

(2011) 03 GAU CK 0048
In the Gauhati High Court
Case No : Review Petition No. 3 of 2009

M.S. Freight Carriers (India) Private Limited	APPELLANT
Vs	
Union of India (UOI)	RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Arbitration Act, 1940 — Section 37
Arbitration and Conciliation Act, 1996 — Section 34
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1(2), Order 47 Rule 1, Order 47 Rule 1(2), 114, 115
Constitution of India, 1950 — Article 136

Citation : (2011) 3 GLR 906

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : Ricky Gurung, S. Deb and B.N. Mazumdar, for the Appellant; S.N. Meitei, CGC., for the Respondent

Final Decision : Dismissed

Judgement

B.D. Agarwal, J.—This application u/s 114 read with Order 47 of the Code of Civil Procedure, 1908 has been filed by the Respondent in the appeal seeking review of the judgment dated 30.4.2008 passed by this Court in RFA No. 1 of 2007, whereby this Court had set aside the award of the Sole Arbitrator passed on 21.12.2005 in Arbitration Case MS No. 3 of 2002.

2. Heard Sri S. Deb, learned Counsel for the applicant/Petitioner and Sri S N Meitei, learned Counsel for the Appellant/Respondent.

3. Before addressing the rival submissions of the counsel it is necessary to recapitulate the facts of the case, which are as under:

The applicant was awarded a contract for handling and transportation of road construction materials from Guwahati to different works sites under Project "Pushpak" of Border Road Task Force in Mizoram. The work orders were issued in the year 1999 and the contract agreement was executed between the parties,

inter alia, incorporating the General Conditions of the contract based on IAFW 2320. Within two months of the issuance of the work orders there was upward revision of prices of petroleum products. Accordingly the contractor made a request to the department to give the benefit of price hike in petroleum products. On rejection of the prayer the contractor referred the matter for arbitration. It may be mentioned here that the arbitrator was appointed by the Chief Justice of the Gauhati High Court. Upon receiving evidence from both sides, the learned arbitrator accepted the claim of the contractor based on the theory of "price escalation" and a sum of Rs. 26,40,984/- was awarded and also awarded another amount of Rupees One Lakh for giving harassment and mental agony to the contractor by way of denying his justified claim. This award was set aside by this Court vide judgment and order dated 30.4.2008.

4. The aforesaid judgment was challenged by the applicant before a Division Bench of this Court by way of filing an application u/s 115 r/w Section 151 of the Code of Civil Procedure. The said application was registered as Civil Revision Petition No. 182 of 2008 and came to be dismissed on 27.6.2008. Thereafter the applicant approached the Hon'ble Supreme Court of India by way of filing Special Leave Petitions under Article 136 of the Constitution of India. The SLP (Civil) Nos. 17730 - 17731 of 2008 were also dismissed by the Apex Court on 4.8.2008. Exactly after 9 months of the dismissal of the SL Ps the review application was filed before this Court along with condonation application. The delay was condoned vide order dated 4.11.2009 passed in CM Application No. 33 of 2009.

5. Section 114 is the substantive provision in the CPC for entertaining a review application and Order 47 lays down the preconditions for accepting the prayer of review of a judgment. For better appreciation of the case, Section 114 and relevant provisions of Order 47 of CPC are extracted below for ready reference:

114. Review- Subject as aforesaid, any person considering himself aggrieved-

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

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

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

Order XLVII

" 1. Application for review of judgment.-(1)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.

(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 applies 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.] "

Rule 2 to 9 xx xx xx

6. Precisely, a judgment can be reviewed on- (i) discovery of fresh evidence, which after the exercise of due diligence, was not within the knowledge of the applicant and could not be produced by him at the time when the decree was passed or order made or (ii) on account of some mistake or error apparent on the face of the record, or (iii) for any other sufficient reason.

7. In the case before me, Sri S Deb, learned Counsel for the applicant submitted that since the Sole Arbitrator was appointed by the Chief Justice of the Gauhati High Court sitting at the Principal Seat at Guwahati the appeal could have been heard only at the Principal Seat at Guwahati and not in any other bench. In this way the learned Counsel for the applicant has challenged the impugned judgment on the ground of lack of jurisdiction. The aforesaid submission was made on the basis of the judgment of the Hon"ble Supreme Court rendered in the case of SBP & CO v. Patel Engineering Ltd., reported in (2005) 8 SCC 618. The learned Counsel also submitted that this Court ought not to have interfered with the award which was based on materials and evidence.

