(b) of the said Act as the said sections 69, 70 and 71 of the said Act are mandatory. However, the Supreme Court of our Country in the case of *Union of India (UOI) Vs. A.L. Rallia Ram*, , has held that a valid contract may result from correspondence and it is not absolutely essential to execute formal document to result into a contract. In that case, it has been further held that a Tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor General of India and acceptance in writing which is expressed to be made in the name of the Governor General and is executed on his behalf by a person authorised in that behalf would form to the requirements of section 175(3) of Government of India Act, 1935. In the instant case, the said Tender of the respondents in respect of the said work submitted in pursuance of the invitation issued by or on behalf of the Municipal Commissioner of the petitioners and sanction and acceptance thereof by the Standing Committee of the petitioners and intimation of that acceptance in writing duly signed by authorised signatory on behalf of the petitioners resulted into a valid and legal contract between the petitioners and the respondents binding on both the petitioners and the respondents and no further formal contract agreement was required to be executed in the manner provided u/s 70(b) of the said Act. The said GCC incorporated in the said contract were valid, legal and binding both on the

petitioners and the respondents. Since in order to constitute an arbitration agreement within the meaning of section 2(a) of The Arbitration Act, 1940, there must be a valid agreement to submit present or future differences to arbitration and the agreement must be in writing and must be accepted by the parties and it is not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto nor it is required to be signed by the parties, a valid, legal, subsisting and binding arbitration agreement by and between the petitioners and the respondents came into existence for reference of claims of the respondents against petitioners before the Arbitrator and the Arbitrator had the jurisdiction to arbitrate in respect thereof.

14. Secondly, after the termination of the said contract by the petitioners, disputes and differences touching or concerning the execution of the said work and/or arising out of or in relation to the said contract did arise by and between the petitioners and the respondents. The respondents did make reference to the Municipal Commissioner of the petitioners in respect of the disputes and differences under Condition No. 96 of the said GCC. Since the Municipal Commissioner failed to do anything in the matter, by their letter dated 20th September, 1988 addressed to the Municipal Commissioner, the respondents called upon him to refer all disputes and differences which had arisen by and between the petitioners and the respondents touching or concerning the said work and/or execution thereof to arbitration as per Condition No. 97 of the GCC.

15. By their further letter of 2nd November, 1988, addressed to the Dy. City Engineer (BC) of the petitioners, the respondents had again called upon the petitioners to refer all the disputes and differences to arbitration and requested him to forward the names of persons on the panel of the petitioners to act as arbitrators to enable the respondents to convey their agreement for appointment of an arbitrator as per Condition No. 97(1) of the said GCC. The petitioners failed and neglected to refer the disputes and differences to arbitration as requested by the respondents. By their Advocates' letter dated 7th December, 1988, addressed to the Municipal Commissioner, the respondents finally called upon him to refer the disputes and differences to arbitration as per the said Condition No. 97 of the said GCC. The petitioners through their City Engineer addressed a letter dated 24th January, 1989 to the said J.D. Pradhan, the Ex. Chief Engineer of the petitioners and while making reference of the disputes and differences which had arisen by and between the petitioners and the respondents in respect of and/or concerning the said work and/or the said contract to his arbitration, appointed him as the sole arbitrator in the matter. The consent of the respondents to appoint the said P.D. Pradhan as sole arbitrator was sought by the petitioners which the respondents gave and accordingly the said P.D. Pradhan was appointed as sole arbitrator for settlement of disputes. The petitioners and the respondents have appeared before the said Arbitrator and participated in the arbitration proceedings before him. Even time to make the Award by the Arbitrator was twice extended by mutual consent of the petitioners and the

respondents.

