

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****REVIEW PETITION NO.1 OF 2021****ARBITRATION PETITION NO.982 OF 2011**

Rajnikant L. Dharia And Anr.

...Petitioners

vs

Mumbai Metropolitan Region Development
Authority And Anr.

...Respondents

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Mr. Pradeep Sancheti, Senior Advocate, a/w. Mr. Chetan Kapadia and Ms. Vidisha Rohira, i/b. Mr. Suryakant Jadhav, and Mr. Nikhil Ranadive, for the Petitioners.

Mr. Prasad Dhakephalkar, Senior Advocate, a/w. Mr. Ashish Kamat, Ms. Simantini Mohite, Mr. Nivit Srivastava and Ms. Sneha Patil, i/b. Maniar Srivastava Associates, for the Respondents.

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CORAM : S.C. GUPTE, J.**DATED: 28 JUNE, 2021****P.C. :**

. This petition seeks review of a final order passed by this court on an arbitration petition, allowing the same and setting aside the award passed by the arbitral tribunal.

2. The award impugned in the arbitration petition was passed in a reference arising out of a tripartite agreement between the Respondent herein (who was the first claimant before the arbitrator) and the State of Maharashtra (the second claimant) on one hand and six landholders (the respondents before the arbitrator) on the other. The

parties had also entered into an agreement to lease in pursuance of the tripartite agreement. There were exemption orders passed in respect of the lands, which were large tracts at Powai, Mumbai, under the provisions of the ULC Act. The main submission of the claimants before the arbitrator was that there were breaches committed by these six landholders and their constituted attorney ('Hiranandani') of the tripartite agreement, the agreement to lease and the exemption orders. These breaches included (i) exceeding the stipulated sizes of tenements that could be constructed, (ii) merger or amalgamation of more than two flats, (iii) impermissibility, even otherwise, of such amalgamation, and (iv) exceeding the proportion of gross area of amalgamated flats to the maximum permissible area of the overall development. The learned sole arbitrator came to a conclusion that the claims were barred by limitation and that there were no breaches on the part of the Respondents or Hiranandani. The award was challenged on all counts including the arbitrator's conclusions both on limitation and the alleged breaches. This court, after hearing the parties, by its order under review, set aside the impugned award, finding fault with the arbitrator's conclusions on both limitation and breaches on the part of the respondent landholders and Hiranandani within the parameters of the law of challenge to an arbitral award.

3. This order is sought to be reviewed mainly on the ground that the impugned order contains a mistake or error inasmuch as what was held by this court in the order was different from what was expressed in court at the time of hearing. It is submitted that what was indicated at the hearing was that the impugned award would be

sustained (particularly on the aspect of breaches of Hiranandani, both on limitation and merits), but that its severable part containing a discussion on one particular issue (namely, Issue No.2, dealing with the upper limit, if any, of the total area of merged/amalgamated flats in preparation to the overall development under the tripartite agreement) would not be sustained.

4. In the first place, an error or mistake in the order, so as to come within the mischief of Order 47 Rule 1 of the Code of Civil Procedure, must be apparent on the record or demonstrable on the face of the order. What was discussed in court or, for that matter, expressed by the court, is hardly relevant if the same does not part of the order passed. In principle, that can never be made the basis for seeking a review of the order. It is another matter if the court, in its order, were either to refer to the view expressed and stop or not permit Counsel to make submissions on the point. In the present case, not only did this court not prevent the Review Petitioners' Counsel from making submissions on any particular points, including those which, according to the Petitioners, the court expressed itself on, but there is no way the court actually did express itself the way it is said to have, as I shall presently point out.

5. At the outset, it is important to note that the issues of limitation as well as the factum and consequences of breaches by Hiranandani are the main part of the arbitration petition and the Respondents' reply thereto. The court has, after hearing both parties, passed its order on all these matters. It is not permissible to argue the

matter once again in review.

6. That would really be the end of the matter, but Mr. Sancheti, learned Senior Counsel for the Review Petitioners, submits that because the court expressed itself the way it did, he desisted from arguing his case on those particular aspects, namely, the point of limitation and merits of the breaches alleged on the part of the landholders and Hiranandani. Learned Counsel submits that if that is so, a review petition, which seeks an opportunity to argue the matter (for the first time), is clearly in order. Learned Counsel submits that even if this is treated as a mistake of Counsel, based on the impression he got from what the court observed or indicated at the hearing, on the principle that no mistake of Counsel or act of court should cause harm to the parties, his client is entitled to a review. Learned Counsel submits that this has always been the law. He relies on the cases of **Musammatt Jamna Kuer vs. Lal Bahadur**¹, **Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulouse Athanasius**² and **Central Bank of India vs. Vrajlal Kapurchand Gandhi**³, in support of his submissions. (Of the cases compiled in his compilation of judgments, learned Counsel only cites and refers to these three.)

