



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
REVIEW PETITION (L) NO. 12665 OF 2024
IN
COMMERCIAL ARBITRATION APPLICATION NO. 1 OF 2024

Shailesh Ranka and others ... Petitioners

Vs.

Windsor Machines Limited and another ... Respondents

Mr. Ankit Lohia a/w Ms. Krushi Barfiwala, Ms. Rima Desai and Mr. Rudra Deosthali i/by Parinam Law Associates for Petitioners.

Mr. Nausher Kohli a/w Ms. Shruti Maniar, Mr. Shrikant Pillai, Ms. Sannaya Gandhi i/by M/s. Solomon & Co. for Respondent No.1.

CORAM : MANISH PITALE, J.

Reserved on : 6TH AUGUST, 2024

Pronounced on: 12TH NOVEMBER, 2024

ORDER:

1. By this petition, the petitioners seek review of order dated 19.12.2023 passed by this Court, dismissing application filed by the applicants for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act').

2. The petitioners submit that in the aforesaid order, there is an error apparent on the face of the record, for the reason that an objection taken by the respondent No.1 in the said application and upheld by this Court, while dismissing the application, is based on a factual error. It is submitted that while the Court proceeded on the basis that the petitioners and respondent No.2 were partners of a partnership firm R-Cube Energy Storage Systems LLP (R-Cube Energy), as a matter of fact, the said R-Cube Energy was earlier a limited liability partnership, but it stood registered as a private limited company in June 2019. It is submitted that

this takes away the very basis of the order passed by this Court, dismissing the application filed under Section 11 of the Arbitration Act.

3. The contesting respondent No.1 has resisted the present review petition, claiming that such a petition for review is not maintainable as the original order, of which review is sought, is an order passed under Section 11 of the Arbitration Act. Since the Arbitration Act does not provide for a statutory remedy of review, the Court is denuded of the power to even entertain such a petition for review. Apart from this, it is claimed that the ground for review is not tenable because arguments were advanced on behalf of the applicants when the application under Section 11 of the Arbitration Act was decided, on the basis that the aforesaid R-Cube Energy was indeed a partnership firm. Before advertng to the rival submissions in detail, a brief reference to the chronology of events leading upto filing of the present review petition would be necessary.

4. The original application under Section 11 of the Arbitration Act bearing Commercial Arbitration Application (L) No.38198 of 2022 was filed on the basis of an arbitration clause contained in an investment agreement dated 02.02.2018 executed between the said R-Cube Energy and the contesting respondent No.1 - Windsor Machines Limited. Since disputes arose concerning the said agreement, the petitioners herein, concerned with R-Cube Energy, issued notice on 20.08.2022 invoking arbitration. The respondent No.1 sent reply on 19.09.2022 and since an arbitrator could not be appointed as per the arbitration clause, the petitioners invoked Section 11(6) of the Arbitration Act. One of the objections raised on behalf of the respondent No.1 to the said application was that, since applicants and respondent No.2 were partners of the said R-Cube Energy and respondent No.2, as a partner, had not joined the other partners i.e. the applicants in invoking arbitration, the said notice

to invoke arbitration was defective and consequently, the application under Section 11 of the Arbitration Act deserved to be dismissed.

5. By order dated 19.12.2023, this Court accepted the said objection based on Section 19(2)(a) of the Indian Partnership Act, 1932 (Partnership Act) and consequently, it was held that the application deserved to be dismissed and accordingly, it was dismissed.

6. The applicants challenged the said order before the Supreme Court by filing Special Leave to Appeal (C) No.5329 of 2024. On 07.03.2024, the Supreme Court disposed of the Special Leave Petition by passing the following order:-

- “1. Learned counsel for the petitioners seeks to withdraw this petition to file review before the High Court.
2. Permission, as prayed for, is granted.
3. Liberty is also given to the petitioner to file the Special Leave Petition against the order impugned herein as well as the order that may be passed in the review petition by the High Court.
4. With these observations, the Special Leave Petition is dismissed as withdrawn.”

