

(2023) 05 DEL CK 0327

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 456 Of 2020

M/S Trade International

APPELLANT

Vs

M/S Avon Healthcare Pvt Ltd

RESPONDENT

Date of Decision : 23-05-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 114, Order 47, Order 47 Rule 1
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2023) 05 DEL CK 0327

Hon'ble Judges : Chandra Dhari Singh, J

Bench : Single Bench

Advocate : Varun Singh, Ytharth Kumar, Himanshu Yadav, Pankaj K. Modi,
Prashant Mehta, Divita Vyas

Final Decision : Dismissed

Judgement

Chandra Dhari Singh, J

I.A. 10101/2023 (Exemption)

Exemption allowed subject to just exceptions.

The application stands disposed of.

REVIEW PET. 146/2023

1. The instant review petition under Section 114 and Order XLVII of the Code of Civil Procedure, 1908 (hereinafter "CPC") has been filed on behalf of the review petitioner (hereinafter "the petitioner") seeking the following reliefs:-

"(a) allow the present Petition seeking review of the Judgment and Order dated 26.04.2023 passed by this Hon"ble Court in OMP(COMM) No. 456/2020; and

(b) allow such other and/or further order(s) as the nature and circumstances of the present case may require."

2. The petitioner has sought review of the judgment passed in the captioned petition on 26th April 2023 whereby this Court dismissed the objections filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Arbitration Act") against the Award dated 31st May 2020.

Submissions on behalf of the petitioner

3. The learned counsel for the petitioner submitted that this Court while passing the judgment under review has failed to consider the arguments which were raised on behalf of the petitioner. It is submitted that while arguing the objections against the impugned Award it was not the case of the petitioner that the doctrine of "Group of Companies" was not applicable on the facts of the case but the arguments were advanced on the manner in which the said doctrine would be applicable. Further, it is submitted that the doctrine could only be applied for the limited purpose of joinder of a third party to the arbitration proceedings in cases when there is arbitration agreement with one party but no arbitration with another concern or connected party. In the present case, the respondent had separate arbitration agreement with the petitioner and M/s Snowcross Healthcare Pvt. Ltd. Therefore, even if the doctrine was to be applied, it would have been necessary to make M/s Snowcross Healthcare Pvt. Ltd. a party with respect to agreement dated 1st November 2012 before the Arbitral Tribunal.

4. It is submitted that the petitioner is facing an arbitral award for an alleged breach of contract by the other entity, i.e., M/s Snowcross Healthcare Pvt. Ltd, which was never made a party to the arbitration proceedings and has not had the chance to defend its case.

5. It is further submitted that the judgment under review does not appreciate that the petitioner, a proprietorship firm of Mr. P.K. Handa and M/s Snowcross Healthcare Private Limited, which is a private company incorporated under the Companies Act are two entirely different entities in the eye of law, whereas, the doctrine of Group of Companies is applicable when there are two companies within the same group and not to individuals / proprietorship firms.

6. Another ground for seeking review of the judgment by the petitioner is regarding non-joinder of a necessary party. It is submitted that only the disputes qua the Sub-Representative Agreement dated 1st November 2012 and Sub-Distribution Agreement dated 1st November 2012 entered into between the petitioner and the respondent/claimant have been submitted for adjudication before the Arbitral Tribunal and therefore, the adjudication of dispute qua any breach emanating from the Purchase Order dated 1st January 2014 and the Proforma Invoice dated 22nd January 2014 entered into between M/s Snowcross Healthcare Pvt. Ltd and the respondent by the Arbitral Tribunal was without jurisdiction.

7. The learned counsel submitted that the Court failed to consider that the Arbitral Tribunal acted beyond the terms of the Contract between the parties. The

Arbitral Tribunal had no power to travel beyond the Contract and act without jurisdiction. The learned Tribunal failed to consider that the petitioner and M/s Snowcross Healthcare Pvt. Ltd are separate legal entities in law and are distinct from one and another, as recognized in the agreement entered with Positive Impact Waste Solutions Incorporation in 2013. Further, both the legal entities had separate agreement with separate arbitration clause with the respondent. Therefore, the Award could have only been made in case both the petitioner and M/s Snowcross Healthcare Pvt. Ltd. were made parties to the arbitral proceedings.

8. The learned counsel for the petitioner has also argued that the petitioner was aggrieved of the findings of the Arbitral Tribunal made under Claim B and Claim C in the Award, however, the same were not considered in the judgment under review. It is submitted that the submission that an Award of Rs. 10,00,000/- was passed by the Arbitral Tribunal despite observing that the respondent had not adduced any evidence, documentary or oral, to prove the actual quantum of the alleged expenses, was not considered.

