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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 14th December, 2022

+ **ARB.P. 806/2017 & REVIEW PET. 416/2019**
JASMINE BUILDMART PRIVATE LIMITED Petitioner

Through: Mr. Ramesh Singh, Sr. Advocate
with Ms. Sheena Taqui, Ms.
Akansha Saini, Mr. Dhvanit
Chopra, Ms. Bina Gupta & Mr.
Shiv Vinayak Gupta, Advocates.

versus

AHLUWALIA CONTRACTS (INDIA) LIMITED

..... Respondent

Through: Mr. Anil K. Airi, Sr. Advocate
with Mr. Sunil Mund, Mr. Mudit
Ruhella & Mr. Mritunjay K.
Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

REVIEW PET. 416/2019

1. This review petition has been filed by the petitioner seeking review of the order dated 16.04.2019 passed by this Court, dismissing the petition filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking appointment of an Arbitrator on the ground that as the parties have arrived at a settlement of *inter-se* claims in relation to

the subject contract, the Arbitration Agreement contained therein no longer remains in existence and/or operative.

2. Before considering the merit of the contentions raised before this Court, I must note that the above order of this Court was challenged by the petitioner before the Supreme Court by way of a Special Leave Petition, being SLP (C) No.18969/2019. The said Special Leave Petition was disposed of by the Supreme Court vide its order dated 16.08.2019, observing as under:-

“Mr. Maninder Singh, learned senior counsel appearing for the petitioner, has prayed for withdrawal of this petition to file review before the High Court.

Without commenting on the aforesaid prayer, the special leave petition is dismissed as withdrawn, without liberty to question the same order again in this Court.”

3. The learned senior counsel for the respondent at the outset challenged the maintainability of the present review petition. He submitted that a power to review its own order is not granted to this Court by the Act. The Act being a self contained code, this Court cannot rely upon the general powers of review that are vested in the High Court. In support of his submission, the learned senior counsel for the respondent has placed reliance on the judgment of the High Court of Bombay in ***Antikeros Shipping Corporation v. Adani Enterprises Ltd., Mumbai***, 2020 SCC OnLine Bom 277
4. On the other hand, the learned senior counsel for the petitioner places reliance on the judgment of the Supreme Court in ***Municipal Corporation of Greater Mumbai And Another v. Pratibha Industries Limited and Others***, (2019) 3 SCC 203, to submit that

Supreme Court has held that the High Court, being a Court of record, would have the power to recall its order once it is found to be without jurisdiction or as suffering from an error apparent on the face of the record. Further, placing reliance on the judgment of the Supreme Court in *Union of India v. Namit Sharma*, (2013) 10 SCC 359, he submits that where the order is against the statute or law settled by the Supreme Court, the same is liable to be reviewed by the Court.

5. On this issue, in the rejoinder, the learned senior counsel for the respondent has placed reliance on the judgment of the Supreme Court in *Budhia Swain and Others v. Gopinath Deb and Others* (1999) 4 SCC 396; and *Asit Kumar Kar v. State of West Bengal and Others*, (2009) 2 SCC 703, to submit that the judgment of *Pratibha Industries Limited and Others* (*supra*) was not only considered and distinguished by the High Court of Bombay in *Antikeros Shipping Corporation* (*supra*), but even otherwise, is not applicable as there is a distinction between the power of review and the power of recall of an order; the power of review would allow the Court to consider the merits of the claim raised and to determine if there is any error apparent on the face of the record, whereas, a power of recall can be exercised only where the Court finds that a procedural error has resulted in an illegality in the order. The learned senior counsel for the respondent submits that in the present case, there is no procedural irregularity committed by this Court and the decision of the Court was based on an appreciation of the submissions made. Even if such appreciation is erroneous, the

remedy of the petitioner would be in an appeal and not by way of recall of the order.

6. I have considered the submissions made by the learned senior counsel for the parties on this preliminary issue on the maintainability of the present Review Petition.
7. In ***Pratibha Industries Limited and Others*** (*supra*), the Supreme Court was considering the question of the power of the High Court to recall its orders. The Supreme Court, placing reliance on Article 215 of the Constitution of India, held that the High Court being a Constitutional Court and a Court of record shall have jurisdiction to recall its own order. The High Court of Bombay in ***Antikeros Shipping Corporation*** (*supra*) distinguished the above judgment, observing that in the case before it, the learned Single Judge had not exercised the powers vested in a Court but on the Chief Justice of the High Court or its delegate.
8. In my opinion, however, this issue need not detain this Court any further, as on merits, I find no case being made out by the petitioner for review/recall of the order dated 16.04.2019 of this Court.
9. At the outset, it needs no emphasis that under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), a review of an order can be sought only:
 - (a) where the applicant shows that it has discovered new and important matter or evidence which, after the exercise of due diligence was not within its knowledge or could not be produced by it at the time when the order was passed; or

- (b) on account of some mistake or error apparent on the face of the record; or
- (c) for any other sufficient reason.

