

(2019) 11 CAL CK 0027

In the Calcutta High Court

Case No : General Application (GA) No. 862 Of 2016, 2244 Of 2018,
Memorandum Of Reviews (RVWO) No. 24 Of 2018, Appeal From Order
(APO) No. 201, 202 Of 2018, Execution Cases (EC) No. 873 Of 2015

Suresh Kumar Jain & Ors

APPELLANT

Vs

Madanlal Jain & Ors

RESPONDENT

Date of Decision : 08-11-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 22(3)(f), Order 47 Rule 1

Citation : (2019) 11 CAL CK 0027

Hon'ble Judges : Dipankar Datta, J;Arijit Banerjee, J

Bench : Division Bench

Advocate : Anirban Ray, Nirmalya Dasgupta, Nilanjan Pal Choudhuri, S.N. Mitra,
Ratnanko Banerjee, D.N. Sharma, Lopita Banerjee, Sunanda Mukhopadhyay,
Rajeev Kumar Jain, Apuva Daga, Laila Khatun

Final Decision : Dismissed

Judgement

Arijit Banerjee, J

(1) This is an application for review of an order dated 30 July, 2018 whereby a co-ordinate Bench of this Court, of which one of us was a member (Arijit Banerjee, J.) disposed of APO 202 of 2017 along with the connected application. The material facts of the case culminating in the present review application are as follows.

(2) In an arbitration proceeding between the parties hereto a consent award dated 3 January, 2013 was passed in terms of the settlement arrived at between the parties as recorded in a document dated 1 January, 2013. The said award was put in execution by both the groups (Suresh Kumar Jain Group and Hulash Chand Jain Group) resulting in institution of two execution cases before the learned Single Judge being EC No. 144 of 2016 (Hulash Chand Jain & Ors. vs. Suresh Kumar Jain & Ors.) and EC No. 873 of 2015 (Suresh Kumar Jain & Ors. - vs- Madanlal Jain & Ors.). The said execution cases were heard from time to time

by the learned Single Judge. On 4 March, 2016 on the prayer made on behalf of the petitioners in EC No. 144 of 2016 the learned Judge directed by way of an interim order, inter alia, that the custodian appointed under the Arbitral Award shall not part with the documents that he was holding till March 11, 2016 or until further orders. The execution applications were posted for hearing on 11 March, 2016. On that date an order was passed by the learned Single Judge extending the interim order dated 4 March, 2016.

(3) Being aggrieved by the said orders dated 4 March 2016 and 11 March, 2016 the petitioners in EC No. 873 of 2015 (Suresh Kumar Jain & Ors.) preferred an appeal being APOT No. 81 of 2016 and filed a stay application therein being GA No. 862 of 2016. The said appeal and the application were heard by the Division Bench from time to time and various orders were passed thereon.

(4) On 30 July, 2018 a Division Bench of this Court disposed of the appeal and the stay application by passing the following order:-

"We have heard the learned counsel for the parties. The custodian namely Kamlesh Sogani is directed to prepare an inventory of the documents which are lying in his custody in presence of representatives of the parties within one month from date. After completion of such inventory, the custodian shall hand over the documents to the Registrar, Original Side of this Court. The Registrar, Original Side shall hold the documents in his safe custody and shall act in terms of the orders that may be passed by the learned single Judge. Parties shall cooperate with the custodian in preparing inventory of the documents as aforesaid.

Parties shall arrange for containers for keeping the documents. Upon handing over the documents to the Registrar, Original Side, the custodian shall stand discharged.

The interim order that was passed by the learned single Judge is modified to the extent as indicated above.

If the parties have any further prayer, they should make such prayer before the learned single Judge in the execution proceedings. It is submitted by the learned counsel representing the custodian that the custodian was granted liberty to file affidavit which has not yet been filed. We put on record that the allegations made against the custodian by the parties in their pleadings are deemed not to be admitted.

No useful purpose would be served by keeping the appeal pending. Thus, the appeal and connected application is disposed of accordingly."

This is the order under review in the present application.

(5) Appearing for the review petitioners Mr. Anirban Roy, learned Advocate urged that there is an error apparent on the face of the order under review inasmuch as the same amounts to modification of the arbitral award in question. The

Arbitral Tribunal had appointed the custodian to hold documents pertaining to the properties being the subject matter of arbitration and to facilitate implementation of the award. The award has not yet been implemented. Hence, the portion of the order under review directing that upon handing over the documents to the Registrar, Original Side, the custodian shall stand discharged, is contrary to the arbitral award and amounts to modification of the award which the Division Bench could not have done in an appeal arising out of a proceeding for execution of the arbitral award in question. Learned counsel submitted that the order under review is to that extent erroneous in law and the impugned portion should be set aside/recalled.

(6) Learned counsel further submitted that the Executing Court cannot go behind the decree under execution (in this case the arbitral award) and must accept the decree (arbitral award) as it is. From that perspective also the impugned portion of the order under review is erroneous.

(7) Learned counsel relied on the following decisions:-

(i) Board Of Control For Cricket In India -vs- Netaji Cricket Club & Ors.. (2005) 4 SCC 741. This decision was relied upon for the proposition that a review application is maintainable if there is a mistake on the part of the Court or if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reasons' in Order 47 Rule 1 of the Code of Civil Procedure are wide enough to include a misconception of fact or law by a Court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit".

(ii) AIR 1956 SC 359, Jai Narain Ram Lundia -vs- Kedar Nath Khetan & Ors. This decision was relied upon for the proposition that the executing Court must take the decree as it stands and cannot go behind it. The executing Court cannot alter the decree.

