2023INSC610

Reportable

IN THE SUPREME COURT OF INDIA
INHERENT JURISDICTION

R.P. (C) NOS. 1273-1274/2021
IN
CIVIL APPEAL NOS. 8345-8346 OF 2018

ARUN DEV UPADHYAYA ...PETITIONER(S)

VERSUS

INTEGRATED SALES SERVICE LTD. & ANR. ...RESPONDENT(S)

J U D G M E N T

VIKRAM NATH,J.

1. These are Review Petitions preferred by Arun Dev Upadhyaya (Review Petitioner) praying for review of the judgment dated 10.08.2021 passed in Civil Appeal Nos. 8345-8346 of 2018 titled Gemini Bay Transcription Pvt. Ltd. vs. Integrated Sales Service

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Reason:

Ltd. & Anr.[1] whereby the said Civil Appeals filed by the Review Petitioner were dismissed.

2. We have heard Shri Harish N. Salve, Sr. Advocate for the Review Petitioner and Shri Shekhar Naphade, learned Senior Counsel for the Respondent No. 1 and also perused the material on record.

3. Relevant facts of the present litigation giving rise to the present review petitions are briefly summarized hereunder:

3.1. D.M.C. Management Consultants Limited[2] was incorporated as a public limited company under the Companies Act, 1956 in July 1995. A Representation Agreement was executed on 18.09.2000 to be effective from 03.10.2000 between DMC and Integrated Sales Service Ltd. (Respondent No.1). The said agreement was signed by Rattan Pathak (Managing Director) on

[1] In short, "GBTL"
[2] In short 'DMC'

behalf of DMC and Terry L. Peteete, Director on behalf of Respondent No.1.

3.2. Under the said agreement, Respondent No. 1 was to find customers for DMC on commission basis. Under the terms of the agreement, Respondent No. 1 as the representative was to assist DMC in selling its goods and services to prospective customers and to receive commission in consideration thereof. Further, as per Clause 8(d), any dispute between the two companies was agreed to be subjected to the laws of the State of Missouri, USA and the same were to be referred to a sole Arbitrator appointed by agreement between the parties. Upon failure to agree to Arbitrator, the appointment was to be made according to the rules of the American Arbitration Association.

3.3. There were two amendments with respect to the Representation Agreement dated 18.09.2000. The first amendment executed in 2005 related to the changes in the rate of commission. This amendment was signed by the review petitioner Arun Dev Upadhyaya in his capacity as Director of DMC and Terry L. Peteete (Director) on behalf of the Respondent No.1.

3.4. The second amendment to the Representation Agreement came to be executed on 01.01.2008. It rendered the First Amendment of 2005 as null and void. This amendment also made some changes to the rate of commission and further it made the laws of Delaware applicable to the Representation Agreement. This Amendment was signed by Rattan Pathak (Managing Director) on behalf of DMC and Terry L. Peteete (Director) on behalf of Respondent No.1.

3.5. The Review Petitioner who was holding the office of Director in DMC tendered his resignation on 31.03.2009. On 22.06.2009, Respondent No. 1 issued a demand for Arbitration to the Review Petitioner under the Commercial Arbitration Rules of the AAA. The statement of claim was also against DMC and GBTL seeking damages to the tune of US $ 4.8 million.

3.6. GBTL filed its objections on 21.07.2009 to the effect that the Arbitral Tribunal has no jurisdiction to include it as a party in the arbitration as it was not a party to the agreement. On the same day, the Review Petitioner also filed a 'without prejudice response' to the Statement of Claim stating, *inter alia* that he was not signatory in the agreement between DMC and Respondent No. 1; secondly, that he never consented to or agreed to be bound by any arbitration agreement; and thirdly, any demand for arbitration against

him in his individual capacity was not acceptable and was denied.

3.7. The signatory to the Representation Agreement i.e. DMC filed its reply on 21.07.2009 to the Statement of Claim made by Respondent No.1.

3.8. In October, 2009, GBTL filed Special Civil Suit No. 1035 of 2009 before the Civil Judge, Senior Division, Nagpur, against Respondent No. 1 seeking declaration and perpetual injunction and also for recovery of damages of Rs. 10,00,000/-. This suit is still pending. An application under Order 39 Rules 1&2 CPC was also filed in the said suit praying to restrain Respondent No. 1 to proceed with the arbitration on the ground that it could not be compelled to participate in the arbitration as it was not a signatory to the agreement.

