

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****REVIEW PETITION (L) NO.6 OF 2015****IN****COMPANY APPEAL (L) NO. 10 OF 2015****IN****CLB COMPANY APPLICATION NO. 296 OF 2014****IN****CLB COMPANY PETITION NO. 13 OF 2012.**

Supermax Personal Care Pvt. Ltd.

... Petitioner

vs.

Vidyut Metallics Pvt. Ltd. and Ors.

...Respondents

Mr. Rohit Kapadia, Senior Advocate along with Mr. A. Bookwala, Senior Advocate, Mr. Ashish Kamat, Mr. Ankit Lohia, Mr. Krishnava Dutt, Mr. Ranjit Shetty, Mr. Rohan Agrawal and Ms. Aastha Roy, instructed by M/s. Argus Partners, for the Petitioner.

Mr. Aspi Chinoy, Senior Advocate, along with Mr. Mustafa Doctor, Senior Advocate, Mr. Rohaan Cama, Mr. Rohan Dakshini, Ms. Shweta Jaydev, Mr. Prakhar Parekh and Mr. Ashwin Bhadang, instructed by M/s. Federal & Rashmikan, for the Respondent Nos. 1 and 2.

CORAM: S. J. KATHAWALLA, J.

Date: 7th January, 2016

P.C.

1. By the above Review Petition, the Petitioner – Original Appellant –Supermax Personal Care Private Limited ('SPCPL')

has prayed that the impugned order dated 30th November, 2015 passed in Company Appeal (L) No. 10 of 2015 be recalled, reviewed and set aside.

2. Admittedly, after the Judgment was passed/pronounced on 30th November, 2015, SPCPL had filed a Special Leave Petition being No. 33769 of 2015 in the Hon'ble Supreme Court, which was dismissed by an Order dated 3rd December, 2015. The said Order is reproduced hereunder:

"Heard Learned Senior Counsel for the Petitioner.

No ground for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petition is accordingly dismissed.

As a sequel to the above, pending Interlocutory Applications stand disposed of.

In case some submission was pressed by the Petitioner before the High Court, and the same has not been noticed by the High Court in the impugned order, it shall be open to the Petitioner to avail all its remedy in accordance with law."

3. From the above Order, it appears that on 3rd December, 2015, a submission was made on behalf of the

Petitioner/Original Appellant before the Hon'ble Supreme Court of India that some submission/s pressed by the Petitioner before the High Court have not been noted by the High Court in the impugned order. However, the Learned Senior Advocate appearing for SPCPL, has today informed the Court that the present Petition is not taken out/filed by SPCPL on the ground that some submission/s was/were pressed by the Petitioner before this Court, and the same had not been noted by this Court, but the above Petition is taken out by the Petitioner as it is seeking review of the impugned order dated 30th November, 2015, under Order 47 of the Code of Civil Procedure, 1908.

4. The Hon'ble Supreme Court of India has in the case of *N. Anantha Reddy vs. Anshru Kathuria and others*¹ considered the scope of the review jurisdiction of the High Court. Paragraph 6 of the said Judgment is relevant and therefore reproduced hereunder:

“ 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

¹ (2013) 15 SCC 534

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."

In the case of *Kamlesh Verma vs. Mayayawati and others*² the Hon'ble Supreme Court once again considered and explained the scope of a review petition. Paragraph 12 of the Judgment in reads thus:

"12. This court has repeatedly held in various judgments that the jurisdiction and scope of review is not that of an appeal and, it can be entertained only if there is an error apparent on the face of the record. A mere repetition through different counsel, of old and overruled arguments, a second trip over ineffectually covered grounds or minor mistakes of inconsequential import are obviously insufficient. This court in Sow Chandra Kante v. Sk. Habib held as under : (SCC p. 675, para 1)

"1. Mr. Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we

² (2013) 8 SCC 320

refused special leave thus making out that a review proceeding virtually amounts to a rehearing. May be, we were not right in refusing special leave in the first round ; but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the precious public time lost with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in

the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except a couple of rulings on point earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

5. The first submission advanced on behalf of SPCPL is that this Court had not considered the issue raised by SPCPL that the Company Law Board ("CLB") erred in passing the Order dated 2nd February, 2015, in Company Application No. 296 of 2014 in respect of properties which form the subject matter of an Arbitration Agreement, including Arbitration Petition (L) No. 55 of 2015, filed under the provisions of Section 9 of the Arbitration and Conciliation Act, 1996, before this Court. Therefore the most fundamental and basic issue on the arbitrability of the disputes pertaining to the properties under

Appeal, thereby excluding the jurisdiction of the CLB, is conspicuously absent in the conclusion and reasoning of the impugned order.