9. Therefore, it is prayed that the judgment dated 26th April 2023 be reviewed considering the grounds raised against the same.

10. Heard and considered the objections raised by the learned counsel for the review petitioner and also perused the contents of the review petition.

Findings and Analysis

11. The petitioner before this Court by way of the instant petition has sought review under the relevant provisions of the CPC. The provision of review under CPC is straightforward and unambiguous in itself and to remove any doubt, the scope and extent of powers of review under Section 114 and Order XLVII of the CPC have been time and again clarified by way of judicial pronouncements.

12. The Hon"ble Supreme Court in *Parsion Devi v. Sumitri Devi*, (1997) 8 SCC 715, while discussing the scope of review under Order XLVII and Section 114 of the CPC discussed as under:

"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In *Thungabhadra Industries Ltd. v. Govt. of A.P.* [AIR 1964 SC 1372 : (1964) 5 SCR 174] (SCR at p. 186) this Court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record"). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition,

between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

8. Again, in *Meera Bhanja v. Nirmala Kumari Choudhury* [(1995) 1 SCC 170] while quoting with approval a passage from *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma* [(1979) 4 SCC 389] this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 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 said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

13. The Hon"ble Supreme Court in *N. Anantha Reddy v. Anshu Kathuria*, (2013) 15 SCC 534, while setting aside an order of a High Court whereby review of a judgment was allowed, observed as under:

"6. A careful look at the impugned order would show that the High Court had a fresh look at the question whether the appellant could be impleaded in the suit filed by Respondent 1 and, in the light of the view which it took, it recalled its earlier order dated 8-6-2011. The course followed by the High Court is clearly flawed. The High Court exceeded its review jurisdiction by reconsidering the merits of the order dated 8-6-2011. The review jurisdiction is extremely limited and unless there is mistake apparent on the face of the record, the order/judgment does not call for review. The mistake apparent on record means that the mistake is self-evident, needs no search and stares at its face. Surely, review jurisdiction is not an appeal in disguise. The review does not permit rehearing of the matter on merits."

14. Recently, in the judgment passed in *S. Murali Sundaram v. Jothibai Kannan*, 2023 SCC OnLine SC 185, the Hon"ble Supreme Court has held as under:

"15. While considering the aforesaid issue two decisions of this Court on Order 47 Rule 1 read with Section 114 CPC are required to be referred to? In the case of *Perry Kansagra* (supra) this Court has observed that while exercising the review jurisdiction in an application under Order 47 Rule 1 read with Section 114 CPC, the Review Court does not sit in appeal over its own order. It is observed that a rehearing of the matter is impermissible in law. It is further observed that review is not appeal in disguise. It is observed that power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of

power. It is further observed that it is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy has been finally decided.

After considering catena of decisions on exercise of review powers and principles relating to exercise of review jurisdiction under Order 47 Rule 1 CPC this Court had summed upon as under:

“(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine *actus curiae neminem gravabit*.”

16. It is further observed in the said decision that an error which is required to be detected by a process of reasoning can hardly be said to be an error on the face of the record.

17. In the case of Shanti Conductors (P) Ltd. (*supra*), it is observed and held that scope of review under Order 47 Rule 1 CPC 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 is 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 justifying the court to exercise its power of review under Order 47 Rule 1 CPC.”

15. Therefore, the position of law with respect to the powers of a Court and its scope under Section 114 and Order XLVII of the CPC is evidently settled. It has been reiterated that there is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. Hence, the powers of this Court are limited by the mandate of law that has been settled by the Hon’ble Supreme Court and accordingly, while considering the instant petition, this Court shall restrict itself from entering into the merits of the case and re-appreciating facts or evidence.

16. In the instant case, the petitioner has raised extensive grounds in the contentions made in the review petition and has gone into the elaborate details

of facts and evidence in the case before the Arbitral Tribunal. As discussed above, this Court is, hence, bound by the limitations set forth by the mandate of the provision under the CPC as well as that of the judgments delivered by the Hon'ble Supreme Court deliberating upon and defining the extent of power of review and shall observe the principle of limited jurisdiction as mandated while adjudicating upon the instant matter.

17. The petitioner, while seeking review, has raised grounds pertaining to the erroneous adjudication of the Group of Companies doctrine, the severability of the petitioner and the third entity, namely, M/s Snowcross Healthcare Pvt. Ltd, and the non-consideration of arguments advanced on behalf of the petitioner.

