

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL APPLICATION (Review) NO.13 of 2015
in
APPEAL UNDER ARBITRATION NO.1/2015

1. M/S. TRIMURTI EXPORTS,
through its Authorized
representative, office at C/F
1 and 3, J.B. Apartments,
Near Pandav Church, Aquem
Alto, Margao, Salcete,
Goa 403601
2. MR. RASHID KHAN (PARTNER)
M/s. Trimurti Exports,
s/o late Abdul Rashid Khan, of
major age, Indian National, r/o
14/B/1, Chalwaddo, Plot No.14,
Davorlim, Margao, Salcete,
Goa 403 601
3. MR. DEVENDRA N. KAMAT (PARTNER)
M/s. Trimurti Exports,
s/o late Shri Narayan Kamat, of major
age, Indian National, r/o S/5, Pitul
Kamat Plaza, Aquem, Alto, Margao,
Salcete, Goa 403 601.
4. MR. BALCHANDRA S. BAKHLE
(PARTNER)
M/s. Trimurti Exports, s/o late
Shri Shrinivas B. Bhakle, of Major age,
Indian National, r/o H.No.5/857,
Aquem, Alto, Margao, Salcete,
Goa 403601.

Respondent Nos. 2 to 4 also at
C/F 1 and 3, J.B. Apartments, Near
Pandav Church, Aquem Alto,
Margao, Salcete, Goa 403601.

.. Applicants

V/s

M/S. MODELAMA EXPORTS LIMITED
having its Registered Office
at B-57, Okhla Industrial Area,
Phase-I, New Delhi 110020
ALSO AT 184, Udyog Vihar,
Phase-I, Gurgaon, Haryana,
represented by its Director
Shri Gaurau Gulati

.. Respondent

Mr. Nitin Sardesai, Senior Advocate with Mr. D. Shirodkar and
Ms. G. Kakodkar, Advocates for the applicants.

Mr. Rajat Wadhwa and Mr. Bhargav Khandeparkar, Advocates for
the respondent.

CORAM :- S. B. SHUKRE, J.

Reserved on : 22nd January, 2016.

Pronounced on : 3rd March, 2016

ORDER :

By this application, the applicants, who were the appellants in Appeal under Arbitration No.1/2015 are seeking the review of judgment dated 07/08/2015 passed by this Court in the said Arbitration Appeal No.1/2015.

2. The respondent had filed original arbitration claim against the applicants contending that the applicants had failed to perform their part of the contract and to refund the amount, which

was paid by the respondent to the applicants together with interest thereon. The respondent had effectively sought for enforcement of the three agreements such as original agreement for sale of iron ore dated 17/07/2009, supplementary agreement dated 01/09/2009 and additional agreement dated 29/05/2010 against the applicants. The claim of the respondent was partly allowed by the arbitrator and by an award dated 18/04/2013, the arbitrator directed the applicants to pay to the respondent a sum of Rs.8.70 Crores along with interest @ 8 % p.a. with effect from 31/12/2010 till realisation of the amount. The award was challenged by the applicants by filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act of 1996, for short) before the Principal District Judge, Panaji. The Principal District Judge dismissed the application by his judgment and order passed on 24/09/2014. The applicants filed an appeal against the said judgment and order under Section 37 of the Act of 1996 before this Court which was registered as Arbitration Appeal No.1/2015. After hearing the applicants and respondent and considering the record before the Court, this Court by judgment passed on 07/08/2015 dismissed the appeal. As the applicants feel that there has been some error apparent on the face of record, which is disclosed by the judgment of this Court, the applicants

are seeking review of the said judgment.

3. I have heard Shri Nitin Sardesai, learned Senior Counsel for the applicants and Shri Rajat Wadhwa, learned Counsel for the respondent. I have gone through the judgment of this Court and the record of the case.

