

(2022) 09 CAL CK 0046

In the Calcutta High Court

Case No : IA No. G.A. 1 Of 2022 In RVWO No. 16 Of 2022

Future Market Networks Limited

APPELLANT

Vs

Laxmi Pat Surana & Anr.

RESPONDENT

Date of Decision : 01-09-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 47, Order 47(1)(a), Order 47(1)(b), Order 47(1)(c), Order 47 Rule 1
Arbitration And Conciliation Act, 1996 — Section 31(7), 36

Citation : (2022) 09 CAL CK 0046

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Rishad Medora, Pooja Chakraborty, Radhika Misra, Debomita Sadhu, Roshni Deepta Acharya, Jishnu Chowdhury, Souradeep Banerjee, Abhidipto Tarafdar, Shuvasish Sengupta, Arindam Guha

Final Decision : Dismissed

Judgement

Moushumi Bhattacharya, J

1. The petitioner seeks review of a Judgment and order passed by this Court on 28.4.2022 on the grounds contained in the Memorandum of Review. The impugned judgment directed stay of the operation of an arbitral award dated 19.5.2016 upon the petitioner depositing the amount directed by the court being Rs. 5,08,80,941/- by way of a bank guarantee and an equal amount in cash with the Registrar, Original Side of this Court within four weeks from the date of the judgment. It was further directed that the respondent no. 1 award-holder would be free to take appropriate steps in the execution proceedings on the petitioner defaulting in complying with the directions contained in the judgment.

2. The said judgment and order was passed in an application filed by the petitioner on the question whether the amount of the award would include the interest component and have a bearing on the conditions which may be imposed for grant of stay of the award under Section 36 of The Arbitration and

Conciliation Act, 1996.

3. The petitioner seeks review of the judgment on the ground that the order passed by this Court ought to be revisited under Section 31(7) of the 1996 Act which, according to the applicant, does not stipulate that post-award interest should be considered as a part of the awarded sum. The petitioner also seeks review on the ground of a Coordinate Bench in Board of Trustees for the Port of Kolkata vs. ABG Kolkata Container Terminal Private Limited; 2019 SCC OnLine Cal 4009. The petitioner contends that the said judgment is binding on this Court. The petitioner hence, through learned counsel appearing on its behalf, urges that the matter should have been referred to a larger Bench for determination of the issue of post-award interest.

4. It is also the contention of counsel appearing for the petitioner that the order contains patent errors apparent on the face of the record for review of the same.

5. Learned counsel appearing for the respondent no. 1 (award-holder) submits that the petitioner is attempting to re-open a concluded issue which is not permissible in an application of the present nature. Counsel disputes the stand of the petitioner in seeking review of the judgment and submits that the application has been filed only to delay the furnishing of security in terms of the direction passed by this Court in the judgment under review. It is also urged that the review application would entail elaborate arguments on behalf of the parties. Counsel submits that the review petition is in effect an appeal in disguise.

6. The primary controversy in the present application for review appears to be the decision in Board of Trustees for the Port of Kolkata vs. ABG Kolkata Container Terminal Private Limited not being followed by the Court in the impugned judgment dated 28.4.2022. This, according to the petitioner, amounts to an error apparent on the face of the record drawing the matter within the fold of Order XLVII of The Code of Civil Procedure, 1908. On perusing the judgment passed in Board of Trustees for the Port of Kolkata vs. ABG Kolkata Container Terminal Private Limited, it is found that the learned Single Judge did not pronounce a decision on whether post-award interest is not permissible under Section 31(7) of the 1996 Act. The learned Judge only expressed a view, in the nature of an obiter dicta, that post-award interest being a variable amount cannot be taken to be a "sum" included in the award. In any event, ABG Kolkata Container did not consider the decision of the Supreme Court in Hyder Consulting (UK) Limited vs. Governor, State of Orissa; (2015) 2 SCC 189 which was pronounced prior to the judgment of the learned Single Judge. In Hyder Consulting, while interpreting Section 31(7) of the 1996 Act, the Supreme Court held that the interest component loses the character of "interest" and takes the colour of "sum". The Supreme Court also held that post-award interest is for the purpose of furnishing speedy payment in compliance of the award and is a mandate of the 1996 Act.

7. Further, the learned Single Judge found that the executing Court had already

exercised discretion in the matter of payment of decretal amount with interest as a condition precedent and hence restrained from exercising discretion on that issue.

8. This Court is hence inclined to accept the submission made on behalf of the respondent no. 1 that the view expressed by the learned Single Judge in ABG Kolkata Container does not constitute a binding precedent. In any event, the question whether the decision in ABG Kolkata Container would be applicable to the issue in the judgment passed by this Court is within the realm of the appellate court and is not a matter of review.

9. The scope of a review under Order XLVII of The Code of Civil Procedure, 1908, is evident from the provision itself. The scope falls within the limited purview of a person aggrieved by any of the three clauses in Order XLVII (1) (a)- (c) who chances upon a new and important evidence which was not within his/her knowledge or could not be produced at the time when the decree was passed/ order made despite exercise of due diligence. A review is also maintainable by reason of an error apparent on the face of the record or for any other sufficient reason. The last condition namely "any other sufficient reason" has been explained in *Kamlesh Verma vs. Mayawati*; (2013) 8 SCC 320 to mean a reason sufficient on grounds analogous to those specified in the Rule; *Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulouse Athanasius*; AIR 1954 SC 526 and reiterated in *Union of India v. Sandur Manganese & Iron Ores Limited*; (2013) 8 SCC 337.