7. As a consequence, the applicants filed the present review petition. In support of the review petition, Mr. Ankit Lohia, learned counsel appearing for the petitioners submitted as follows:-

- a. On the question of maintainability, it was submitted that the petition has to be entertained by this Court, for the reason that the order dated 19.12.2023 was passed by this Court after amendment was introduced in Section 11(6) as per Amendment Act, with effect from 23.10.2015. It was submitted that prior to the amendment, the power under Section 11(6) of the Arbitration Act was exercised by the 'Chief Justice or a person designated by him', but post-

amendment, the power under Section 11(6) is exercised by the 'Court or an institution designated by the Court';

- b. It was submitted that the power, post-amendment, being exercised by the 'Court', the objection as regards maintainability raised by the respondent No.1 has to be rejected and the judgements on which reliance is placed, also can be demonstrated to be erroneous as the change in law, brought about by the aforesaid amendment, was ignored in such judgements;
- c. Specific reliance was placed on order dated **05.04.2021** passed by the Supreme Court in **Special Leave Petition (C) No. 4820 of 2021** (*Mohd. Anwar and others Vs. Pushpalata Jain and others*). It was submitted that the effect of the amendment noticed by the Madhya Pradesh High Court, was appreciated and accepted by the Supreme Court in its judgement. In that context, reference was also made to the said judgement of the Madhya Pradesh High Court in the case of *Pushpalata Jain Vs. Raj Enterprises and others*, **2020 SCC OnLine MP 4694**, which was the subject matter of challenge in the aforementioned order passed by the Supreme Court. In that context, reliance was also placed on judgement of the Supreme Court in the case of *Municipal Corporation of Greater Mumbai and another Vs. Pratibha Industries Limited and others*, **(2019) 3 SCC 203**;
- d. It was submitted that once the position post-amendment is appreciated in the correct perspective, the High Court being a Court of record under Article 215 of the Constitution of India assumes significance. It was submitted that being a Court of record, the High Court is required to ensure that its

record is always correct and if there is any error, it is to be corrected forthwith by exercising power of review. In this context, reliance was placed on judgement of Allahabad High Court in the case of *Siemens Limited Vs. Madhyanchal Vidyut Vitran Nigam Limited and another* (judgement and order dated **18.01.2021** passed in **Arbitration and Conciliation Application No.5 of 2019**), as also the judgement and order of the Calcutta High Court in the case of *Radha Bhattad Vs. Rashmi Cement Limited*, **2023 SCC OnLine Cal 2570**. Reference was also made to the judgment of the Supreme Court in the case of *M. M. Thomas Vs. State of Kerala and another*, **(2000) 1 SCC 666**;

- e. On this basis, it was submitted that the review petition is clearly maintainable and if the Court is in agreement that the review petition is maintainable, the error apparent on the face of the record is clearly made out because this Court in the order dated 19.12.2023 proceeded on the basis that R-Cube Energy was a partnership firm, while as a matter of fact, it is a private limited company. The fact that it is a private limited company was stated in paragraph 2(b) of the original application filed under Section 11(6) of the Arbitration Act. On this basis, it was submitted that the order ought to be reviewed and the application under Section 11(6) of the Arbitration Act deserved to be allowed so that an arbitrator could be appointed for resolving the disputes between the parties.

8. On the other hand, Mr. Nausher Kohli, learned counsel appearing for the contesting respondent No.1 submitted as follows:-

- a. The Arbitration and Conciliation Act is a complete Code in itself and therefore, unless a power of review is specifically provided under the Arbitration Act, this Court cannot exercise such a power to entertain the present review petition. The learned counsel relied upon recent judgement of Constitution Bench of the Supreme Court *In Re : Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*, **(2024) 6 SCC 1**;
- b. It was submitted that the thrust of the submissions on behalf of the petitioners appears to be based on an earlier judgment of the Supreme Court in the case of *Jain Studios Limited Vs. Shin Satellite Public Co. Ltd.*, **(2006) 5 SCC 501**. The distinction between the factual position in the said case and the present case is that, while the Supreme Court has a specific power of review under Article 137 of the Constitution of India, the same logic cannot apply to this Court, while considering a review petition in the context of an order, concerning an application for appointment of arbitrator / arbitral tribunal.
- c. Specific reliance was placed on Division Bench judgement of this Court in the case of *Antikeros Shipping Corporation Vs. Adani Enterprises Limited*, **2020 (3) Mh.L.J. 855**. It was submitted that the Division Bench of this Court categorically held that an order passed under Section 11 of the Arbitration Act cannot be made subject matter of review. Reliance was also placed on judgement and order passed by this Court in the case of *Rozy Blue (India) Private Limited Vs. Orbit Corporation Limited*, **2013 SCC OnLine Bom 341**.