8. Per contra, Sri Meitei, learned Central Government Counsel, for Union of India submitted that the review application is misconceived and not maintainable in view of the preconditions laid u/s 114 and Order 47 Rule 1(2) of the CPC. According to the learned Counsel not only the impugned judgment was challenged before a Division Bench but the same was also assailed before the Hon"ble Supreme Court on merit and having dismissed both the revision applications as well as the SL Ps this review application has been filed, which is hit by the aforesaid provisions.

9. I agree with the submissions of the learned Counsel for the applicant that a judgment can be reviewed if there is ex facie material to show that the court had no jurisdiction to hear the appeal. However the facts of this case do not indicate that Aizawl Bench of Gauhati High Court had no jurisdiction over the issue altogether. Section 20 of the CPC provides that a suit may be instituted where Defendant resides or carries on business or where cause of action wholly or in part arises. In the present case the contract agreement was executed in the State of Mizoram since the office of Chief Engineer of Project Pushpak is situated in Aizawl. At the same time road construction materials were to be transported from Guwahati to different works site in the State of Mizoram. Hence one part of cause of action clearly accrued in the Sate of Mizoram.

10. The above apart, the award of the learned Arbitrator was challenged before the learned Additional District Magistrate (Judicial) at Aizawl u/s 34 of the Arbitration and Conciliation Act, 1996. At no point of time, the applicant herein raised the issue of non maintainability of the case at Aizawl for lack of jurisdiction. Strangely, the applicant also did not raise the issue of territorial jurisdiction during the hearing of the main appeal u/s 37 of the Arbitration Act. Conspicuously, the question of territorial jurisdiction of the Aizawl Bench of the Gauhati High Court was also not raised in the revision application before the Division Bench nor before the Hon''ble Supreme Court of India in the SL Ps. In this way the impugned judgment is sought to be reviewed entirely on a new plea, which cannot be permitted since it is not covered under any one of the three pre conditions laid down under Order 47.

11. It is true that the review application could have been entertained under the cover of "any other sufficient reason". In the case of Chhajju Ram v. Neki and ors (AIR 1922 P.C.112), the Hon''ble Privy Council had the occasion to examine contours of the words "sufficient reason" incorporated under Order XLVII Rule 1 of CPC. After delineating the differences of review powers prescribed under the Code of Civil Procedure, 1877 and 1908. Their lordships have held that the court cannot travel beyond the parameters laid down in Rule 1 under the garb of "any other sufficient reason".

12. In the case of Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, the Hon''ble Supreme Court has held that review of a judgment is a serious step and the Court should be reluctant to reopen the case and render a fresh decision. Their lordships have held that normal principle is that a judgment pronounced by a Court is final and departure from this principle should only be in exceptional circumstances.

13. In this way the consistent view expressed in various judicial authorities with regard to contours of review jurisdiction is that the review jurisdiction should be exercised cautiously and sparingly only when a substantial case of miscarriage of justice is made out. It is also the settled position of law that a party cannot seek review of a judgment on merit or on the plea that the judgment is de-hors to the pleadings etc. As noted earlier a review application is not entertainable if a

decree or order is appealable and no appeal has been preferred. Order 41 Rule 1(2) CPC further postulates that a party who has not preferred any appeal from the decree or order may apply for a review of a judgment notwithstanding pendency of an appeal by some other party except where the ground of such appeal is common to the applicant or the Appellant. In the present case the judgment passed in RFA No. 1 of 2007 was assailed by the applicant itself not only before a Division Bench but also before the Hon"ble Supreme Court. It is true that the revision application was dismissed being not maintainable. However, the applicant had challenged the impugned judgment dated 30.4.2008 before the Apex Court on merit taking number of grounds and upon hearing the counsel the SL Ps were dismissed. On this ground alone the review application is not maintainable.

14. The judgment of the Apex Court in the case of SBP & CO v. Patel Engineering Ltd (supra) was in the context of appointment of Arbitrator by the Chief Justice of High Courts. In the said judgment the Apex Court has held that while appointing arbitrators the Chief Justice has the power to decide his jurisdiction for appointment of arbitrators and whether there is a valid Arbitration Agreement and whether there is a live dispute for referring the same to arbitration proceeding. However, their Lordships have nowhere expressed their view about the jurisdiction of a Court to examine the legality of an award where cause of action has arisen. Instead, in paragraph 12, their Lordships have observed that the arbitral tribunal can still go behind the decision of the Chief Justice about its jurisdiction or on the existence of an arbitration clause. In this way the authority is not applicable in the present case.

15. In the result, I do not find any merit in the review application. Consequently, the review application is dismissed.