16. In the facts of the case if it would have been held that there did not exist a valid, legal, subsisting and binding arbitration agreement by and between the petitioners and the respondents even on conclusion of the said contract the appointment of the Arbitrator by the petitioners in response to the request made by the respondent for making reference of the disputes and differences which had arisen by and between the petitioners and the respondents to arbitration constituted agreement between the petitioners and the respondents to refer the disputes and differences touching and/or concerning or anywise relating to the said work to arbitration de hors the said Tender documents. In this connection, reliance has been justifiably placed by Mr. Tulzapurkar on the case of Messrs Evergreen Pictures v. Ms. Madhubala and another, reported in AIR 1955 N.U.C. 3841, where it has been held that whether or not there was an arbitration agreement in the original agreement, the party had sufficiently agreed to refer all differences between the parties to arbitration by appointment of a person as an arbitrator in response to the other party's request for such appointment. Even in the case of West Minister Chemicals & Produce Ltd. v. Eichhelz & Looser, reported in (1954)1 L L L R 99, also relied upon by Mr. Tulzapurkar, the Queens Bench has held that a party appointing an arbitrator and authorizing him to arbitrate in the disputes referred to him for arbitration cannot challenge his award on the ground of lack of his jurisdiction. Mr. Bharucha in support of his submission that even an arbitration agreement de hors the said Tender documents was also required to be executed in the manner set out in section 70(b) of the said Act has relied upon an unreported judgment of Pendse, J., of this Court delivered on 10th February, 1983 in Arbitration Suit No. 1079 of 1974 Pravinkant K. Parikh v. Municipal Corporation for Greater Bombay and another . The said suit was u/s 20 of the Arbitration Act, 1940. On the facts of that case, Pendse, J., held that at no stage the Corporation had agreed to refer the disputes to arbitration and merely because the plaintiff therein had made an offer to do so, was not sufficient to conclude that there existed a valid and subsisting arbitration agreement. On the facts of that case, the Court came to the conclusion that there was no valid contract between the parties and as such the request of the plaintiff therein for reference to arbitration was totally misconceived. u/s 70(b) of the said Act, it is only a contract for the execution of any work or supply of any materials or goods involving an expenditure exceeding Rs. 10,000/- which is required to be in writing and sealed with the common seal of the Corporation in the manner prescribed in sub-section (2) of section 70 of the said Act. An agreement to refer the disputes to arbitration by and between the petitioners and the respondents being not a contract for the execution of any work or supply of any materials or goods involving an expenditure exceeding Rs. 10,000/-, the provisions of section 70(b) of the said Act will not apply to such an agreement. The facts of the said case before Pendse, J., being different than the facts in the instant case, the said authority cited by Mr. Bharucha has no applicability. Hence, in my view, even de hors the said contract, there did exist

an arbitration agreement between the petitioners and the respondents for referring the disputes and differences touching or concerning the execution of the said work or arising out of or in relation to the said contract to the arbitration of the Arbitrator and that the Arbitrator had the jurisdiction to arbitrate in respect thereof.

17. Lastly, since preliminary objection as regards jurisdiction of the Arbitrator for want of formal contract agreement executed in the manner prescribed u/s 70(b) of the said Act was raised before the Arbitrator on behalf of the petitioners and legal submissions in connection therewith were made in writing and the Arbitrator was invited to decide the said specific question referred to him, in my view, the question of law as regards the jurisdiction of the Arbitrator was specifically referred to him. In view of the fact that a question of law was specifically referred to the Arbitrator and that the parties desired to have a decision on that specific question from the Arbitrator, this Court will not interfere with the said Award of the Arbitrator on the ground that there is an error of law apparent on the face thereof even if the view of law taken by the Arbitrator does not concur, which is not so in this case, with the view of this Court. The Arbitrator rightly held that he had the jurisdiction to arbitrate and did proceed with the hearing of the arbitration reference before him. In the submission of Mr. Bharucha the decision on question of Arbitrator's jurisdiction rests finally or ultimately with the Court and not with the arbitrator or Umpire. In this respect, he has relied upon the case of Renusagar Power Ltd. v. General Electric Company and another, decided by the Apex Court of this Country and reported in Renusagar Power Co. Ltd. Vs. General Electric Company and Another, . However, as held by the Apex Court of this Country in the case of Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, on which reliance has been justifiably placed by Mr. Tulzapurkar, if a question of law is specifically referred and it becomes evident that the parties desired to have the decision on such specific question from the arbitrator rather than from Court, then the Court will not interfere with the award of the arbitrator on the ground that there is an error of law apparent on the face thereof even if the view of law taken by the arbitrator does not concur with the view of the Court. Hence, the said Award of the Arbitrator can not be set aside or remitted.

In the result, the petition is dismissed with no order as to costs.