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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**REVIEW PETITION (LODGING) NO. 51 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO. 376 OF 2017**

Kalpataru Power Transmission Ltd.,
a company incorporated under the
Companies Act, 1956, having its
registered office at Plot No.101,
Part III, GIDC Estate, Sector – 28,
Gandhinagar – 382028, Gujarat

... Petitioner

Versus

Maharashtra State Electricity Transmission Co. Ltd.,
a company incorporated under the
Companies Act, 1956, having its
office at 8th Floor, Prakashganga,
Plot No.C-19, E-Block, Bandra-Kurla
Complex, Bandra (E), Mumbai – 400 051

... Respondent

.....

Mr. Mustafa Doctor, Senior Counsel along with Mr. Rahul Lakhiani,
Mr.Yuvraj Singh and Ms. Isha Maniar i/by M/s. Desai & Diwanji for the
Petitioner.

Mr. A.Y. Sakhare, Senior Counsel along with Mr. Abhijeet Joshi and
Ms.Varsha Sawant for the Respondent.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 17th DECEMBER, 2019

PRONOUNCED ON : 21st JANUARY, 2020

JUDGMENT :

. Kalpataru Power Transmission Limited, the review petitioner
(original respondent) to the arbitration petition seeks recall of the judgment
and order dated 8th November, 2019 delivered by this Court in Commercial

Arbitration Petition No. 376 of 2017. The respondent in this review petition was the original petitioner and had impugned the arbitral award dated 6th January, 2017 passed by the Arbitral Tribunal. By a judgment dated 8th November, 2019, this Court had allowed the said Commercial Arbitration Petition and has set aside the impugned majority arbitral award dated 6th January, 2017 passed by the Arbitral Tribunal. Some of the relevant facts for the purpose of deciding this Review Petition and the clarifications sought in the praecipe dated 20th November, 2019 filed by the respondent herein are as under :-

2. It is not in dispute that the review petitioner had nominated Shri Ashwin Ankhad, advocate as its nominee arbitrator in view of the dispute having been arisen between the parties by invoking arbitration agreement. The respondent herein had appointed a former Chief Justice of Karnataka as presiding arbitrator. It is not in dispute that the learned arbitrator nominated by the petitioner herein did not file any statement of disclosure as contemplated under Section 12(1) of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act').

3. The respondent herein filed Commercial Arbitration Petition No. 376 of 2017 impugning the majority award dated 6th January, 2017 on various grounds. It was one of the contention of the respondent herein that learned arbitrator nominated by the petitioner herein was disqualified to act as

arbitrator in view of Section 12(5) of the Arbitration Act read with Fifth and Seventh Schedule. No disclosure as contemplated under Section 12(1) read with 12(5) was made by the learned arbitrator nominated by the petitioner herein. The respondent came to know about various interest of the learned arbitrator nominated by the respondent herein after declaration of the impugned award by the Arbitral Tribunal. Mr. Sakhare, learned senior counsel for the respondent at the outset raised a preliminary objection about maintainability of the Review Petition on the ground that Arbitration Act being a self contained code and there being no provision prescribing a remedy for seeking review under the Arbitration Act, in view of limited judicial intervention under Section 5 of the Arbitration Act, review petition filed by the petitioner herein seeking recall of the judgment dated 8th November, 2019 is not maintainable.

4. Learned senior counsel relied upon the judgment of Supreme Court in case of ***Kapra Mazdoor Ekta Union v/s. Birla Cotton Spinning and Weaving Mills Ltd. and Another, (2005) 13 SCC 777*** and in particular paragraphs 12, 13 and 17 to 19 and would submit that the Arbitration Act does not contain any provision granting power of review, expressly or by necessary implication. This review petition filed by the petitioner thus shall be dismissed on that ground alone. Learned senior counsel placed reliance on the judgment of this Court in case of ***Madhav Structural Engineering Ltd. v/s. Maharashtra State Road Development Corporation Ltd., 2013 (2)***

Mh.L.J. 372 and in particular paragraphs 10 and 15 in support of the submission that Arbitration Act being a self contained code and there being no provision providing for a review, the review petition filed by the petitioner herein deserves to be dismissed.