4. It is the contention of the learned Senior Counsel that although there is no specific provision under the Act of 1996 for review of the judgment of this Court, the plenary power of this Court under Article 215 of the Constitution of India to correct errors apparent on the face of the record by reviewing its own judgment would enable this Court to entertain this application, if the error in the judgment is manifestly clear and does not require any minute consideration of the reasoning and record of the case. He further submits that error apparent can be seen from the fact that this Court has not considered the argument that the agreement in question having been rendered void in view of the decision of the Hon'ble Apex Court in the case of **Goa Foundation Vs. Union of India and others**; (2014)6 SCC 590, the provisions of Section 65 of Indian Contract Act, 1872 would come into play and would confine the liability of the applicants

under the agreements only to the extent of returning of the advantage received under the agreement and would not extend it to payment of interest thereon. He submits that this Court, while dealing with the said argument, found that Section 65 would not be attracted as the agreement was not void, there being no common mistake of fact. He submits that the argument relating to agreement being void on account of common mistake of fact was only an alternate argument and the main plank of the argument was that the agreement had become void in view of the judgment of the Hon'ble Apex Court in the case of **Goa Foundation** (supra). But, he further submits, the issue of agreement being void for the reason of ban imposed upon mining activities has not been considered at all by this Court, which is an error apparent in the judgment. The learned Senior Counsel has also taken me through the relevant paragraphs of the judgment of this Court, in particular paragraph nos.15, 21, 23 and 24 to buttress his argument. He therefore, submits that the application deserves to be allowed.

5. Shri Wadhwa, learned Counsel for the respondent submits that it is well settled law that unless a Statute expressly provides for power of review, same would not be available to any

authority or Court. He submits that the Act of 1996 being a self-contained code which does not provide for any power of review, any application filed for review of the judgment of this Court like the present application, would not be maintainable. He further submits that even otherwise the impugned judgment is not liable to be reviewed for the reason that the argument relating to the agreement being void and applicability of Section 65 of the Contract Act to the facts of the present case has been specifically dealt with by this Court and it would not be permissible now to reopen the issue once again and consider this argument as if this Court is sitting in appeal over its own judgment. He submits that such an exercise is not permissible while exercising power of review and therefore, there is no substance in this review application.

6. The respondent has taken an objection on the maintainability of this review application and, therefore, it would be necessary for me to deal with the same at the outset. According to learned Counsel for the respondent, there being no provision in the Act of 1996 expressly granting power of review, remedy of review is barred. Reliance has been placed on the cases of (i) ***Madhav Strucutral Engineering Ltd Vs. Maharashtra***

State Road Development; 2013 Law Suit (Bom) 55 (ii) **Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury** (1995)2 BLJR 892 (iii) **Kapra Majdoor Ekta Union Vs. Management of M/s. Birla Cotton Spinning an Weaving Mills Ltd and others**; AIR 2005 SC 1782 (iv) **Kalabharati Advertising V. Hemant Vimalnath Narichania and Ors**; AIR 2010 SC 3745 (v) **Conros Steels Pvt. Ltd. Vs. Lu Qin (Hond Kong) Company Ltd**; AIR 2015 Bom 106.

However, in the opinion of learned Senior Counsel for the applicants, the correct legal position in this regard can be ascertained from the cases of (i) **State of Maharashtra Vs. Hindustan Construction Co. Ltd.** (Review Petition No.2/2013) decided on 04/04/2013; (ii) **Ganesh Trading Company Vs. Government of Maharashtra**; 2007 (2) Bom CR 920 (iii) **ITI Ltd Vs. Siemens Public Communications Network Ltd**; (2002)5 SCC 510 (iv) **M. M. Thomas vs. State of Kerala and another**; (2000)1 SCC 666 and (v) **Jain Studios Ltd through its President Vs. Shin Satellite Public Co.Ltd**; (2006)5 SCC 501.