5.1 As regards the above submission, Mr. Chinoy, Learned Senior Advocate appearing for Respondent No. 1 – Vidyut Metallica Pvt. Ltd. ('VMPL') and Respondent No.2 – Rajendra K. Malhotra ('RKM') inter alia submitted that it was not urged by the Counsel for SPCPL before this Court that in view of the Arbitration Clause in the Business Transfer Agreement ('BTA'), CLB could not have passed its order. The Appellant's written submissions at para 4.1 (Pg. 8) only record that the Appeal filed has inter alia raised the said issue, but does not contend that any such submission/contention had in fact been urged, nor do the written submissions in fact deal with the same. Mr. Chinoy submitted that in any event no question arises of the jurisdiction of the CLB being excluded by the Arbitration Clause in the BTA, inasmuch as SPCPL was not even a party to the CLB proceedings and the order of the CLB was directed towards ensuring that the New Directors secure charge of the Company's properties. Mr. Chinoy submitted that the Appeal

was filed by SPCPL against the CLB's order by falsely contending for the first time that it was allegedly in possession of Plant No. 2 – a claim which has been held to be both false and mala fide by the said Judgment dated 30th November, 2015. Mr. Chinoy submitted that the above contention raised by SPCPL in the Review Petition therefore deserves to be rejected.

5.2 In my view, Mr. Chinoy is correct in his submissions. Since at the hearing of the Appeal it was not contended/urged by the Counsel for SPCPL that the CLB could/should not have passed its order in view of the Arbitration Clause in the BTA between SPCPL and VMPL, there is no question of the Judgment not having considered the same.

5.3 In fact SPCPL itself in the Appeal filed before this Court raised the issue of its possession in respect of Plant No. 2 by virtue of the BTA dated 30th December, 2010 and the Supplementary BTA dated 18th March, 2011. After considering the detailed arguments of both the parties including SPCPL qua the alleged possession of SPCPL in regard to Plant No.2, this Court by its Judgment dated 30th November, 2015 held that the

claim of SPCPL qua its possession of Plant No. 2 is both false and mala fide. Despite the above, SPCPL filed a Special Leave Petition before the Hon'ble Supreme Court inter alia on the ground that the High Court in its jurisdiction under Section 10-F of the Companies Act erred in going into the issues of interpretation of BTA which contain an arbitration clause and in respect of which an Arbitration Petition under Section 9 of the Arbitration and Conciliation Act, 1996, was pending. After the SLP was dismissed on 3rd December, 2015, SPCPL has moved the present Review Petition inter alia contending that this Court had not considered the issue raised by SPCPL that the CLB erred in passing the order in respect of the properties which form the subject matter of an Arbitration Agreement.

5.4 As stated earlier, SPCPL has at the hearing of the Appeal not contended that the CLB could not have passed this Order in view of the Arbitration Clause in the BTA between SPCPL and VMPL.

Therefore the first submission advanced by SPCPL in the Review Petition is rejected.

6. The second contention of SPCPL is that at no point of time has SPCPL ever averred or submitted that SPCPL is not controlled by Rakesh Malhotra. Therefore there is evidently an apparent error on the face of the record when this Court has held that the Petitioner has made a statement that it is not controlled by Rakesh Malhotra.

6.1 The above submission advanced on behalf of SPCPL cannot be accepted. In fact, when VMPL had submitted in its pleadings that SPCPL had failed to deny that Rakesh Malhotra is in control and management of the Appellant (SPCPL), SPCPL in its written submissions (para 6.5 Note 1) dealt with the said submission of VMPL by reiterating that, “ *none of the members [directors] of the RKM family are on the board of directors of the Appellant*” and that “*the Appellant was not concerned with the family disputes between members of the RKM family*”.

6.2 Again, when VMPL/RKM had in their written submissions pointed out that Rakesh Malhotra had in the SLP preferred by him against the Judgment and Order dated 12th/20th August, 2014, categorically affirmed/stated that he “*is in control of the*

newly formed Indian Company called Supermax Personal Care Ltd.” [Para (1) (c) – Pg. 2 and para (III) (A) (iii) – Pg. 6/7 and extracted in Para 5.15 of the Judgment], SPCPL had in its further written submissions in fact sought to distance itself from the said statement/admission by alleging that, “the Appellant is not bound by any grounds raised by Rakesh Malhotra Respondent No. 2 herein) in the Special Leave Petition” (Para 2 Pg. 2).

6.3 In fact, even in the present Review Petition, SPCPL has once again alleged that its Appeal has nothing to do with the personal disputes of Rakesh Malhotra with his father RKM and that SPCPL had not “*filed the Appeal at the instance of Rakesh Malhotra*”.

Therefore, the second submission/ contention of SPCPL also stands rejected.