5. Learned senior counsel placed reliance on an unreported judgment of this Court delivered on 9th October, 2006 in Review Petition No. 24 of 2006 in Arbitration Petition No. 351 of 2005 in case of **M/s. Thanikkudam Bhagwati Mills Ltd. v/s. Mrs. Reena Ravindra Khona and Others** in support of the aforesaid submission.

6. Learned senior counsel for the respondent also invited my attention the some of the paragraphs of the affidavit in reply filed by his client and also the praecipe dated 20th November, 2019 filed by his client in the Commercial Arbitration Petition No. 376 of 2017 *inter-alia* praying that the statements/observation made by this Court in relation to the paragraph 14, 54 and 58 of the judgment dated 8th November, 2019 delivered in the said Commercial Arbitration Petition be deleted. It is submitted that those statements/observation made by this Court in those paragraphs did not form part of the pleadings of either the petitioner or the respondent.

7. Mr. Mustafa Doctor, learned senior counsel for the petitioner in this review petition responded to the preliminary objection raised by Mr.

Sakhare, learned senior counsel for the respondent and also dealt with the grounds raised in the review petition. In so far as the issue of maintainability raised by Mr. Sakhare, learned senior counsel for the respondent is concerned, he submits that the even according to the respondent the statements/observation made by this Court in paragraphs 14, 54 and 58 of the judgment dated 8th November, 2019 did not form part of the pleadings of either the petitioner or the respondent. He submits that the petitioner has thus rightly filed this Review Petition *inter-alia* praying for seeking recall of the judgment dated 8th November, 2019 delivered by this Court. Learned senior counsel strongly placed reliance on an unreported judgment of this Court delivered on 4th April, 2013 in case of ***Hindustan Construction Co. Ltd. v/s. State of Maharashtra*** in Review Petition No. 2 of 2013 and in particular paragraph nos. 6, 19, 20 to 26 and would submit that this Court while dealing with similar facts after considering various judgment of Supreme Court and this Court has held that the procedural review can be exercised by Court under the plenary jurisdiction.

8. It is submitted that the provisions of Code of Civil Procedure, 1908 can be applied to the proceedings in Court to the extent the provisions thereof are not inconsistent with the provisions of the Arbitration Act. None of the provisions of the Arbitration Act bars High Court from exercising power of procedural review by exercising plenary jurisdiction. It is submitted that the said judgment of this Court squarely applies to the facts of

this case and is binding on this Court. Learned senior counsel states that the Special Leave Petition filed by the State of Maharashtra arising out of the said judgment dated 4th April, 2013 delivered by this Court is already admitted by the Supreme Court and is pending for final disposal till date.

9. Learned senior counsel for the review petitioner placed reliance on the judgment of this Court in case of ***Satpal P. Malhotra and others v/s. Puneet Malhotra and others, 2013 SCC OnLine Bom 689*** and in particular paragraph 91 and would submit that this Court has held that the provisions of Code of Civil Procedure, 1908 would apply to the arbitration proceedings filed in the Court to the extent, it is not inconsistent with any of the provisions of the Arbitration Act. There is no bar under the provisions of Arbitration Act from applicability of the provisions of Code of Civil Procedure, 1908 to the arbitration proceedings filed in Court. He submits that this Court in the said judgment has rejected the submission of the appellant that right of filing cross-objection was not provided under Section 37 of the Arbitration Act and not having been provided, cross-objection would not be maintainable. This Court accordingly held that there was no bar under the provisions of Arbitration Act in maintainability of cross-objection. He submits that the said judgment delivered by this Court would apply to the facts of this case. Though there is no specific provision under the Arbitration Act for filing a review petition, since, there is no inconsistency in the provisions of the Arbitration Act and the Code of Civil

Procedure, 1908, in so far as the power of review of Court is concerned, this Court has ample power to entertain this review petition and in any event by exercising plenary jurisdiction.