- d. The learned counsel further specifically relied upon the judgements of the Delhi High Court in the case of *Diamond Entertainment Technologies Pvt. Ltd. and others Vs. Religare Finvest Limited*, **2023 SCC OnLine Del 95** and *Kush Raj Bhatia Vs. DLF Power and Services Limited*, **2022 SCC OnLine Del 4263**.
- e. The judgement in the case of **Municipal Corporation of Greater Mumbai and another Vs. Pratibha Industries Limited and others** (supra) relied upon by the petitioners was sought to be distinguished by contending that the original application before the Supreme Court, in the said case, was under Section 9 of the Arbitration Act and not under Section 11 thereof. It was further submitted that, while disposing of the application under Section 9 of the Arbitration Act, since the parties agreed, an arbitrator was appointed by the High Court. On this basis, it was submitted that the present petition for review ought to be dismissed.
- f. It was further submitted that in any case, while the arguments were being advanced at the time of the application under Section 11(6) of the Act being decided by this Court by order dated 19.12.2023, the applicants made submissions proceeding on the basis that R-Cube Energy was a partnership firm. It was never contended that R-Cube Energy was a private limited company and therefore, there is no question of any error apparent on the face of the record. On this basis, it was submitted that the review petition deserved to be dismissed.

9. I have considered the rival submissions, particularly on the point

of maintainability of the review petition. Even if I have to overrule the objection regarding maintainability and a finding is rendered that there is indeed an error apparent on the face of the record, I would only review and recall the order dated 19.12.2023, for the original application filed under Section 11 of the Arbitration Act to be placed before the Bench assigned to deal with such applications, as per the extant assignment. To go any further than reviewing or recalling the order would amount to exceeding my jurisdiction. In fact, this review petition was heard in the midst of the assignment of anticipatory bail applications and bail applications being handled by me in terms of the extant assignment. The arguments were heard and the order was reserved on the review petition and now the order / judgment is being pronounced after having considered the submissions on the point of maintainability.

10. The basis of the objection raised by the contesting respondent No.1 to the present review petition is that, the Arbitration Act being a complete Code in itself, the review petition could be entertained only if the Arbitration Act provided for the power of review to be exercised by the Court. Reliance was placed on Section 5 of the Arbitration Act to contend that insofar as Part I thereof is concerned, the Court can grant relief or entertain a petition / application only to the extent specifically provided under the Arbitration Act.

11. Specific reliance was placed on judgement of the Division Bench of this Court in the case of **Antikeros Shipping Corporation Vs. Adani Enterprises Limited** (supra), wherein the Division Bench held that, while deciding an application under Section 11 of the Arbitration Act, the Court has only one arrow in its quiver and the single judge by exercising the power of review had used an arrow, which was not available to be used on the bow. The thrust of the submissions was that, in the present case also, the petitioners were asking me to use an arrow,

not available in the quiver. The Delhi High Court in its judgements in the cases of **Diamond Entertainment Technologies Pvt. Ltd. and others Vs. Religare Finvest Limited** (supra) and **Kush Raj Bhatia Vs. DLF Power and Services Limited** (supra) relied upon the aforesaid view of the Division Bench of this Court in the case of **Antikeros Shipping Corporation Vs. Adani Enterprises Limited** (supra). Much emphasis was also placed on the fact that the Supreme Court in the case of **Jain Studios Limited Vs. Shin Satellite Public Co. Ltd.** (supra) exercised its power of review under Article 137 of the Constitution of India. In that context, it was emphasized that the Constitution Bench of this Court in **In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899** (supra) and a learned Single Judge of this Court in the case of **Rozy Blue (India) Private Limited Vs. Orbit Corporation Limited** (supra) categorically held that there could be no power of review to be exercised in the context of an order passed under Section 11 of the Arbitration Act. At this stage, it would be appropriate to state that even the learned counsel for the petitioners was very clear that a substantive review was being sought in the present petition and not just a procedural review.

12. The aforesaid submissions made on behalf of the contesting respondent No.1, while objecting to the very maintainability of the present petition, proceeded on the basis that the power of review can be exercised only as a statutory power specifically conferred under the Arbitration Act and since there is no such power given under the Arbitration Act, the review petition ought to be dismissed.

13. I am of the opinion that the petitioners have successfully pointed out the basic distinction between the position of law as it existed prior to the amendment of Section 11 of the Arbitration Act and post its

amendment, with effect from 23.10.2015. It is crucial that the words 'the Chief Justice or the person or institution designated by him' in Section 11(6) of the Arbitration Act have been replaced with the words 'the Supreme Court or as the case may be, the High Court or any person or institution designated by such Court'. The petitioners are justified in contending that the change in law brought about by the aforesaid amendment takes away the basis of the objection raised on behalf of the contesting respondent No.1.