7. SPCPL has in its third submission pointed out that the subject matter of the Appeal were three properties, viz. Plant No.2, Peeco Plant and Panama Quarters. It submitted that it is true that no argument was submitted on behalf of SPCPL before this Court pertaining to Peeco Plant and Panama Quarters.

However, it is submitted that no submissions were made by SPCPL qua the Peeco Plant and Panama Quarters since VMPL/RKM did not dispute the case of SPCPL.

7.1 Mr. Chinoy, the Learned Senior Advocate appearing for VMPL/RKM has correctly submitted that SPCPL's contention that VMPL/RKM did not dispute the case of SPCPL's claim to possession of the Peeco Plant and Panama Quarters is belied by the pleadings on record.

7.2 In the VMPL/RKM's Additional Affidavit dated 9th February, 2015 filed in the Appeal, VMPL/RKM had categorically pointed out that, *"the Panama quarters is not transferred to SPCPL under the BTA and remains the exclusive property of the Respondent No. 1 Company/VMPL..... It is denied that the Panama Quarters are or "was always in the possession of the Appellants" as has been falsely alleged. Significantly it is not even alleged as to how, when and from whom SPCPL allegedly got possession of the said property"* (Para 7). So also in the said Affidavit in para 8, the Respondents had specifically denied that, *"SPCPL is, or can be in possession of the said properties*

(Plant No.2, PEECO Plant, or the Panama Staff Quarters.”.

7.3 In its Affidavit-in-Rejoinder dated 24th February, 2015, SPCPL had in fact alleged that, *“in the first & second affidavit, Respondent No.1 has falsely alleged that Respondent No. 1 is in possession of Plant No.2, Panama Quarters & other properties which form a part of the BTA dated 30th Dec. 2010”* and that it was allegedly *“impermissible in this Appeal for Respondent No. 1 to allege possession of Plant No.2, Panama Quarters or any other property”.*

7.4 In its Affidavit-in-Sur-Rejoinder dated 24th February, 2015, it had been specifically pointed out by VMPL that Rakesh Malhotra in his Affidavit dated 4th September, 2014, filed in the UK Court had listed *“VMPL's Plant No.2, Peeco Plant & Staff Quarters”* as being in possession of VMPL.

7.5 Despite VMPL having repeatedly taken the stand in the above Appeal that SPCPL is not in possession of Plant No.2, Peeco Plant or the Panama Staff Quarters, SPCPL admittedly advanced no arguments/case regarding the Peeco Plant and Panama Staff Quarters either orally or even in their written

submissions. Accordingly, there was no occasion for this Court to deal with the same in its Judgment.

7.6 SPCPL has also made a grievance that in Company Application (L) No. 76 of 2015, VMPL/RKM had proceeded on the basis that the Peeco Plant and Panama Staff Quarters were not the subject matter of SPCPL's Appeal. The Appeal was filed by SPCPL. According to SPCPL the Appeal filed by it included Plant No. 1, Peeco Plant and Panama Staff Quarters. SPCPL therefore cannot rely on the view of VMPL/RKM qua the subject matter of the Appeal and contend that it advanced no arguments before this Court as regards Peeco Plant and Panama Quarters merely because VMPL contended that the Peeco Plant and Panama Quarters were not the subject matter of SPCPL's Appeal. As set out earlier, VMPL/RKM had repeatedly stated in their Affidavits that SPCPL is not in possession of the Peeco Plant and Panama Staff Quarters. Despite that, SPCPL admittedly advanced no argument/case regarding Peeco Plant and Panama Staff Quarters and therefore raising a grievance at this stage i.e. in the Review Petition would lend no assistance to SPCPL.

Therefore the third submission of SPCPL is also rejected.

8. The above Review Petition was filed in Court on 14th December, 2015. However, in the said Petition no grievance is made qua the observations of this Court with regard to licenses in respect of Plant No.2 in the Order dated 30th November, 2015 or the Court not having appointed a Commissioner to visit Plant No.2 to verify as to who was in possession of the same.

8.1 Today after the above three submissions are made, Mr. Rohit Kapadia, the Learned Senior Advocate appearing for SPCPL tenders a draft amendment and seeks to amend the Review Petition to include SPCPL's submissions qua the observations of this Court pertaining to transferable licenses of Plant No. 2, as well as non-appointment of a Commissioner to visit Plant No.2 and verify as to who was actually in possession of the same.

8.2 Mr. Kapadia on behalf of SPCPL submitted that in paragraph 10 at page 58 of the impugned order this Court has held that, *"In fact, though Clause 1.1.4 (viii) of the BTA included in "Business Assets" all the transferable licenses*

including licenses pertaining to Plant No. 2 , the same was consciously deleted in the Supplemental BTA". It is submitted that there is no provision whatsoever in the Supplemental BTA whereby Clause 1.1.4 (viii) of the BTA has been amended/modified in any manner. It is submitted that Part II of Annexure 7 of the BTA was amended by the Supplemental BTA and not Annexure-1 Part L of the BTA.