3.9. The Tribunal on 23.12.2009 passed an interlocutory order holding that the Tribunal had jurisdiction to decide whether the non-signatory to the Representation Agreement were appropriately named in the arbitration or not; the issue of piercing of the corporate veil and joinder of non-signatory parties could be decided after evidence is received and is not a preliminary issue; the claims of the Review Petitioner and GBTL would not be jeopardized and would not constitute a waiver of their rights of claims as non-signatory parties; that they must contest the arguments and factual claims made by Respondent No.1; their non-participation in the arbitration would potentially expose them to an adverse award or an award by default. According to the Review Petitioner, the above order was passed in his absence and GBTL.

3.10. The application under Order 39 Rules 1 & 2 CPC filed in the Special Civil Suit No. 1035 of 2009 was rejected by Civil Judge, Nagpur vide order dated 25.01.2010.

3.11. The Arbitrator gave an award on 28.03.2010 in favour of Respondent No.1 with the finding that DMC was in breach of their Representation Agreement and further holding that since DMC, Review Petitioner and GBTL colluded together, they were jointly and severally liable to pay the amount along with interest. The award was for an amount of US $ 6,948,100.

3.12. The Respondent No. 1 before approaching the High Court moved an application under Section 47 of the Arbitration and Conciliation Act, 1996[3] seeking execution of the Arbitral Award before the Principal District Judge at Nagpur.

[3] In short 'the Act'

However, the said Application was found to be not maintainable as it was the High Court which would have jurisdiction. The application before the Nagpur Bench of the Bombay High Court, seeking enforcement of the Award was registered as M.C.A. No. 1319 of 2015. Review Petitioner on 27.01.2016 filed objections under Section 47 of the Act to which Respondent No. 1 filed its reply on 06.02.2016. A second set of objections were filed by the Review Petitioner on 03.03.2016 under Sections 44 to 49 of the Act challenging the recognition of the award as a foreign award as it did not satisfy the requirements both under the Act and also under the provisions of the New York Convention. DMC and GBTL filed separate objections under Section 49 of the Act to which replies were filed by Respondent No.1.

3.13. The learned Single Judge vide judgment dated 18.04.2016 held that the award was a

foreign award and enforceable against DMC only. It accepted the objections raised by Review Petitioner and GBTL that the award was not enforceable against them. The Letters Patent Appeal preferred by Respondent No.1 was registered as Arbitration Appeal No.3 of 2016. In the meantime, objections were raised regarding maintainability of the appeal and also Review Petitions were filed before the Single Judge.

3.14. The Division Bench rejected the objection regarding the maintainability against which the matter was carried to this Court by the Review Petitioner but the same was dismissed on 30.09.2016. The Division Bench finally vide judgment dated 04.01.2017 allowed the Arbitration Appeal No. 3 of 2016 and held the award to be enforceable against Review Petitioner and GBTL also as the award was a foreign award as against Review Petitioner and GBTL. Review

Petitions were filed before the Division Bench which were dismissed on 24.02.2017.

3.15. The orders dated 04.01.2017 and 24.02.2017 were challenged before this Court by the Review Petitioner by way of SLP (Civil) Nos. 8899-8900 of 2017 (Civil Appeal Nos.8345-8346 of 2018). GBTL as also DMC filed separate SLPs before this Court. In the SLP filed by DMC, this Court granted leave subject to condition that it deposits US $ 2.5 million. This Court vide judgment dated 10.08.2021 dismissed all the appeals. The present Review Petitions have been preferred only by Arun Dev Upadhyaya (Review Petitioner) to review the judgement dated 10.08.2021.

4. In the impugned judgement, it has been held that it would not be permissible to review the award on merits even on the ground of existence and validity

of the arbitration and the only ground on which the enforcement of foreign awards could be resisted or refused are contained in Section 48 of the Act. It also held that the canvas of Section 46 of the Act is wider than that of Section 35 of the Act and as such would apply to all the persons who are not even parties to the Arbitration Agreement. It also held that the tortious dispute can also be referred to arbitration because it is in connection with the agreement.

5. Mr. Salve submitted that essential points in the submissions made on behalf of the Review Petitioner before this Court have not been considered nor any finding returned by this Court as such the impugned order suffers from an error apparent on the face of record.

6. The submissions of Mr. Salve briefly summarized are as under:

A) The impugned judgment overlooked the fundamental point made on behalf of the Review Petitioner that Section 44 read with Section 46 of Act makes only a foreign award enforceable and in order to ascertain whether the award is foreign award the Court is not constrained by Section 48 of the Act.