10. Learned senior counsel for the petitioner placed reliance on the judgment of Supreme Court in case of ***Mahanagar Telephone Nigam Limited v/s. Applied Electronics Limited, (2017) 2 SCC 37*** and in particular paragraphs 1, 20 and 27. He submits that by the said judgment, a two Judge Bench has held that the judgment rendered by the Supreme Court in case of ***ITI Ltd. v/s. Siemens Public Communications Network Ltd., (2002) 5 SCC 510*** is a binding precedent. It is held that the said two Judge Bench in that matter was unable to follow the views expressed by the Supreme Court in case of ***ITI Ltd.*** (supra) as in their considered opinion, the said decision deserved to be reconsidered by a larger Bench. Learned senior counsel submits that the Supreme Court in that matter in case of ***ITI Ltd.*** (supra) had clearly held that though a remedy of revision is not provided under the provisions of Arbitration Act, remedy of revision under Section 115 of the Code of Civil Procedure, 1908 would be applicable and such application for revision under Section 115 would be maintainable even in absence of any such specific remedy available under the provisions of the Arbitration Act.

11. Mr. Sakhare, learned senior counsel for the respondents in his rejoinder arguments on the issue of maintainability raised by him tried to

distinguish the judgment of this Court in case of **Hindustan Construction Co. Ltd.** (supra) and would submit that no case is made out by the petitioner for seeking procedural review, in this case by exercising plenary jurisdiction. It is submitted that in any event, the civil appeal against the said judgment in case of **Hindustan Construction Co. Ltd.** (supra) is still pending before the Supreme Court.

12. In so far as the judgment of Supreme Court in case of **ITI Ltd.** (supra) relied upon by Mr. Doctor, learned senior counsel for the petitioner is concerned, Mr. Sakhare, learned senior counsel for the respondents submits that admittedly the said issue of maintainability of a revision application under Section 115 of the Code of Civil Procedure, 1908 has been already referred to the larger bench.

13. Learned senior counsel for the respondents once again strongly placed reliance on paragraphs 12, 14 and 17 to 19 of the judgment of Supreme Court in case of **Kapra Mazdoor Ekta Union** (supra) and would submit that a power of review is an inherent power and must be conferred either expressly or by necessary implication. There is difference between procedural review and an application seeking review of order on merits. Petitioner is directly or indirectly seeking review of the judgment delivered by this Court on merits and thus even if this Court has plenary jurisdiction to recall any order, such powers cannot be exercised by this Court in view of the petitioner seeking recall of the said judgment on merits of the matter.

14. Mr. Doctor, learned senior counsel for the petitioner in rejoinder on the issue of maintainability of this review petition submits that whether a review is procedural review or not, it is maintainable in view of there being no inconsistency between the provisions of Code of Civil Procedure, 1908 and the Arbitration and Conciliation Act, 1996. He invited my attention to various observations/findings of this Court in the said judgment dated 8th November, 2019 and in particular paragraphs 19, 20, 53, 54, 55 and 58 and would submit that all these observations/findings rendered by this Court in these paragraphs are based on incorrect facts. None of the parties had either pleaded or argued those facts across the bar that the son and daughter-in-law of the learned arbitrator nominated by the petitioner with relatives of any of the directors either of the petitioner or even Shouri Construction Private Ltd.

15. It is submitted that the daughter-in-law of the learned arbitrator nominated by the petitioner was not the daughter of any of the directors of those two companies nor the son of the learned arbitrator nominated by the petitioner was son-in-law of any of the directors of those two companies nor they were their relative in any manner whatsoever. He submits that these averments made in the review petition are not denied by the respondents. Even according to the respondents, some of the statements/observations made in those paragraphs were not part of the pleadings either of the petitioner or the respondents.

16. It is submitted by the learned senior counsel that the entire judgment delivered by this Court was mainly on the premise that the learned arbitrator nominated by the petitioner was disqualified on the ground that he did not disclose the relationship of its son and daughter-in-law with the Munot family who were some of the directors in the petitioner as well as the said Shouri Construction Private Ltd. He submits that the entire judgment shows apparent error which is based on an incorrect and factual premise that the son and daughter-in-law of the learned arbitrator nominated by the petitioner being relatives of the directors of a party to the proceedings and thus the learned arbitrator was disqualified. It is submitted by the learned senior counsel that on merits the finding rendered by this Court that the respondents herein did not issue further work orders is also factually incorrect.