18. On this aspect, this Court deems it relevant to reproduce the findings as culled out in the judgment dated 26th April 2023. While deciding the objections under Section 34 of the Arbitration Act, this Court framed issues based on the arguments advanced on behalf of the parties. The relevant portion of the judgment is as under:

"60. The Judgments cited above stood in conformity with the principles laid down with respect to the Group of Companies Doctrine until a three Judge bench in the case of Cox and Kings Limited v. SAP India Private Limited And Anr. (2022) 8 SCC 1 doubted the bearing of the doctrine of the ground that the ratio in Chloro Controls (supra) is based on economic convenience rather than correct application of law. The Court referred the aspect of interpretation of "claiming through or under" as occurring in amended Section 8 of the Act qua the doctrine of Group of Companies to a larger Bench.

61. In the instant case, the two entities, i.e., the petitioner and the M/s Snowcross Healthcare Pvt. Ltd are identified as sister companies which are carrying on similar trade pertaining to the instant case. The proprietor Mr.Handa is also the director of the M/s Snowcross Healthcare Pvt. Ltd. and both the entities entered into a transaction with the respondent for a similar purpose, i.e., the sale of medical equipments. It is the contention of the petitioner that the invoice dated 22nd January, 2014 has a separate arbitration clause and the party to this invoice was M/s Snowcross Healthcare Pvt. Ltd. while the agreement dated 1st November, 2012 signed by the petitioner entity had a separate arbitration clause and the Group of Companies doctrine was invoked by the arbitrator while decided the claims is not appropriate.

62. Upon a perusal of material on record, it is evident that both entities, the petitioner and the M/s Snowcross Healthcare Pvt. Ltd. were operating from the same address and even the contact details and identification of representatives were overlapping for both the entities. The transaction was in direct nexus with the purpose of the agreement dated 1st November, 2012. The subject matter was the sale and purchase of same medical equipments and thus the nature of the transactions arising out of both the agreement dated 1st November 2012 and 22nd January, 2014 was composite in nature sharing a direct nexus. It is also

pertinent to mention that in both the documents mentioned above, the arbitration was the agreed mechanism of the dispute resolution between the parties. Since the Hon'ble Supreme Court has referred the doctrine to a larger Bench to determine its legality, the doctrine till the time is not over-ruled by the Larger Bench, shall be applicable in the relevant circumstances. The subject matter of the dispute at hand was wholly arbitrable in nature as well as the transactions arising out of the agreement dated 1st November, 2012 between the respondent and the petitioner as well as the invoice dated 22nd January 2014 shared a common nexus pertaining to the sale of medical equipments. Therefore, this Court is of the view that the doctrine not being over-ruled has been rightly put to use by the learned arbitrator. The issue no.1 is decided accordingly."

19. While adjudicating the aforesaid issue, a thorough consideration was given to the submissions of both the parties, petitioner as well as the respondent, the contentions that were raised in the pleadings and written submissions and the impugned Award passed by the Arbitral Tribunal. Only upon such consideration the observations as produced above were passed. A Court adjudicating upon a petition under Section 34 of the Arbitration Act shall not sit in appeal and reappreciate the entire evidence produced before the Arbitral Tribunal by the parties.

20. While passing the abovementioned observations in the judgment under review, this Court was empowered to look into the contents of the impugned Award and was also bound by the mandate of Section 34 of the Arbitration Act which excessively narrows down the scope of interference with an arbitral award. Accordingly, the part of the judgment, which the petitioner has sought the review of, was passed after testing whether there was any patent illegality apparent on the face of the record which would shock the conscience of the Court. The relevant doctrine of Group of Companies was discussed in the background of the contentions raised and material brought before the Court and accordingly, the judgment was passed.

Conclusion

21. The aforesaid discussion, analysis and circumstances show that only errors pertaining to mistake or error apparent on the face of record, which strike on mere looking at the record and do not require any long-drawn process of reasoning, would invite a review of the judgment in question. However, by way of the instant petition, the petitioner has sought to delve into the merits of the case and has sought the interference of the Court by entering into the merits and reappreciation of facts and evidence, instead of showing that there are any errors so apparent on the face of the record, which is completely beyond the scope of the provisions invoked. Review may certainly not be exercised on the ground that the decision was erroneous on merits.

22. The grounds raised by the petitioner in the review application cannot be said to be of the nature that invite interference of this Court for reviewing the

judgment. The petitioner has failed to show that there is any error which is apparent on the face of record and which strikes on mere looking at the record.

23. Therefore, keeping in view the circumstances, objections raised in this review petition and the arguments advanced on behalf of the petitioner, this Court does not find any cogent reason to entertain the present review petition and interfere with the judgment dated 26th April 2023.

24. Accordingly, the instant petition stands dismissed.

25. The order be uploaded on the website forthwith.