B) Undisputedly, the Review Petitioner was not a party to the Representation Agreement however, the Arbitrator applying Delaware law and its principles made the review petitioner a party to the arbitration proceedings initiated by Respondent No.1 against DMC. The said award was sought to be enforced in India and in the said enforcement proceedings, objections were raised by Review Petitioner which have not been dealt with in the impugned order.

C) The contention specifically raised at the time of argument before this Court were not considered

and in fact misconstrued or misunderstood resulting into an error apparent on the face of record. Reference has been made to the written submissions submitted on behalf of the Review Petitioner at the time of arguments before this Court which specifically included the following points:

(i) Though under the Delaware law, a non-party to the agreement could have been included in the arbitration proceedings but when the same is being enforced in India, then, the award will have to be tested as to whether it could be enforced against the non-party to the agreement as per the Indian law. The submission is that there was no foreign award as against the Review Petitioner which could be enforced in India. The language of Section 35 and Section 46 of the Act are not *pari materia.* Under

Section 35, an arbitral award shall be final and binding on parties and persons claiming under them respectively meaning that, to a non-party claiming under the party to the agreement, the arbitral award would be binding, whereas under Section 46 of the Act a foreign award would be binding for all purposes on the persons as between whom it was made and not against non-party even though claiming under the party to the agreement. Sections 35 and 46 of the Act are reproduced below:

> "35. **Finality of arbitral awards.-** Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

> 46. **When foreign award binding.-** Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by

any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award."

(ii) In the impugned judgment this aspect of the matter has not been considered although it was a vital issue and goes to the root of the matter as to whether a foreign award could be treated as binding and enforceable against the non-party to the agreement.

(D) Lastly, according to the Review Petitioner, damages were calculated not in any quantified manner but only on basis of Mr. Peteete's intimate understanding of the business, not supported by any documentary material.

7. On the other hand, Sri Naphade, learned Senior Counsel appearing for respondent No.1 sought to justify the impugned judgment referring to various

findings therein. He also submitted that this being a review petition, there was limited scope for this Court to examine the arguments of the petitioner as they would tantamount to a fresh hearing of the appeal. Further, according to him, all the points now sought to be argued have already been considered by this Court, no case for review is made out and the review petitions deserve to be dismissed.

8. Before proceeding to deal with the arguments on merits of the review petitions, it would be appropriate to briefly comment on the scope of review.

8.1. The review petitions have been filed under Article 137 of the Constitution of India read with Rule 1 of Order XLVII of the Supreme Court Rules, 2013. Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court. The same is reproduced hereunder:

> *"**137**. Review of judgments or orders by the Supreme Court.-- Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."*

8.2. According to the said provision, the Supreme Court would have power to review any judgment or order made by it subject to the provisions of any law made by the Parliament or any Rules made under Article 145. The Supreme Court Rules 2013 have been framed under Article 145 by this Court and duly approved by the President. It may be stated that no law has been made by the Parliament in that respect and, as such, the power of review vested in this Court would be governed by the Rules.

8.3. Order XLVII of Part-IV of the Supreme Court Rules, 2013 provides for the powers of review and the procedure for hearing such review. The said provision is reproduced hereunder:

"PART-IV

ORDER XLVII

REVIEW

1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule I of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

The application for review shall be accompanied by a certificate of the Advocate on Record certifying that it is the first application for review and is based on the grounds admissible under the Rules.

2. An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review.

3. Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge

or Bench of Judges that delivered the judgment or order sought to be reviewed.

4. Where on an application for review the Court reverses or modifies its former decision in the case on the ground of mistake of law or fact, the Court, may, if it thinks fit in the interests of justice to do so, direct the refund to the petitioner of the court-fee paid on the application in whole or in part, as it may think fit.

5. Where an application for review of any judgment and order has been made and disposed of, no further application for review shall be entertained in the same matter."

A perusal of the above provision makes it amply clear that in a civil proceeding review could not be entertained except on the grounds mentioned in Order XLVII Rule 1 of C.P.C.

8.4. Section 114 of CPC vests power of review in Courts and Order XLVII Rule 1 CPC provides for the scope and procedure for filing a review petition. The same is reproduced hereunder:

"Order XLVII Rule 1 CPC:

"1. Application for review of judgment*- Any person considering himself aggrieved-*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from ***the discovery of new and important' matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made,*** *or* ***on account of some mistake or error apparent on the face of the record*** *or* ***for any other sufficient reason,*** *desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order. (emphasis supplied)*

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can

present to the Appellate Court the case on which he applied for the review.