17. Mr. Sakhare, learned senior counsel for the respondent does not dispute that the son and daughter-in-law of the learned arbitrator nominated by the review petitioner are not the relatives of the directors of the review petitioner as well as Shouri Construction Private Limited. He however invited my attention to the findings and observation made by this Court in paragraphs 51, 56, 74 to 76 and would submit that this Court has recorded various other reasons also in the said judgment as to how the learned arbitrator nominated by the review petitioner was disqualified under Section

12(1) and 12(5) to be read with grounds read with explanation in Fifth Schedule and Seventh Schedule. He submits that the petitioner had not disputed that the son and daughter-in-law of learned arbitrator who was nominated by the review petitioner were directors of Shouri Construction Private Ltd. He submits that this Court has specifically held that the petitioner as well as the said Shouri Construction Private Ltd. were promoted by the said promoters. This Court also had relied upon the term “affiliate” while holding that the learned arbitrator nominated by the petitioner was disqualified.

18. Learned senior counsel submits that even if this Court ignores the observations/findings rendered by this Court in various paragraphs relied upon by the learned senior counsel for the petitioner, the other reasons recorded by this Court to hold that the learned arbitrator nominated by the petitioner was disqualified still hold good. Thus the entire judgment and more particularly the conclusion drawn by this Court while allowing the said Commercial Arbitration Petition cannot be recalled.

19. It is submitted by the learned senior counsel that the other paragraphs of the said judgment which are strongly relied upon by the respondents herein cannot be recalled by this Court, even otherwise exercising plenary jurisdiction. Learned senior counsel invited my attention to various pages of the compilation of documents which was tendered by the learned senior

counsel by the respondents at the time of hearing of the Commercial Arbitration Petition and more particularly various financial documents and statements relating to the two companies, various forms filed by the retiring directors and newly appointed directors with the Registrar of Companies. He submits that this Court has considered all those forms and resolution passed by the petitioner and also by the said Shouri Construction Private Ltd. This Court has no power to recall those paragraphs which are touching the merits of the matter by exercising plenary jurisdiction. He submits that the Arbitration Act does not provide for any such substantive review of the order on merits.

20. Mr. Doctor, learned senior counsel for the petitioner invited my attention to the paragraph 18 of the judgment of the Supreme Court in case of ***Kapra Mazdoor Ekta Union*** (supra) and would submit that even if there is difference between a procedural review and a review on merits, the petitioner does not seek any review of the judgment delivered by this Court on merits. It is submitted by the learned senior counsel that since in this case the learned arbitrator nominated by the petitioner was appointed after 23rd October, 2015, provisions of Schedule Fifth and Seventh will apply and have to be read with Sections 12(1) and 12(5) of the Arbitration Act. Learned senior counsel fairly admitted that in the first sentence of paragraph 58 of the judgment, the word “not” has to be inserted after the words “the respondent has”. Statement is accepted.

REASONS AND CONCLUSION

21. The question that arises for consideration of this Court is whether this review petition seeks recall of the judgment and award dated 8th November, 2019 thereby setting aside the impugned majority award dated 6th January, 2017 passed by the Arbitral Tribunal is maintainable under the provisions of the Arbitration and Conciliation Act, 1996 or under any other provisions of law or not?

22. Learned senior counsel appearing for both the parties referred to and relied upon various judgments of Supreme Court and in this Court in support of their rival contention on the issue of maintainability of review petition.

23. This Court in case of ***Hindustan Construction Co. Ltd.*** (supra) had considered a situation where a review petition was filed by the original respondent no.1 in the arbitration appeal, seeking review of the judgment and order passed by this Court thereby setting aside part of the judgment and order passed by the learned District Judge in respect of some of the claims having found those claims barred by law of limitation by this Court in the said arbitral appeal though there was no finding rendered by the arbitral tribunal or by the learned District Judge in respect of those claims holding those claims as barred by law of limitation.

24. This Court in the said judgment found that the issue of limitation in support of those claims which were held as time barred for the first time by

the Appellate Court was not raised by either party. The review petitioner in that matter had pressed in service, the plenary jurisdiction of this Court on the ground that none of the parties had raised any issue of limitation in respect of those claims which were held barred by law of limitation by the Appellate Court for the first time.