10. The Supreme Court in *Kamlesh Verma* also explained the second condition on which an aggrieved person can seek review of a decree or order, namely, an error apparent on the face of the record. The Supreme Court opined that the error must be a material error manifest on the face of the order and one that undermines the soundness of the order or results in miscarriage of justice. The Supreme Court was further of the view that an error apparent would not be an error which is not self-evident or has to be deduced by a process of reason or even one that has to be "fished out and searched". Reference in this context may be made to a recent judgment of a 3-Judge Bench of the Supreme Court, delivered on 18th August, 2022 in *S. Madhusudhan Reddy vs. V. Narayana Reddy*; 2022 SCC OnLine SC 1034.

11. The grievance of the review applicant in the present case is that this Court failed to refer to ABG Kolkata Container in the impugned judgment. According to the review applicant, the failure to refer to ABG Kolkata Container amounts to an error apparent on the face of the record and that the applicant is hence entitled to seek review of the judgment.

12. This Court is constrained to decide otherwise. First, as already held, ABG Kolkata Container cannot be treated as a binding precedent on the point of post-award interest not being contemplated under section 31(7) of the 1996 Act. Second, the invitation to the Court to consider ABG Kolkata Container at the

stage of review would in effect result in re-considering the entire issue of post-award interest itself. This would essentially mean a re-hearing of the application which was heard and disposed of by the court by way of the impugned judgment. This was precisely the issue which was held to be impermissible by the Supreme Court in *Kamlesh Verma*. The Supreme Court in the decision firmly discouraged re-hearing of the matter as well as re-appreciation of the evidence which may result in the Court reaching a different conclusion. Third, not referring to *ABG Kolkata Container* does not amount to an error apparent on the face of the record since the non-consideration is clearly not an error which is apparent at first blush. It is also not an error of advertence. Most important, the error cannot be held to be one which has led to a miscarriage of justice.

13. It may also be pointed out that the other ground canvassed by the review applicant of the court being under an obligation to refer the issue to a larger Bench is also not relevant since *ABG Kolkata Container* did not decide the issue as a *ratio decidendi*; ref. a Division Bench decision of the High Court of Judicature at Hyderabad in *Hindustan Ispat Private Limited vs. The Commercial Tax Officer, Jubilee Hills, Hyderabad* (MANU/AP/0780/2015).

14. *Director of Settlements, AP vs. M.R. Apparao*; (2002) 4 SCC 638, *Commissioner of Income tax vs. Thana Electricity Supply Ltd.*; 1993 SCC OnLine Bom 591 and *K.G. Derasari vs. Union of India*; (2001) 10 SCC 496 were decided on the question of the binding effect of certain decisions as precedents. Since it has already been held that *ABG Kolkata Container* cannot be treated as a binding precedent for the reasons as stated in the earlier part of the judgment, the aforesaid decisions do not assist the case of the review applicant. In any event, the Supreme Court in *M.R. Apparao* drew a distinction between an “*obiter dictum*” as opposed to a “*ratio decidendi*” and held that the former is an observation by the Court of a legal question suggested in a case before it but not arising in such manner as to require a decision and further that an *obiter* may not be a binding precedent as the observation was unnecessary for the decision pronounced. Moreover, the facts in *K.G. Derasari* were entirely different where the issue before the Supreme Court was whether the Central Administrative Tribunal was justified in issuing a direction which amounted to review of an earlier decision in an application for contempt. *K.G. Derasari* also proceeds on the basis of the earlier decision being a binding precedent which is not applicable in the present case as reiterated above.

15. *Board of Control for Cricket in India vs. Netaji Cricket Club*; (2005) 4 SCC 741 cited on behalf of the review applicant for the proposition that the rule of “any another sufficient reason” being analogous to the other conditions specified in Order XLVII Rule 1 of the CPC as held in *Moran Mar Basselios* is not a universal rule is not acceptable since paragraph 91 of *BCCI* makes it clear that the applicant has to make out an exceptional case for tweaking the ratio of *Moran Mar Basselios*.

16. The last ground for review as urged by the applicant is that the applicant

should not be compelled to bear the entire burden of the direction contained in the impugned judgment. In other words, the review applicant contends that the entire burden of furnishing the security for the purposes of stay of the Award has fallen on the review applicant alone whereas the respondent no. 2 would also enjoy the benefit of such stay without being required to furnish any security. In answer to this contention, it may be said that the application filed by the respondent no. 2 for stay of the Award is yet to be considered by the Court and hence the grievance of the review applicant is premature. The decision of the court in the application for stay of the respondent no. 2 cannot be foretold and the decision will become relevant as and when pronounced for the point urged.

17. This Court is hence of the view that the application for review must fail as the grounds for review are entirely beyond the scope of Order XLVII Rule 1 of The Code of Civil Procedure, 1908.

18. RVWO 16 of 2022 is accordingly dismissed without any order as to costs. GA 1 of 2022 is disposed of in terms of the above.

19. The parties shall be at liberty of mentioning the application filed by the respondent no. 2 for listing.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.