7. In the case of **Madhav Structural Engineering Ltd.** (supra) decided on 23/01/2013, learned Single Judge of this Court took a view that since the Act of 1996 is a self contained code and

does not provide for any remedy of review, the power to review own judgment cannot be seen to be present in the High Court exercising its jurisdiction under the Act of 1996. The learned Single Judge of this Court who took this view in the said decision, however, in another case of ***State of Maharashtra Vs. Hindustan Construction Co. Ltd*** (supra) decided on 04/04/2013, having noticed the law laid down by the Hon'ble Apex Court in the case of ***M. M. Thomas*** (supra), took a view that the High Court's power under Article 215 of the Constitution of India being plenary, the provisions of the Act of 1996 can not exclude that power of the High Court and it includes a power to undertake a procedural review in case of error apparent on the face of record in order to prevent miscarriage of justice or correct the grave and palpable error committed by it. Thus, the judgment of ***Madhav Structural Engineering Ltd.*** (supra), renders no assistance to the case of the respondent that the present review application is not maintainable. Rather, the view taken by the same learned Single Judge of this Court subsequently in the case of ***Hindustan Construction Co. Ltd*** (supra) by relying upon the ratio of the case of ***M. M. Thomas*** (supra) helps bolster up the argument of learned Senior Counsel in this regard. As a matter of record, the issue has already been answered by the Hon'ble Apex Court in the

year 2000 through its decision rendered in the case of **M. M. Thomas** (supra). In that case, the question was as to whether or not, the High Court, in the absence of any express powers conferred upon it to review its own order under the Kerala Private Forests (Vesting and Assignment) Act, 1971, had the power to review its own decision given in an appeal filed under the said Act. Hon'ble Supreme Court answered the question by observing that the High Court being a Court of record, as envisaged under Article 215 of the Constitution, has inherent power to correct its records and in fact has a duty to itself to keep all its record correctly and in accordance with law and, therefore, if any apparent error is noticed by the High Court in respect of any order passed by it, the High Court has not only a power, but a duty to correct it. Relevant observations of the Hon'ble Apex Court as they appear in paragraphs no.14, 15, 16 and 17 are reproduced thus :

“14. The High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A Court of record envelopes all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High

Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regard is plenary. In Naresh Shridhar Mirajkar & Ors. v. State of Maharashtra³ a nine Judge Bench of this Court has recognised the aforesaid superior status of the High Court as a court of plenary jurisdiction being a court of record.

15. *In Halsbury's Laws of England (4th Edn. Vol.10, para 713) it is stated thus :*

"The chief distinctions between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court. An objection to the jurisdiction of one of the superior courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is unnecessary. The High Court, for example, is a court of universal jurisdiction and superintendency in certain

classes of actions, and cannot be deprived of its ascendancy by showing that some other court could have entertained the particular action."

(Though the above reference is to English Courts the principle would squarely apply to the superior courts in India also.)

16. Referring to the said passage and relying on the decision of this Court in *Naresh Shridhar Mirajkar*³ a two Judge Bench of this Court in *M.V. Elisabeth v. Harwan Investment & Trading (P) Ltd*⁴ has observed thus : (AIR Headnote)

"The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction...."

17. *If such power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record."*

8. It is clear from the decision of the Hon'ble Apex Court

in the aforestated case that the High Court being a Court of record has not only a power, but a duty to correct its order if any apparent error is noticed by it. Learned Senior Counsel for the applicants has also relied upon the case of ***Jain Studios Ltd*** (supra) in order to draw an analogy between the power of review of Hon'ble Apex Court under Article 137 and power of review of the High Court emanating from Article 215 of the Constitution of India. I do not think that any such analogy can be drawn as the power under Article 137 is specific and is made available only to Hon'ble Apex Court.

9. Learned Senior Counsel for the applicants has further submitted that exclusion of jurisdiction of a Court by a Statute can be only by express words in the Statute and cannot be easily inferred. He places his reliance upon the case of ***ITI Ltd*** (supra). In this case, Hon'ble Apex Court held that exclusion of jurisdiction by a Statute can be only by express words and cannot be easily inferred from the scope of the jurisdiction of Civil Court to decide disputes between the parties under Section 9 of the Code of Civil Procedure. Since the observations have been made in the context of Section 9 of C.P.C., same could not be pressed into service for interpreting the powers of High Court as Court of record under

Article 215 of the Constitution of India.