10. Though the words ‘sufficient reason’ are wide enough to include a misconception of fact or law by a court, a mere erroneous decision *per se* is not a ground to review an order; the remedy there-against is only by questioning the said order in an appeal.
11. In the present review petition, the petitioner prays for recall of the order dated 16.04.2019 of this Court by contending that the settlement agreement arrived at between the parties before the learned National Company Law Tribunal (hereinafter referred to as the ‘NCLT’) was confined to only the two Running Account Bills that were in dispute before the learned NCLT. It was for that reason that the settlement agreement did not mention the invocation of the Arbitration Agreement by the petitioner or required the petitioner to withdraw such invocation or the present Arbitration Petition, which was pending as on that date. The settlement agreement merely required the respondent to withdraw its petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘IBC’) that was pending before the NCLT.
12. The learned senior counsel for the petitioner, placing reliance on the judgment of the Supreme Court in ***Sanjiv Prakash v. Seema Kukreja and Others***, (2021) 9 SCC 732, submits that this Court while exercising its powers under Section 11 of the Act, cannot enter into a mini-trial or elaborate review of the facts and law to determine

whether the said settlement agreement would exhaust the Arbitration Agreement between the parties. This would be usurping the jurisdiction of the Arbitral Tribunal. Placing reliance on the judgment of the Supreme Court in *Gayatri Project Limited v. Sai Krishna Construction*, (2014) 13 SCC 638, the learned senior counsel for the petitioner submits that where there is a doubt on the interpretation and effect of the settlement agreement, the same deserves to be adjudicated by the Arbitral Tribunal. He submits that the petitioner has not invoked the Arbitration Agreement challenging the terms of the settlement agreement between the parties nor is it based on the settlement agreement, therefore, the effect or interpretation of the Settlement Agreement should have been left by this Court to be determined by the Arbitrator.

13. I do not find merit in the above submission of the learned senior counsel for the petitioner.
14. The petition under Section 11 of the Act was filed by the petitioner on 12.12.2017. The same was first listed before this Court on 14.12.2017, when notice thereupon was issued to the respondent. The order dated 16.03.2018 of this Court records that notice could not be issued to the respondent for want of Process Fee. Therefore, fresh notice was issued on that day to the respondent to be served by way of speed-post and approved couriers. The respondent thereafter, filed its reply to the petition, placing reliance on the settlement agreement dated 16.12.2017.
15. Upon hearing the parties, this Court passed the order dated 16.04.2019, observing as under:-

“6. I am unable to agree with the counsel for the petitioner. Settlement Agreement dated 16.12.2017 is admittedly also in relation to the agreement in question. It records the terms of the settlement and does not further state that any other disputes between the parties still survive or can be adjudicated in accordance with the dispute resolution mechanism as mentioned in the original agreement. Once a Settlement Agreement arrived at between the parties, the original contract stands novated and no longer survives including the Arbitration Agreement contained therein.

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9. In the present case, the parties have arrived at a Settlement Agreement in relation with the contract in question. In my opinion, there being no allegation that the Settlement Agreement is void or not validly executed for any reason, the petitioner cannot fall back on the Arbitration Agreement contained in the original contract between the parties, the same no longer being in existence.”

16. The petitioner challenged the above order before the Supreme Court by way of a Special Leave Petition (C) No.18969/2019, which was dismissed as withdrawn by the aforementioned order dated 16.08.2019. The petitioner then filed the present review petition.

17. In ***Vidya Drolia and Others v. Durga Trading Corporation*** (2021) 2 SCC 1, the Supreme Court, while holding that usually the Court should refer the parties to arbitration unless a party thereto has been able to establish a case of non-existence of a valid Arbitration Agreement, also observed that an absolute “hands off” approach would be counter-productive and harm arbitration as an alternative dispute resolution mechanism, and that effective intervention is acceptable as it does not obstruct but effectuates arbitration. An exercise of *prima facie* power of

judicial review as to the validity of the Arbitration Agreement would save costs and check harassment of objecting parties when there is clearly no justifiable and good reason not to accept plea of non-arbitrability. The exercise of the limited *prima facie* review does not in any way interfere with the principle of ‘kompetenz-kompetenz’ but ensures that vexatious and frivolous matters get over at the initial stage.

18. In ***Indian Oil Corporation v. NCC Limited***, 2022 SCC OnLine SC 896, the Supreme Court while deciding on the Court’s power to deal with the aspect of ‘accord and satisfaction’ of claims in a petition under Section 11 of the Act, has held as under:

“89....Therefore, even when it is observed and held that such an aspect with regard to ‘accord and satisfaction’ of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in the case of Vidya Drolia (supra). Therefore, in the facts and circumstances of the case, though it is specifically observed and held that aspects with regard to ‘accord and satisfaction’ of the claims can be considered by the Court at the stage of deciding Section 11(6) application, in the facts and circumstances of the case, the High Court has not committed any error in observing that aspects with regard to ‘accord and satisfaction’ of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal. However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of Sub-section (6-A) in Section 11 of the Arbitration Act, scope of inquiry by the Court in Section 11 petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which

is relatable to the disputes at hand. We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and on-arbitrability, the same can also be considered by the Court at the stage of deciding Section 11 application if the facts are very clear and glaring and in view of the specific clauses in the agreement binding between the parties, whether the dispute is non-arbitrable and/or it falls within the excepted clause. Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to 'accord and satisfaction' of the claims."