25. After advertng to the judgments of Supreme Court in following cases:-

- (a) ***Shivdeo Singh and others v/s. State of Punjab and others, AIR 1963 SC 1909.***
- (b) ***M.M. Thomas v/s. State of Kerala and another, (2000) 1 SCC 666.***
- (c) ***Kapra Mazdoor Ekta Union v/s. Birla Cotton Spinning and Weaving Mills Ltd. and another, (2005) 13 SCC 777.***
- (d) ***Supreme Court Bar Association v/s. Union of India and another, (1998) 4 SCC 409.***
- (e) ***Parsion Devi and others v/s. Sumitri Devi and others, (1997) 8 SCC 715.***
- (f) ***ITI Ltd. v/s. Siemens Public Communications Network Ltd., (2002) 5 SCC 510.***

and to the judgments of this Court in following cases :-

- (a) ***Ittyavira Mathai v/s. Varkey Varkey, AIR 1964 SC 907.***
- (b) ***Rosy Blue (India) Pvt. Ltd. v/s. Orbit Corporation Ltd., in***

***Chamber Summons No.714 of 2012 in Arbitration
Application No. 112 of 2011.***

- (c) ***M/s. Madhav Structural Engineering Ltd. v/s. The
Maharashtra State Road Development Corporation Limited
in Review Petition (St.) No. 16618 of 2010 in Arbitration
Appeal No. 5 of 2008.***

this Court in the said judgment in case of ***Hindustan Construction Co. Ltd.*** (supra) held that merely because the “High Court” is not described as *persona designata* in Section 37 of the Arbitration Act would not mean that if any such appeal is entertained by the High Court under Section 37(1) of the Arbitration Act, it would not be the High Court exercising its power under Article 215 of the Constitution of India and would not be the Court of record.

26. This Court negated the contention that the High Court under Article 215 would not have plenary jurisdiction including procedural review relating to the errors apparent on the face of the record. It is held by this Court in the said judgment that the provisions of the Arbitration Act do not exclude the powers of High Court to exercise its plenary powers and to exercise procedural review in case of errors apparent on the face of the record causing miscarriage of justice or shows grave and palpable errors committed by it. This Court distinguished the earlier judgment in case of ***M/s. Madhav***

Structural Engineering Ltd. (supra) and also in case of **Rosy Blue (India) Pvt. Ltd.** (supra). In the facts of that case, this Court found that the State Government had raised issue of limitation only in respect of the claim nos.3 to 5 and not in respect of claims nos.1 and 2. This Court however had set aside the award also in support of claim nos. 1 and 2 on the ground of limitation on its own.

27. This Court accordingly held that procedural review can be exercised by Court under plenary jurisdiction. The provisions of Code of Civil Procedure, 1908 can be applied to the proceedings in Court to the extent of the provisions thereof not inconsistent with the provisions of the Arbitration Act. None of the provisions of the Arbitration Act bars High Court for procedural review by exercising plenary jurisdiction. This Court accordingly recalled the judgment and order passed by this Court in so far as the claim nos. 1 and 2, in that matter which were held as time barred by the said judgment by exercising plenary jurisdiction.

28. Mr. Doctor, learned senior counsel for the review petitioner also strongly placed reliance upon the judgment of this Court in case of **Satpal P. Malhotra and others v/s. Puneet Malhotra and others** (supra) in support of the submission that since none of the provisions of the Arbitration Act bars the remedy of review prescribed under Order XLVII Rule 1 of the Code of Civil Procedure, 1908, this Court can exercise not only plenary jurisdiction

but also can exercise power of review under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 and can recall the entire judgment and order passed by this Court. He submits that in the said judgment, this Court had entertained the cross-objection filed in an appeal under Section 37 of the Arbitration Act on the ground that there was no bar under the provisions of the Arbitration Act to entertain cross-objection. He submits that this Court in the said judgment also had held that there was no inconsistency in the provisions of the Code of Civil Procedure, 1908 and the provisions of Arbitration Act, in so far as the filing of cross-objection in the appeal filed under Section 37 of the Arbitration Act is concerned.

