IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO.1 OF 2009

IN

ARBITRATION APPEAL NO.19 OF 2008

Madhusudan Goswami … Petitioner
Vs.
STCI Commodities Limited and another … Respondents

Mr. Ram Upadhyay i/b. Law Competere Consultus for Petitioner.
Mr. M. K. Jariwalla i/b. R. K. Asso. for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JULY 14, 2017

P.C. :

Heard Mr. Upadhyay, learned Counsel for the petitioner and Mr. Jariwalla, learned Counsel for the respondent No.1 at length.

2. By this Petition under Section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), petitioner has sought review of the order dated 09.01.2009 passed by this Court in Arbitration Appeal No.19 of 2008. By that order, the proceedings instituted by the petitioner as Arbitration Appeal were dismissed on the ground of maintainability.

3. In support of this Petition, Mr. Upadhyay invited my attention to Arbitration Appeal No.19 of 2008, and in particular cause title as also heading of the appeal. He submitted that the cause title though described the proceedings as 'Arbitration Appeal', petitioner herein was described as 'petitioner'. The heading also was that the 'proceeding is filed under Section 34 of the Act'. He, therefore, submitted that there is error on the face of the record in treating the Arbitration Petition /

Application as an Appeal under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Act'). He, therefore, submitted that this is a fit case for exercising powers under Section 114 read with Order XLVII thereby recalling the order dated 09.01.2009. In support of this proposition, he relied upon the decision of the Apex Court in the case of ***Chairman & Managing Director, Central Bank of India and others Vs. Central Bank of India SC/ST Employees Welfare Association & others***, **AIR 2006 SC 326**, and in particular paragraph 9 where the Apex Court reproduced paragraph 25 of ***State of Rajasthan Vs. Surendra Mohnot***, **(2014) 14 SCC 77** as also paragraphs 13 and 14. In paragraph 14, the Apex Court referred to its earlier decision in ***S. Nagaraj Vs. State of Karnataka***, **1993 Supp (4) SCC 595**. Relying upon these decisions, Mr. Upadhyay submitted that an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. In paragraph 14, the Apex Court reproduced paragraph 18 of **S. Nagaraj** (*supra*) wherein it was observed that justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone.

4. I have considered the submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the proceedings filed by the petitioner shows that petitioner has described the proceedings as 'Arbitration Appeal'. It is no doubt true that petitioner was described as petitioner in the appeal and the heading of the proceeding also was that the proceeding is filed under Section 34 of the Act. A perusal of paragraph 1 shows that petitioner has contended that this appeal is being made under Section 34 of the Act for setting aside the impugned award. In paragraphs 2, 4 to 8 and 10,

even in the grounds in paragraph 11, petitioner has described himself as 'appellant'. The matter was heard before this Court on 09.01.2009 when the following order was passed:

> "An appeal under the Arbitration and Conciliation Act, 1996 has been filed in order to challenge an arbitral award dated 12th March, 2008 of the Arbitral Tribunal. In view of the provisions of section 34, an appeal would not be maintainable for the purposes of challenging the arbitral award since under the provisions of section 37 of the Act, an appeal lies against the original decree of the Court setting aside or refusing to set aside the arbitral award under section 34. The Arbitration Appeal is accordingly disposed of on the ground that it is not maintainable leaving it open to the appellant to take recourse to such remedies as are available in law. In the event the appellant does so, all questions including the question of limitation are kept open."

5. A perusal of the above extracted order shows that this Court proceeded on the premise that petitioner has instituted Arbitration Appeal under Section 34 of the Act. It is relevant to note that this Court disposed of the appeal on the ground of maintainability and granted liberty to the petitioner to take recourse to such remedies as are available in law. At the time of hearing of the appeal, petitioner did not request the Court to treat appeal as application / petition under Section 34. Petitioner's Advocate did not pray for converting appeal into Petition / Application. What is material to note is that by order under review, this Court permitted petitioner to take recourse to such remedies as are available in law. No explanation worth the name is coming as to why petitioner did not file Petition / Application under Section 34 of the Act. Even this Petition for seeking review of order dated 09.01.2009 is coming for admission in the year 2017. The explanation offered by the petitioner's Advocate is that the papers were misplaced cannot be accepted as petitioner could have reconstructed the proceedings.

6. During the course of hearing, in order to test bonafides of the

petitioner, I called upon Mr. Upadhyay to indicate as to whether petitioner is willing to deposit amount under the Award so that his request for recalling the order can be considered. This is in view of the fact that the award was made as far back as on 11.03.2008 and during the penency of the proceedings, the Act was amended with effect from 23.10.2015. Amended Section 36(2) lays down that where an application to set aside the arbitral award has been filed under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose. Sub-section (3) lays down that upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court, may subject to such conditions as it may deem fit, grant stay to the operation of such award for reasons to be recorded in writing. Proviso thereto lays down that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

7. Order XLI, Rule 1(3) of C.P.C. lays down that where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit. In the case of ***Bhogvati Sahakari Sakhar Vs. Chaugule and Sons***, **AIR 2003 Bom. 185**, in paragraph 10, the learned Single Judge of this Court observed that,

> 10. A judicial note, at this stage, can be taken that in our country it is said that it is easy to obtain decree but difficult to execute it. If the power under Order 41, Rule 1(3) of Civil Procedure Code is exercised by the Appellate Court, upon prima facie satisfaction; then, in that event, exercise of such

> power will result in realisation of the fruits of the decree. The provision made under Order 41, Rule 1(3) of Civil Procedure Code appears to be in public interest with intention to shorten the length and width of the unnecessary litigation and to prevent multiplicity of the proceedings and at the same time to help the decree holder to realise the fruits of the decree obtained by him. This often not used provision needs to be activated and put into operation considering the flooded corridors of the Court which, in my view, would not only serve the ends of justice between the parties but serve the cause of administration of justice.

8. However, Mr. Upadhyay indicated that petitioner is not inclined to deposit the amount. He relied upon the decision in **Chairman & Managing Director, Central Bank of India** (*supra*). In this decision, the Apex Court has reiterated that an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. There is no dispute with this proposition. It cannot be said that there was any error in the order dated 09.01.2009. In fact, there was error in drafting the proceedings and even during the course of hearing of the appeal, no request was made for converting the appeal into Petition / Application under Section 34. No prayer was made for amending the proceedings and / or treating proceeding as Application / Petition under Section 34 of the Act. That apart, when the liberty was given to the petitioner to take recourse to appropriate proceedings, even that remedy is not availed of. The petitioner is not ready to deposit the amount under the award of 2008 in this Court even in the year 2017. This is a clear case of unjust enrichment on the part of the petitioner by retaining that amount and depriving successful party fruits of the litigation. Hence, no case is made out for invocation of powers under Section 114 read with Order XLVII of C.P.C. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)