Explanation. *The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."*

9. A plain reading of the above provisions in uncertain terms states that the power to review can be exercised only upon existence of any of the three conditions expressed therein. 'A mistake or an error apparent on the face of the record' is one of the conditions. It is only on this ground that review has been preferred. The above phrase has been consistently interpreted by authoritative pronouncement of this Court for decades. A three Judge Bench of this Court comprising of Hon'ble Sri S.R. Das, C.J., M. Hidayatullah and Sri K.C. Das Gupta, J.J. in the case of **Satyanarayan Laxminarayan Hegde and others Vs. Millikarjun**

Bhavanappa Tirumale[4], discussed the scope of the phrase 'error apparent on the face of record'. The challenge before this Court in the said case was the judgment of the High Court on the ground whether it suffers from an error apparent on the face of the record. The High Court had issued a writ of certiorari and had quashed order of the Tribunal and restored that of the Mamlatdar. In paragraph 8 of the report, the issue which was to be considered is reflected. The same is reproduced hereunder:

> *"8. The main question that arises for our consideration in this appeal by special leave granted by this Court is whether there is any error apparent on the face of the record so as to enable the superior court to call for the records and quash the order by a writ of certiorari or whether the error, if any, was "a mere error not so apparent on the face of the record", which*

[4] **AIR 1960 SC 137**

can only be corrected by an appeal if an appeal lies at all."

10. After discussing the relevant material on record, the conclusion is stated in paragraph 17 of the report. The view was that where an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. The view that long-drawn process of arguments to canvass a point attacking the order in a review jurisdiction, cannot be said to be an error apparent on the face of record. Relevant extract from paragraph 17 of the report is reproduced hereunder:

"17.....Is the conclusion wrong and if so, is such error apparent on the face of the record ? If it is clear that the error if any is not apparent on the face of the record, it is not necessary for us to decide whether the conclusion of the Bombay High Court on the question of notice is correct or not. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can

hardly be said to be an error apparent on the face of the record. As the above discussion of the rival contentions show the alleged error in the present case is far from self evident and if it can be established, it has to be established by lengthy and complicated arguments. We do not think such an error can be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ. In our opinion the High Court was wrong in thinking that the alleged error in the judgment of the Bombay Revenue Tribunal, viz., that an order for possession should not be made unless a previous notice had been given was an error apparent on the face of the record so as to be capable of being corrected by a writ of certiorari."

11. Another case which may be briefly dealt with is the case of **Parison Devi Vs. Sumitri Devi**[5], where, this Court ruled that under Order XLVII Rule 1 CPC, a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be

[5] **(1997) 8 SCC 715**

said to be an error apparent on the face of the record justifying the Court to exercise its power of review. It also observed that a review petition cannot be allowed to be treated as an appeal in disguise.

12. A series of decisions may also be referred to wherein, it has been held that power to review may not be exercised on the ground that decision was erroneous on merits as the same would be the domain of the Court of appeal. Power of review should not be confused with appellate powers as the appellate power can correct all manners of errors committed by the subordinate courts. The following judgments may be referred:

(1) **Shivdeo Singh Vs. State of Punjab; AIR 1963 SC 1909**

(2) **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma; AIR 1979 SC 1047**

(3) Meera Bhanja (Smt.) Vs. Nirmala Kumari Choudhary (Smt.); (1995) 1 SCC 170.

(4) Uma Nath Pandey Vs. State of U.P.; (2009) 12 SCC 40

13. Recently, this Court in a judgment dated 24th February, 2023 passed in **Civil Appeal No.1167-1170 of 2023** between **S. Murali Sundaram Vs. Jothibai Kannan and Others**, observed that even though a judgment sought to be reviewed is erroneous, the same cannot be a ground to review in exercise of powers under Order XLVII Rule 1 CPC. Futher, in the case of **Perry Kansagra Vs. Smriti Madan Kansagra[6],** this Court observed that while exercising the review jurisdiction in an application under Order XLVII Rule 1 read with Section 114 CPC,

[6] **(2019) 20 SCC 753**

the Review Court does not sit in appeal over its own order.

14. In another case between **Shanti Conductors (P) Ltd. Vs. Assam SEB,**[7] this Court observed that scope of review under Order XLVII Rule 1 read with Section 114 CPC is limited and under the guise of review, the petitioner cannot be permitted to reagitate and reargue questions which have already been addressed and decided. It was further observed that an error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record.