29. In so far as the judgment of Supreme Court in case of ***Mahanagar Telephone Nigam Limited v/s. Applied Electronics Limited*** (supra) relied upon by the learned senior counsel for the review petitioner is concerned, the Supreme Court in the said judgment had expressed a view that the Arbitration Act is a complete Code and Section 5 in categorical terms along with other provisions, lead to a definite conclusion that no other provisions can be attracted. The application of Code of Civil Procedure, 1908 is not conceived of and therefore as a natural corollary, the cross-objection cannot be entertained. The Supreme Court however clarified that though the said view was expressed in that matter, the judgment rendered in ***ITI Ltd.*** (supra) is a binding precedent. The Supreme Court accordingly directed that the earlier decision in case of ***ITI Ltd.*** (supra) deserves to be reconsidered by a

larger bench. It appears that the said issue has not been decided by the larger bench of the Supreme Court till date.

30. In case of **ITI Ltd.** (supra) the Supreme Court has held that under Section 37(1) of the Arbitration Act, appeal is not to any designated person but to a Civil Court. The proceedings before such Court will have to be controlled by provisions of the Code of Civil Procedure, 1908 and therefore the remedy by way of the revision under Section 115 of the Code of Civil Procedure, 1908 will not amount to a judicial intervention not provided for by part I of the Code. It is held by the Supreme Court in the said judgment that when the Arbitration Act under Section 37 provided for an appeal to the Civil Court and the application of the Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar under Section 5 will not be attracted because conferment of appellate power on the Civil Court in part I of the Arbitration Act attracts the provisions of the Code of Civil Procedure, 1908 also.

31. In my view, since the issue before the Supreme Court in the said judgment was whether a revision application under Section 115 of the Code of Civil Procedure, 1908 was maintainable or not in spite of provisions under Section 5 of the Arbitration Act is now referred to the larger bench by a two Judge bench of the Supreme Court in case of **Mahanagar Telephone Nigam Limited v/s. Applied Electronics Limited** (supra), I do not propose to

decide the larger issue whether a Court can exercise powers of review under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 seeking review of the orders passed by the Court under the provisions of Arbitration Act or not.

32. In so far as the judgment of this Court in case of **Satpal P. Malhotra and others v/s. Puneet Malhotra and others** (supra) relied upon by the learned senior counsel for the review petitioner is concerned, this Court in the said judgment had adverted to the judgment of Supreme Court in case of **ITI Ltd.** (supra) and had held that cross-objection in an appeal filed under Section 37 of the Arbitration Act was maintainable, Special Leave Petition against the said judgment in case of **Satpal P. Malhotra and others v/s. Puneet Malhotra and others** (supra) is pending before the Supreme Court.

33. In so far as the judgment of Supreme Court in case of **Kapra Mazdoor Ekta Union** (supra) relied upon by Mr. Sakhare, learned senior counsel for the respondent is concerned, a perusal of the said judgment indicates that the Supreme Court had considered the issue whether Industrial Tribunal/Labour Court has power to exercise procedural review under the provisions of Industrial Disputes Act, 1947 or not and decided the difference between review on merits and procedural review. The Supreme Court in the said judgment held that power of review is not an inherent power and must be conferred by law either expressly or by necessary implication where a

Court or *quasi-judicial* authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or *quasi-judicial* authority is vested with power of review by express provision or by necessary implication. Procedural review however belongs to a different category. In such a review, the Court or *quasi-judicial* authority having jurisdiction to adjudicate, proceeds to do so, but in doing so ascertains whether it has committed a procedural illegality that went to the root of the matter and invalidates the proceedings itself, and consequently the order passed therein.

34. Supreme Court in the said judgment adverted to the earlier judgment in case of ***Grindlays Bank Ltd v/s. Central Government Industrial Tribunal, 1980 Supp SCC 420***, in which it was held that when a review is sought due to a procedural difficulty, the inadvertent error committed by the Tribunal must be corrected *ex-debito justitiae* to prevent the abuse of its process and such power inheres in every Court or Tribunal. Supreme Court held that the order passed was liable to be recalled and reviewed not because it was found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceedings.