(iii) Decision of the Apex Court in Civil Appeal No. 7800 of 2014 (S. Bhaskaran - vs- Sebastian (Dead) By Lrs. & Ors. This case was also relied upon in support of this submission that the executing Court cannot travel beyond the order or decree under execution.

(8) Appearing for the custodian Mr. Rajeev Kumar Jain, learned Advocate and appearing for the respondents, Mr. S.N. Mitra, learned Senior Advocate, both submitted that the present review application is not maintainable. They submitted that none of the grounds for review contemplated by Order 47 Rule 1 of the CPC exists in the present case. It was submitted that there is a long line of decisions of the Hon'ble Supreme Court to the effect that a Court while considering a review application does not act as an Appellate Court. The power to review can be exercised only on one of the grounds mentioned in Order 47 Rule 1 of CPC and not otherwise. It was submitted that the observation of the Supreme Court in the case of Board Of Control For Cricket In India (supra)

cannot be read in isolation and must be read in consonance with the other decisions, prior and subsequent, of the Apex Court. Learned counsel relied on the following decisions in support of their submissions: (i) State of West Bengal & Ors -vs- Kamal Sengupta & Anr., (2008) 8 SCC 612. (ii) Parsion Devi & Ors. -vs- Sumitri Devi & Ors., (1997) 8 SCC 715. (iii) Dr. Somayajulu, Secretary, Diesel Loco Shed and South Eastern Railway House Building Cooperative Society Ltd.-vs- Attili Appala Swamy & Anr., (2015) 2 SCC 390. (iv) Meera Bhanja -vs- Nirmala Kumari Choudhury, (1995) 1 SCC 170.

(9) We have carefully considered the rival contentions of the parties.

(10) One of us (Arijit Banerjee, J.) who was a member of the Division Bench which passed the order under review, has clear recollection that the said order was passed on consent of the parties. Learned counsel for the custodian prayed for discharge. Neither of the parties objected to such prayer. In effect the order was a consent order. Learned counsel for the respondents submitted, and we think rightly, that review at the instance of any of the parties to a consent order is impermissible. However, learned counsel for the petitioners submitted that even by consent the parties could not vary/modify an arbitral award. If we permit the petitioners to agitate this point, the same would amount to reopening the appeal and rehearing the same on the basis that the earlier Division Bench erred in law in passing the order under review. That is not the scope of a review petition. Let us note a few Supreme Court decisions on this point.

(11) In State of West Bengal & Ors -vs- Kamal Sengupta & Anr.(supra), the Hon'ble Supreme Court observed at paragraph 22 of the reported judgement as follows:

"22. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

(12) In the said decision at paragraphs 25 to 30 the Hon'ble Supreme Court discussed its earlier decisions wherefrom, inter alia, the following points emerge :

(i) That a decision is erroneous in law is no ground for ordering review. If the Court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it.

(ii) The words "any other sufficient reason" must mean a reason sufficient on

grounds at least analogous to those specified in Rule 1 of Order 47 of CPC.

(iii) A review is by no means an appeal in disguise whereby an erroneous decision can be corrected.

(iv) An error which is not self-evident and has to be dictated by a process of reasoning, cannot 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.

(v) In exercise of jurisdiction under Order 47 Rule 1 CPC, it is not permissible for an erroneous decision to be reheard and corrected.

(vi) 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 only by a higher forum, the latter can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise".

(vii) Order 47 Rule 1 CPC does not postulate a rehearing of the dispute on the ground that a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict.

(viii) The power of review may not be exercised on the ground that the decision under review was erroneous on merits. That would be the province of the Appellate Court. The power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the subordinate Court.

(12) The aforesaid propositions of law are also supported by the decisions of the Hon'ble Supreme Court in the cases of Meera Bhanja -vs- Nirmala Kumari Choudhury, (1995) 1 SCC 170 and Dr. Somayajulu, Secretary, Diesel Loco Shed and South Eastern Railway House Building Cooperative Society Ltd.-vs- Attili Appala Swamy & Anr., (2015) 2 SCC 390.

(13) Keeping in mind the aforesaid principles of law enunciated by the Hon'ble Supreme Court explaining the limits of exercising the power of review under Order 47 Rule 1 CPC, we are unable to entertain this review petition. Even if learned counsel for the petitioners is right in submitting that the earlier Division Bench ought not to have discharged the custodian since the same amounted to variation of the arbitral award whereunder the custodian was appointed, at best the decision under review would be one which is erroneous in law. The mechanism of review cannot be resorted to for correcting an erroneous decision which would be the exclusive domain of an Appellate Court. We do not find any error apparent on the face of the record that would persuade us to entertain this review petition. The observation of the Hon'ble Supreme Court in the case of Board Of Control For Cricket In India (supra) must be read in consonance with the catena of other decisions of the Hon'ble Supreme Court referred to above. Any and every decision vitiated by misconception of law cannot be the subject

matter of review. Otherwise, all erroneous decisions of Courts could be said to have been rendered under misconception of law and, therefore, reviewable. This would run contrary to the position of law established by a long line of Supreme Court decisions. If the petitioners are aggrieved by reason of the order under review being erroneous in law or on merits, their remedy is to approach the higher forum. This review petition is not maintainable.

(14) RVWO No. 24 of 2018 along with GA No.2244 of 2018 are, accordingly, dismissed.

(15) However, there will be no order as to costs.

(16) Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.