14. Even in the judgement of the Division Bench of this Court in the case of **Antikeros Shipping Corporation Vs. Adani Enterprises Limited** (supra), the Court was conscious of the fact that the application under Section 11 in the said case was disposed of on 21.04.2011, which was prior to the aforesaid amendment brought about with effect from 23.10.2015, and that the power being exercised prior to the amendment was that of the Chief Justice or his delegate. This is further clear from the following paragraphs of the Division Bench judgement of this Court in the case of **Antikeros Shipping Corporation Vs. Adani Enterprises Limited** (supra):-

“23. Prior to the amendment of the Act by the Arbitration & Conciliation (Amendment) Act, 2015 brought into force with effect from 1st January, 2016 when in sub-section 4, 5 and 6 of Section 11 of the Act the words 'the Chief Justice or any person or institution designated by him' wherever they occur were replaced by the words 'the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court', the position was that under the Act the procedure for appointment in case of sub-section 3 being applicable was to file an application before the Chief Justice of a High Court or any person or institution designated by him, in a case of domestic arbitration and before the Chief Justice of India or any person or institution designated by him in International Commercial Arbitration.

24. In the decision reported as *2005 MhLJ Online (S.C.) 17 = (2005) 8 SCC 618, S.B.P. & Co. vs. Patel Engineering Ltd. and anr.*, a 7-Judge Bench of the Court held that the power

under Section 11 of the Act was a judicial power.

25. Though a judicial power, the power under Section 11, prior to the Act being amended with effect from 1st January, 2016 was not the power vested in the Court, but vested in the Chief Justice or his delegate. Power under Section 9 and Section 34 of the Act is in the Court, and the Court would be as defined under clause (e) of sub-section (1) of Section 2 as it then existed in the Act. In the decision reported as *2015 (3) Mh.L.J. (S.C.) 9 = (2015) 1 SCC 32, State of W. B. and ors. vs. Associated Contractor*, in paragraphs 16 and 17 the Supreme Court noted that 'it is obvious that section 11 applications are not to be moved before the Court as defined but before the Chief Justice either of the High Court or of the Supreme Court as the case may be, or there delegates.'..... 'the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value, being a decision of a judicial authority which is not a Court of record '.

26. Thus, the impugned decision in so far it uses the arrow in the quiver by relying upon decisions noting jurisdiction and power of Constitutional Courts, being Courts of record, has used an arrow which was not available to be used on the bow.”

15. The Allahabad High Court in the case of **Siemens Limited Vs. Madhyanchal Vidyut Vitran Nigam Limited and another** (supra) specifically took note of the change in law, post amendment of Section 11(6) of the Arbitration Act with effect from 23.10.2015. This was also taken note of by the Calcutta High Court in the case of **Radha Bhattad Vs. Rashmi Cement Limited** (supra). The Madhya Pradesh High Court in the case of **Pushpalata Jain Vs. Raj Enterprises and others** (supra) also took note of the said distinction in the nature of power being exercised post amendment of Section 11(6) of the Arbitration Act.

16. In fact, in the challenge raised to the said judgement of the Madhya Pradesh High Court, in the case of **Mohd. Anwar and others Vs. Pushpalata Jain and others** (supra), the Supreme Court held that the High Court was justified in exercising its power of review of the order passed on an application under Section 11 of the Arbitration Act. It

is also relevant to note that in the case of **Municipal Corporation of Greater Mumbai and another Vs. Pratibha Industries Limited and others** (supra), the Supreme Court referred to the inherent powers of the High Court under Article 215 of the Constitution of India as a Court of record and in that context, the High Court being justified in exercising power of review in the context of orders passed under the Arbitration Act.

17. The Delhi High Court in its judgements in the cases of **Diamond Entertainment Technologies Pvt. Ltd. and others Vs. Religare Finvest Limited** (supra) and **Kush Raj Bhatia Vs. DLF Power and Services Limited** (supra), while relying upon the judgement of the Division Bench of this Court in the case of **Antikeros Shipping Corporation Vs. Adani Enterprises Limited** (supra), appears to have ignored the change in law brought about by the amendment with effect from 23.10.2015. The moment it becomes clear that the power under Section 11(6) of the Arbitration Act is being exercised by the “High Court” and not by an authority in the form of the “Chief Justice or any person or institution designated by him”, there can be no confusion about the fact that as a constitutional court and court of record, this Court can exercise power of review even in the context of order passed under Section 11 of the Arbitration Act. There also cannot be any doubt about the fact that being a court of record, the High Court has inherent power under Article 215 of the Constitution of India to correct its record and it cannot allow an error in its record to continue, when such an error is indeed pointed out by the parties, seeking review of the order.