35. The question now arises for consideration of this Court is whether the review petitioners have applied for procedural review or seeks review of the

judgment and order passed by this Court on merit. A perusal of the judgment referred to aforesaid clearly indicates that the Court has inherent or implied powers to set aside a palpably wrong order passed under a misapprehension by it and if found erroneous and vitiated by an error of procedure or mistake which went to the root of the matter and invalidate the entire proceedings. I shall now proceed to decide whether review petitioner has demonstrated any such error of procedure or mistake which went to the root of the matter and whether in the facts of this case, Court shall exercise powers of procedural review under plenary jurisdiction or not.

36. It is common ground that both the parties have proceeded on the premise that certain findings/observations made by this Court in some of the paragraphs of the judgment and order are based on wrong factual premise which facts were neither pleaded nor formed part of the record. In so far as the review petitioners are concerned, the reliance is placed on paragraphs 14, 20, 53, 54, 55, 58, 67 to 69 whereas the respondent has urged that various observations made in paragraphs 14, 54 and 58 of the said judgment as highlighted in the praecipe dated 20th November, did not form part of the pleadings either for the petitioner or the respondent.

37. Since, it is common ground and both the parties have agreed that certain observations made by this Court atleast in paragraphs 14, 54 and 58 of the judgment and order dated 8th November, 2019 were not part of the

pleadings either of the petitioner or the respondent, in my view, there is a procedural error to that effect and it can be corrected by this Court by exercise procedural review under plenary jurisdiction. The judgment of this Court in case of ***Hindustan Construction Co. Ltd.*** (supra) pressed in service by Mr. Doctor, learned senior counsel for the review petitioner applies to the facts of this case in so far as paragraphs 14, 54 and 58 to the extent set out in the praecipe dated 20th November, 2019 are concerned. The other paragraphs pointed out by the review petitioner in the review petition are the submissions based on these paragraphs.

38. Following observations/findings thus made in the said judgment and order dated 7th October, 2019 thus stand deleted:-

a. Part of paragraph No.14 on Page No.9 of the Judgment i.e. :

“... The said Mr. Mofatraj Munot is the father-in-law of the son of the learned nominee arbitrator of the respondent and was a close relative of the said director. Mr. Parag M. Munot is brother-in-law of the son of the nominee arbitrator of the respondent.”

b. Part of paragraph No.54 on Page No.34 of the Judgment i.e. :

“The learned arbitrator also did not disclose that the son of the learned arbitrator was son-in-law of Mr. Mofatraj Munot and brother-in-law of Mr. Parag Munot, who were Directors in both these companies. The

respondent though did not deny the relationship of the learned arbitrator nominated by the respondent with the Munot Family, who were the Directors in the Shouri Constructions Private Limited and ...”

c. Part of paragraph No.58 on Page No.36 of the Judgment i.e. :

“... and that the said Mr. Mofatraj Munot and Mr. Parag Munot were the father-in-law and brother-in-law respectively of the son of the learned arbitrator nominated by the respondent. ...”

39. The next question arises for consideration of this Court whether the entire judgment and order dated 8th November, 2019 seeks recall on the basis the observations made in aforesaid three paragraphs i.e. paragraphs 14, 54 and 58 which did not form part of the pleadings of either parties or not. A perusal of the said judgment and order dated 8th November, 2019 passed by this Court and in particular paragraphs 61 to 66 of the said judgment indicates that this Court has adverted to the various judgments of Supreme Court interpreting Section 12(5) of the Arbitration Act, Fifth to Seventh Schedule, 246th Law Commission Report recommending amendments to the Arbitration and Conciliation Act, 1956 and more particularly to Section 12 of the Arbitration Act and had applied those principles in paragraphs 67, 68, 72 and 74 to 76. In paragraph 74 of the said judgment and order, this Court had applied grounds 10, 18 and 19 of Seventh Schedule and has held that the review petitioner had not disputed that the son and daughter-in-law of the

learned arbitrator nominated by the review petitioner were directors of Shouri Construction Private Limited. This Court also referred to the term “affiliate” and has recorded a positive finding that the said terms would clearly apply to the facts of this Case.