8.3 SPCPL had in para 6.2 of its Written Submissions inter alia set out that the Transferable Licenses for carrying on the Business include licenses in respect of Plant No. 2 (Annexure-1 Part L at Pg. 178/C-3A). As set out in my Order dated 30th November, 2015, this Court had on two occasions placed the matter on Board to put its queries to the Advocates for the parties and get their response to the same. In fact, in a connected matter where Mr. Chinoy had appeared for VMPL/RKM and Mr. Ankit Lohia for SPCPL, Mr. Chinoy had enquired if I could tell them in advance the issues on which I needed their further response/

clarification, when Mr. Chinoy was informed that since SPCPL has given in detail its interpretation to several clauses of BTA, he should respond to the same, more particularly to SPCPL's contention that transferable licenses for carrying on the business include licenses in respect of Plant No.2 (Annexure-1 Part L of BTA, to which no response is found in the written submissions of VMPL/RKM. In fact, at that point of time Mr. Lohia in a lighter vein enquired whether SPCPL should treat the same as a compliment. The idea behind narrating this is that both VMPL/RKM and SPCPL were specifically put to notice that this Court would need further hearing on the issue of Transferable Licenses in respect of Plant No.2.

8.4 When the Counsel for the parties appeared before this Court at such further hearing, Mr. Chinoy, in response to one of my queries i.e. the query pertaining to the Transferable Licenses in respect of Plant No.2, took me through Clauses 1.1.4 (viii), 1.1.25, 5.1.3, 10.2 of the BTA

including Part L of Annexure 1 and Part I of Annexure 7 as well as Clause 2.2.25 of the Supplemental BTA, and submitted that a conjoint reading of the said Clauses shows that the obligation to transfer the licenses by VMPL in favour of SPCPL in respect of Plant No. 2 itself was deleted. At that stage, this argument of Mr. Chinoy was not dealt with or disputed by the Advocates appearing for SPCPL. An attempt is now being made for the first time to re-argue this issue through a Senior Advocate appearing for the first time in this matter which cannot be allowed. It is also pertinent to note that the statement in the order as quoted by SPCPL does not mean that the Court proceeded on the ground that Clause 1.1.4 (viii) of the BTA has been amended by the Supplemental BTA. What is meant by the Court is that the obligation to transfer licenses in respect of Plant No. 2 was deleted. This was stated in view of the submissions made by Mr. Chinoy which were not disputed by SPCPL.

9. Lastly, Mr. Kapadia, the Learned Senior Advocate appearing for SPCPL, submitted that despite a submission being made before this Court that a Commissioner be appointed to visit Plant No.2 and determine as to who is in actual possession of Plant No.2, this Court has failed to appoint one in its Judgment dated 30th November, 2015.

9.1 As set out in the Order dated 30th November, 2015, the employees deputed by SPCPL were working in VMPL's Plant No. 2 as agreed under the Secondment Agreement dated 18th March, 2011. Two Directors of VMPL, viz. Vyas and Chaudhari, were supervising the work carried out by the employees seconded/deputed by SPCPL to Plant No.2. The said Directors had made a statement before the CLB that they have stopped acting as the Directors of VMPL since November, 2014. The question of appointing a Commissioner to visit Plant No. 2 and give a report as to who is in possession of the same did not arise because admittedly the employees deputed by SPCPL were working in Plant No.2 on equipments leased by SPCPL to VMPL and the Directors of VMPL supervising the work under the Secondment Agreement dated 18th March, 2011 were not

attending to the same since November, 2014. If a Commissioner would have been deputed the only thing that he would see and note was that the workers deputed by SPCPL under the Secondment Agreement at VMPL's Plant No. 2 were carrying out the job work activities at Plant No.2. It is for this reason that it is recorded in paragraph 13 of the Order dated 30th November, 2015 as follows:

"In the circumstances, as correctly submitted by Mr. Chinoy, the fact that SPCPL's employees who were seconded/deputed to VMPL under the Secondment Agreement are operating VMPL's Plant No.2 or that SPCPL has been paying the wages/statutory dues of such seconded employees or that such deputed/seconed employees wear the uniform of SPCPL or the affidavits filed by such deputed employees, does not and cannot mean that SPCPL is either in possession or in control of VMPL."

The grievances made by SPCPL in this regard therefore cannot be entertained.

10. In the circumstances, the above Review Petition is rejected with costs.

(S.J. KATHAWALLA, J.)