18. The position of law with regard to the review power being exercised, only if it is so provided by the statute, is certainly applicable to authorities and bodies that are creations of the very statute. In the present case, this Court, as a High Court, exercised its power while

disposing of the application filed by the petitioners under Section 11 of the Arbitration Act. If an error apparent on the face of the record is indeed pointed out by the review petitioners, as a court of record enjoined with the inherent power to correct its own record, there can be no impediment in this Court exercising the power of review. The change in law post the amendment with effect from 23.10.2015, completely changes the scenario and in that context, the judgements relied upon by the review petitioners clearly indicate that the objection with regard to maintainability of the present review petition cannot be upheld. Therefore, it is held that the present review petition is maintainable.

19. Having held so, I am of the opinion that the petitioners have successfully pointed out an error on the face of the record in the order dated 19.12.2023, whereby the original application filed under Section 11 of the Arbitration Act was dismissed. A perusal of the said order shows that it proceeded on the basis that R-Cube Energy was a partnership firm. On that basis, the position of law in the context of Section 19(2)(a) of the Partnership Act was taken into consideration and it was held as per the settled position of law that the petitioners, without the respondent No.2 joining them, could not have invoked the arbitration clause to seek appointment of an arbitrator. It is pointed out in the review petition that, as a matter of fact, R-Cube Energy is a private limited company upon its registration in June 2019 itself. This completely changes the context in which the original application filed under Section 11 of the Arbitration Act could be decided. The objection raised by contesting respondent No.1 and upheld by me in the said order dated 19.12.2023 proceeded on the basis that R-Cube Energy was a partnership firm. But, the moment it is found that it is indeed a private limited company, the whole basis of the said objection and consequently, the order dated 19.12.2023 is taken away. This clearly qualifies as an error apparent on the face of the record of the order dated 19.12.2023.

20. It is indeed a fact that when the said order was passed and rival submissions were made on the point of the law relating to Section 19(2) (a) of the Partnership Act, it was not pointed out during oral arguments that R-Cube Energy was not a partnership firm, but it was a private limited company. This is evident from the submissions made on behalf of the petitioners in respect of the said objection as recorded in paragraph 11 of the order dated 19.12.2023. It is for this reason that in the present review petition, it has been contended on behalf of the contesting respondent No.1 that when such a factual position was not pointed out on behalf of the petitioners during oral arguments, it cannot be said that there is an error apparent on the face of the record in the order dated 19.12.2023.

21. But, even if the petitioners during oral arguments failed to point out the aforesaid fact and made submissions on the basis that R-Cube Energy was a partnership firm, it cannot be ignored that in the application filed under Section 11 of the Arbitration Act, it was indeed stated on behalf of the petitioners that the said R-Cube Energy was a private limited company. In any case, merely because oral submissions were made on behalf of the petitioners on a factually incorrect basis, it cannot take away the fact that R-Cube Energy is indeed a private limited company from June 2019 itself. Therefore, the aforesaid submission made on behalf of the contesting respondent No.1 cannot be accepted. I am of the opinion that the petitioners have clearly made out a case for seeking review and recall of the order dated 19.12.2023 as there is indeed an error apparent on the face of the record. Therefore, I am inclined to review and recall the order dated 19.12.2023.

22. Although it was strenuously argued on behalf of the petitioners that I should proceed further, beyond reviewing and recalling the order dated 19.12.2023, by entertaining the original application under Section

11 of the Arbitration Act, and to allow the same by appointing an arbitrator, I refuse to proceed any further, for the reason that the assignment pertaining to dealing with applications under Section 11 of the Arbitration Act is not with me as per the extant roster / assignment. In such a situation, acceding to the aforesaid submission made on behalf of the petitioners would amount to exceeding my jurisdiction as per the extant roster / assignment.

23. As noted hereinabove, this review petition was heard in the midst of the assignment of anticipatory bail applications and bail applications with me and the order had to be reserved. As anticipatory bail applications and bail applications, by their very nature, are extremely urgent and the workload was extremely heavy, I could devote time to decide the present review petition in Diwali Vacation of this Court. I am convinced that the petitioners have succeeded in making out a ground for seeking review / recall of the order dated 19.12.2023.

24. In view of the above, the petition is allowed to the extent that the order dated 19.12.2023 stands recalled.

25. The original application filed under Section 11 of the Arbitration Act by the petitioners stands revived. It shall now be placed before the appropriate Bench as per the extant assignment, for disposal in accordance with law.

(MANISH PITALE, J.)

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