40. In paragraphs 76, this Court held that the learned arbitrator nominated by the review petitioner herein was himself ineligible to act as an arbitrator having failed to disclose his interest and relationship of his son and daughter-in-law who were directors of affiliate company at material time, which clearly gave rise to justifiable doubts about his independence or impartiality, his appointment being illegal and void *ab-initio*, the constitution of Arbitral Tribunal comprising of such ineligible arbitrator was also illegal void *ab-initio* and thus the entire arbitral proceedings were vitiated on that ground itself.

41. It is thus clear and beyond reasonable doubt that the reasons recorded by this Court in paragraphs 74 and 75 of the said judgment were based on the principles of law laid down by the Supreme Court in several judgments referred in earlier paragraphs of the judgments are independent to the reasons recorded in part of paragraphs 14, 54 and 58 of the said judgment and thus the entire judgment cannot be vitiated on the grounds of findings/observations recorded in part of the paragraphs 14, 54 and 58.

42. Mr. Doctor, learned senior counsel for the review petitioner tried to find fault with the observations made and the conclusion drawn by this Court even in paragraphs 74 and 75 of the said judgment on merits. In my view the observations/findings recorded therein do not disclose procedural error and thus cannot be corrected by exercising procedural review under plenary jurisdiction. There is difference between power of Court to exercise procedural review by exercising plenary jurisdiction and power of review by exercising powers under Order XLVII Order 1 of the Code of Civil Procedure, 1908 on the grounds set out therein. This Court thus cannot recall the observations/findings recorded therein and the conclusion drawn in paragraphs 74 and 75 based on the judgments of Supreme Court referred to aforesaid and based on facts.

43. In so far as reliance placed by Mr. Sakhare, learned senior counsel for the respondent on the judgment of this Court in case of ***M/s.Madhav Structural Engineering Ltd.*** (supra) and judgment of this Court in case of ***M/s. Thanikkudam Bhagwati Mills Ltd.*** (supra) is concerned, those judgments would not assist the case of the respondent and are clearly distinguishable in the facts of this case. This Court had not exercised any procedural review under plenary jurisdiction of this Court in those judgments. The judgment of this Court in case of ***M/s.Madhav Structural Engineering Ltd.*** (supra) was distinguished by this Court in case of ***Hindustan Construction Co. Ltd.*** (supra).

44. In so far as the other submissions made by the learned senior counsel on the issue of merits of the matter are concerned, those issues also do not fall within the purview of procedural review by exercising plenary jurisdiction by this Court and are accordingly rejected.

45. I therefore pass the following order:-

(a) The following observations made by this Court in paragraphs 14, 54 and 58 stand deleted.

(i) Part of Paragraph No.14 on Page No.9 of the Judgment i.e.

“... The said Mr. Mofatraj Munot is the father-in-law of the son of the learned nominee arbitrator of the respondent and was a close relative of the said director. Mr. Parag M. Munot is brother-in-law of the son of the nominee arbitrator of the respondent.”

(ii) Part of Paragraph No.54 on Page No.34 of the Judgment i.e.

“The learned arbitrator also did not disclose that the son of the learned arbitrator was son-in-law of Mr. Mofatraj Munot and brother-in-law of Mr. Parag Munot, who were Directors in both these companies. The respondent though did not deny the relationship of the learned arbitrator nominated by the

respondent with the Munot Family, who were the Directors in the Shouri Constructions Private Limited and ...”

(iii) Part of Paragraph No.58 on Page No.36 of the judgment i.e.

“... and that the said Mr. Mofatraj Munot and Mr. Parag Munot were the father-in-law and brother-in-law respectively of the son of the learned arbitrator nominated by the respondent. ...”

(b) Insert the word ‘not’ in the first sentence of the judgment after the words ‘the respondent has’.

(c) Prayer (a) for recall of the entire judgment and order dated 8th November, 2019 is rejected.

(d) Praecipe dated 20th November, 2019 filed by the respondent is disposed off in aforesaid terms.

(e) There shall be no order as to costs.

(R.D. DHANUKA, J.)

At this stage, Mr.Doctor, learned senior counsel for the review petitioner continues the statement made before this court on 17th December,2019 that his client would not withdraw the bank guarantee for the period described in the statement. Statement is accepted. The other directions issued by this court in the said order to continue for the period mentioned therein.

(R.D. DHANUKA, J.)