10. In the case of ***Ganesh Trading Co.*** (supra), the learned Single Judge of this Court by following the law laid down in the case of ***Naresh Sridhar Mirajkar Vs. State of Maharashtra***; AIR 1967 SC 1 held that the High Court, being a court of record, is superior Court, which itself is competent to determine the scope of its jurisdiction and would also have the duty to itself to keep all its record correctly and as such, would have the power to correct any apparent errors if noticed in its orders. This case again shows that even though in the Act, 1996 no express power to review is conferred upon the High Court, same would not be taken away from the High Court in view of the fact that the High Court, being a Court of record in view of Article 215 of the Constitution of India, is a superior court having a duty to itself to keep its record correctly and in accordance with law and has inherent power to correct an apparent error, if noticed in its order.

11. Learned Counsel for the respondent has submitted that the view taken by the learned Single Judge of this Court in the case of ***Pawar Co. Vs. Godavari Marathwada Irrigation***

Development Corporation (RA No.25/2015 dated 03/08/2015) that the High Court, as a court of record, has a duty to itself to keep its record correctly and in accordance with law and thus would have power to review its own decision for correcting any apparent error, has been stayed by the Hon'ble Apex Court in the Special Leave Petition No.27015/2015 on 05/10/2015. No doubt, Hon'ble Apex Court has granted stay to the operation and implementation of the judgment in the case **Pawar Co.** (supra), but, the stay is only to the operation and implementation of that judgment, which has been impugned in SLP No.27015/2015. The stay order does not say anything about the view expressed by the learned Single Judge of this Court while rendering the judgment. Therefore, as of now, the position would be the one clarified by the Hon'ble Apex Court in the case of **M. M. Thomas** (supra).

12. In the cases of **Kapra Majdoor Ekta Union** (supra) and also **Kalabharati Advertising** (supra), the Hon'ble Apex Court held that in the absence of express provision conferring power of review on the Tribunal or the Corporation, the Tribunal or the Corporation would have no power to review its own decision and that such a jurisdiction cannot be conferred on it by the Court or consent of the parties. It is obvious that this principle of law

has been made applicable to a Tribunal or a Corporation and not to the High Court and, therefore, would not be applicable to the facts of the present case.

13. In the case of **Conros Steel Pvt. Ltd.** (supra), Full Bench of this Court held that the Act, 1996 is an exhaustive and comprehensive code which determines extent of judicial intervention, as provided under Section 5 of the Act, 1996 which reads thus :

“5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

According to learned Counsel for the respondent, it can be inferred from the above observations that the power of review has been expressly taken away from the High Court by the Act, 1996. With respect, I must say, such an interpretation cannot be assigned to the said observations of the Full Bench of this Court as what has been said is only about the nature and extent of the powers conferred under the Act, 1996 and nothing has been

said about exclusion of inherent jurisdiction of High Court in view of the provision of Article 215 of the Constitution of India.

14. The sum and substance of the above discussion is that it would have to be held that this Court does have the power to review its own decision taken under the provisions of the Act, 1996, if any apparent error is noticed therein. The reason being that this Court is a court of record, possessed of inherent power, and is fastened with a duty to itself to keep all its records correctly and in accordance with law. The objection regarding maintainability of the present application is, therefore, rejected.