15. From the above, it is evident that a power to review cannot be exercised as an appellate power and has to be strictly confined to the scope and ambit of Order XLVII Rule 1 CPC. An error on the face of record must be such an error which, mere looking at the

[7] **(2020) 2 SCC 677**

record should strike and it should not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

16. In the above backdrop of the scope of review to which these petitions are confined, we proceed to consider whether a case for review is made out or not.

17. As many as 18 grounds have been raised in the review petitions, we have considered not only the oral submissions advanced by Mr. Salve, learned Sr. Counsel, but have also perused all the grounds raised in the review petition. A close perusal of the judgment dated 10.08.2021 reflects that all the grounds taken in the review have been discussed in detail and findings returned not accepting the claim of the Review Petitioner. What is sought to be argued is basically that the view taken is erroneous and therefore, impugned judgment deserves to be reviewed.

18. We may briefly refer to the relevant argument and the findings returned by this Court in the impugned judgment dated 10.08.2021. In paragraph 26 of the impugned judgment, this Court summarized the four points argued by Mr. Salve. The said paragraph is reproduced hereunder:

> *"26. Shri Harish Salve, learned Senior Advocate appearing on behalf of Arun Dev Upadhyaya,* ***argued that the commission of a tort would be outside contractual disputes that arise under the Arbitration Agreement and that since the cause of action really arose in tort, the Award was vitiated on this ground.*** *He also argued relying heavily upon Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472 ["Dallah"]* ***that a full review based on oral and/or documentary evidence ought to have been undertaken which was not done on the facts of this case, the Division Bench merely echoing the Arbitrator's findings.*** *He then made a* ***distinction between Section 46 and Section 35 of the Arbitration Act, and argued that under Section 46, a foreign award is to be treated as binding only on persons as between whom it was made and***

not on persons who 25 may claim under the parties. *He also* ***argued that insofar as*** *his client was concerned,* ***there was no evidence to show his involvement in any manner and that the findings against his client*** *are* ***unreasoned and perfunctory****, and on* ***this ground also the Award stands vitiated."***

(emphasis supplied)

19. Paragraph 29[8] of the judgment deals with the analysis and interpretation of Section 44 of the Act. This Court noticed that there would be six ingredients to qualify an arbitral award to be a foreign award. Paragraph 29 is reproduced hereunder:

"29. A reading of Section 44 of the Arbitration and Conciliation Act, 1996 would show that there are six ingredients to an award being a foreign award under the said Section. First, it must be an arbitral award on differences between persons arising out of legal relationships. Second, these differences may be in contract or outside of contract, for example, in tort. Third, the legal relationship so spoken of ought to be considered "commercial" under the law in India. Fourth, the award must be made on or after the 11th day of October, 1960.

[8] The paragraph nos. are from the original impugned judgment annexed in the paper book.

Fifth, the award must be a New York Convention award – in short it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories. And Sixth, it must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies."

20. In Paragraph Nos.30 to 33, this Court discussed the ingredients. Further, in paragraphs 34 to 37, the Court dealt with the scope of Section 47 of the Act and the argument of the counsel for the Review Petitioner that evidence should be adduced and it should be a full trial to prove that the non-signatory would also be bound by a foreign award, was rejected.

21. In Paragraph Nos.38 to 57, this Court dealt with in detail the argument that review on merits of the award would be permissible under Section 48(1) of the Act and held against the Review Petitioner as none of the grounds therein were available to the Review Petitioner.

22. In paragraph Nos.66 to 70 of the report, this Court dealt with the argument that damages awarded in tort would be outside the scope of the arbitration agreement and rejected the said argument.

23. In paragraph 71 of the report of the judgment, this Court compared the scope of Section 35 and 46 of the Act and further observed that once the award was not challenged in the State where it was made it could not be said that the arbitral award had infracted the substantive law of the agreement.

24. Paragraphs 72 and 73 of the report dealt with the issue of violation of any public policy and this Court found that there was no such violation.

25. In paragraphs 74 to 76, this Court justified the quantification of the damages and the basis for determining the same even if it was based on best judgment assessment.

26. Each and every argument having been considered by this Court in its judgment dated 10.08.2021, the arguments advanced if accepted would result in expressing a different opinion on the points raised and decided, which we are afraid do not fall within the settled contours of Order XLVII Rule 1 CPC relating to error apparent on the face of record. The other grounds of invoking the review power are neither existing nor have been raised in the present petitions.

27. Accordingly, we do not find any good ground to allow the review petitions. They are, accordingly, dismissed.

.....J.
[B.R. GAVAI]

.....J.
[VIKRAM NATH]

NEW DELHI
JULY 5, 2023.