19. This Court, exercising such limited power of review found that with the settlement agreement being executed between the parties, there was no dispute left to be referred to arbitration. This view may be erroneous, but it is certainly not something which is lacking jurisdiction of this Court. Therefore, the judgment of the Supreme Court in **Namit Sharma** (*supra*) relied upon by the learned senior counsel for the petitioner, would not be applicable.

20. In the present case, the respondent had issued a notice dated 31.07.2017 under Section 8 of the IBC to the petitioner claiming an amount of Rs.11,71,13,713/- as the alleged undisputed outstanding amount owed by the petitioner. The petitioner, in its reply dated 12.08.2017 to the above notice, claimed that, in fact, it is the respondent who owes an amount of Rs.4,37,10,201/- to the petitioner. The petitioner thereafter, vide notice dated 10.11.2017, invoked the Arbitration Agreement between the parties, claiming the above amount.

21. In the settlement agreement, Clause (2) defines "subject matter of settlement" as under:-

“In relation to work order for works of Construction of Krrish Provence Estate (Structure and Finishing Work) at Sector 2, Gwal Pahari, Gurgaon, Haryana ("Provence") by JBPL and Work Order of Construction of Monde-De Housing (RCC Structure and Associated works) at Sector -2, Gwal Pahari, Gurgaon, Haryana ("Monde de Provence") by KRNPL.”

22. Therefore, the entire dispute with relation to *inter alia* the Work Order for construction of ‘Krrish Provence Estate Housing’, that is, the subject agreement, stood settled between the parties. The plea that the Settlement Agreement was in relation to only the two Running Account Bills that were subject matter of the petition filed by the respondent before the learned NCLT, therefore, cannot be accepted. In terms of the Settlement Agreement, the petitioner agreed to pay a sum of Rs.19.81 Crore to the respondent, which is beyond the claim of the respondent, clearly evidencing that the Settlement was not confined to the claim of the respondent before the learned NCLT, but was a holistic settlement of all disputes between the parties, including the claims of the petitioner against the respondent.

23. Faced with this situation, in the Review Petition filed before this Court, the petitioner asserted as under:

“10 That the proceedings initiated by the Respondent before the NCLT would constitute in terrorem proceedings which compelled the Petitioner to enter into a settlement in order to avoid the threat of initiation of Corporate Insolvency Resolution Process against the Petitioner under the provisions of IBC. The Residential project in issue in respect of which the disputes have risen is nearing completion and at the finishing stage, (OC has been applied for)

involving the interest of 176 home buyers. Any order under the IBC initiating Corporate Insolvency Resolution Process ("CIRP") would have been greatly detrimental to the Project "Krrish Provence Estate" home buyers as also the Petitioner. Hence, a limited settlement in respect of some running bills, which were inadvertently admitted by the Petitioner's staff, which led to the filing of the NCLT proceedings cannot foreclose the rights of the Petitioner against the Respondent Contractor arising under the Original Agreement."

(Emphasis Supplied)

24. On a query put to the learned senior counsel for the petitioner as to how a challenge to the Settlement Agreement can be referred to arbitration, the petitioner has now filed an additional affidavit dated 08.12.2022, reiterating that the settlement was entered into for the reasons stated in the above quoted paragraph and further stated as under:

"4. In any event and to obviate any doubt whatsoever, the petitioner states that they are not challenging the settlement dated 16.12.2017 entered between the parties in the insolvency proceedings before NCLT, which in turn was confined to the RA bills raised by the respondent on the petitioner.

5. That the Petitioner herein states that claims of the Petitioner company are de-horced the above stated settlement and for the claims relating to faulty construction and abandoning of work by the Respondent company on the project site of the Petitioner company, as a result of huge losses were incurred including several cases by the home buyers claiming compensation."

25. The petitioner therefore, tried to improve upon its case and has taken contradictory stand which cannot co-exist. The judgement of the Supreme Court in ***Gayatri Project Limited*** (*supra*) would not, therefore, come to the aid of the petitioner.

26. In *Sanjiv Prakash (supra)*, the Supreme Court, on the facts of that case, found that to test the objection of the respondent therein against the reference of the parties to arbitration, a detailed consideration of the clauses of the agreement together with surrounding circumstances in which these agreements were entered into would be required. It was on those facts that the Supreme Court observed that the High Court had erred in refusing to refer the parties to arbitration. In the present case, I, even on a *prima facie* perusal of the Settlement Agreement, find that the Arbitration Agreement stood discharged on execution of the Settlement Agreement. The remedy of the petitioner, if at all, shall be against the Settlement Agreement.

27. In view of the above, I find no merit in the present petition. The same is dismissed.

28. The petitioner shall pay costs of Rs.1 Lakh to the Delhi High Court Bar Clerk's Association.

NAVIN CHAWLA, J

DECEMBER 14, 2022/nc

Signature Not Verified

Digitally Signed By:RENUKA

NEGI

Signing Date:20.12.2022

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