15. Now, the next question that arises for consideration is- Is there any apparent error in the judgment of this Court dated 07/08/2015, which requires correction ? Learned Senior Counsel for the applicants submits that if there is a mistake or error apparent on the face of record one of the examples of which is that an argument on material aspect though advanced but was not dealt with, a review application would lie and must result in it's being allowed. There can be no doubt about this submission as it reflects settled position of law as can be seen from the cases of ***Moran Mar Basselios Catholicos and another Vs. Most Rev. Mar Poulose Athanasius & Others***; AIR 1954 SC 526 and ***Smt.***

Meera Bhanja (supra). However, I must say, there are some limitations on the exercise of power of review. It is not permissible for the reviewing court to re-appreciate the evidence and sit in appeal over the finding reached by the earlier Bench. The other limitation is related to what should be considered to be an error apparent on the face of the record. An error is apparent when it is seen manifestly from the record without the court being required to look for it by minutely examining the record. The mistake should be glaring and clear, which strikes once mind without making any special efforts. Now, bearing in mind these principles of law governing the exercise of power of review of this Court that we would have to consider the judgment sought to be reviewed by the applicants.

16. Learned Senior Counsel submits that though the argument relating to the agreement between the parties in 2009 being void has been reproduced in the judgment of this Court, same has not been dealt with properly and only discussion that has been made in respect of that argument is in few lines appearing in paragraph 24. According to him, thrust of the argument was that the agreement was void in view of the judgment of the Hon'ble Supreme Court in **Goa Foundation** (supra) and, therefore, the

benefit of Section 65 of the Indian Contract Act should deservedly have gone to the applicants and as such the applicants could not have been directed to pay any interest on the advantage that they received under the agreement, which advantage only, it was in the sum of Rs.9.1 Crores in this case, was liable to be directed to be returned to the respondent. But, learned Senior Counsel submits, this Court rejected the argument on the ground that the agreement was not void because there was no common mistake of fact. He further submits that on an erroneous assumption that there was no common mistake of fact, this Court refused to give benefit of Section 65 of the Indian Contract Act and thus erred in not applying the ratio of the cases of ***Life Insurance Corporation of India Vs. Rajmata Saheb Chowhanji and others***; (1978)3 SCC 244 and ***Mt. Rani Kunwar Vs. Mahbub Baksh***; AIR 1930 All 252. According to learned Counsel for the respondent, learned Single Judge, after considering the said argument of the applicants, has, rightly or wrongly, held that the agreement in question is not void and, therefore, this cannot be considered to be an error apparent on the face of record.

17. It is true that while dealing with the argument of the agreement being void by virtue of the decision of Hon'ble Apex

Court in the case of **Goa Foundation** (supra), this Court primarily considered the said agreement from the view point of common mistake of fact between the parties which was only an alternate argument. But at the same time, it cannot be ignored that this Court has also considered a relevant fact which is of the judgment in **Goa Foundation** (supra) having been rendered at a time, it was rendered on 21/04/2014, when the application under Section 34 was pending before the learned District Judge. This Court, thus, found that second part of the agreement to pay an amount of Rs.12.26 Crores with interest was clearly segregable even assuming that first part became unenforceable on account of mining ban. It was in this context that this Court found that the view taken by the learned Arbitrator was plausible .

18. This would only show that this Court has considered the contention of the applicants regarding the agreement becoming void on the said ground and made it's conclusions. Once it is found that the contention has been specifically dealt with and conclusions arrived at in a decision, there would not be any error apparent on the face of record of the decision. If the conclusions, in the opinion of the party, do not arise or are incorrect, same would be the subject matter of appeal and not the

procedural review. This is what has happened in the present case, which would take the review of the decision of this Court dated 07/08/2015 away from the pale of power of review of this Court emanating from Article 215 of the Constitution of India.

19. It is also submitted by learned Senior Counsel that if the contention that the agreement was void had been accepted by this Court, even the arbitration proceedings based on it would have been rendered void, by relying on the judgment in ***Jaikishan Dass Mull*** (supra). In view of what I have already found earlier, the said argument is now no longer open for consideration of this Court or otherwise it would amount to sitting in appeal over its own decision.

20. Reliance has also been placed by the applicants on the case of ***Rajasthan Housing Board*** (supra). I find that this case being on the provisions of Land Acquisition and Tenancy Laws, holds no relevance to the issues involved in the present application.

21. In the result, the review application stands dismissed.
No costs.

S. B. SHUKRE, J.

SMA