7. Before the authorities are discussed, however, it is necessary to clear some cobwebs about the factual matrix. The submission itself is premised on Counsel's assessment based on what the court expressed or indicated in court or, rather, what he understood to be the court's expression or indication. There is nothing to show that the court actually

1 158 Federal Court RLW 1950

2 (1955) 1 SCR 520 : AIR 1954 SC 526

3 (2003) 6 Supreme Court Cases 573

expressed itself or indicated the way learned Counsel submits it did. Though it is difficult to recall what actually transpired then in court at today's date (more than a year having passed since the date of the order under review), there is no way this court would have at any time indicated that it was upholding the award. If anything, the court was inclined to prima facie accept the Respondents' (i.e. the arbitration petitioners') challenge to the award. The major part of that challenge was the aspect of breaches committed by Hiranandani, which called for the claimant's plea of damages. Secondly, there is nothing in the affidavit of Mr. Hiranandani, in support of the review petition, to indicate that learned Counsel for the Review Petitioners did not argue the matter as a result of what transpired in court or, for that matter, what this court expressed or indicated at the hearing. The only mistake that is adverted to in the affidavit is "*between what was expressed by this Hon'ble Court at time of hearing the parties and the decision recorded by this Hon'ble Court in the Impugned Judgment.*" Apart from the fact that what was said to be expressed, vague as it is in the sworn testimony of the Review Petitioners, is not correct, even if one were to go by the suggestion that the court was with the Review Petitioners whilst hearing the original arbitration petition. If anything, as I have noted above, the court was against the Petitioners. The only other suggestion in the affidavit of the Review Petitioners is that this court had "*made it abundantly clear at the time of reserving the matter for passing order on 8 March 2019 that the impugned award is sustainable except for the few points more particularly mentioned in the Review Petition.*" This is absolutely false. Not only did the court not indicate any such thing, far from making it clear, what the court did was to simply declare that the

matter was closed for orders and would be listed later for order. The entire text of the order is set out below:

“1. By an order dated 22 October 2019, the parties were directed to file brief synopsis of their submissions. The Respondents have filed their submissions.

2. Learned Counsel for the Petitioners informs the Court that the Petitioners would like to rely on the original list of dates and events submitted at the time of hearing on 22 January 2019 and they do not propose to file any synopsis of written submissions.

3. The arbitration petition is, accordingly, closed for orders and will be listed soon for orders.”

8. In its affidavit in reply to the review petition, Respondent No.1 herein (who was original Petitioner No.1 in the arbitration petition) has denied the allegations. It is categorically denied that at the time of hearing the arbitration petition, this court expressed that the award would be sustained or that (only) the finding of the arbitrator on Issue No.2 would be set aside or that the petition would be disposed of upholding the award. It is also denied by Respondent No.1 that the Review Petitioners (original respondents) restricted their submissions for the stated reason or at all. These denials have been made in an affidavit whose affiant affirms his presence in the court “*at the time of all hearings and listings.*” He has averred that “*the Senior Advocate appearing on behalf of the Petitioner was allowed to argue fully and completely in the matter*”.

9. Mr. Sancheti submits that the fact that the Petitioners

restricted their submissions only to some aspects of the matter and not the others, is borne out by the circumstances of the case. Learned Counsel submits that the Petitioners' written submissions dealt only with some issues and not others. Barring that lone circumstance, everything on record suggests to the contrary. In the first place, the matter was extensively heard, and both sides made full submissions. The record shows that it was heard on three days. Some clarifications were thereafter sought on 22 October 2019 when the matter was kept for directions, and parties were directed to file brief synopsis of their submissions in the matter and the petition was reserved for orders. This order does not refer to any particular issue to which the submissions were to relate; the directions were for synopsis of the parties' "submissions". Even the submissions filed by the Review Petitioners do not indicate that the court had given any such impression as is now alleged or that their submissions, for that reason or at all, were restricted on that basis. And the order of 21 January 2020, as noted above, simply notes that the Review Petitioners (original Respondents) "have filed their submissions" and that the petition was "closed for orders and will be listed soon for orders". The order under review indicates that it was mainly on the case of the breaches alleged against Hiranandani that the impugned award was liable to be set aside. On the question of limitation, this court observed, after discussing the case extensively, that it made "for a compelling case fraud and concealment of facts and documents" (on the part of the Review Petitioners, who were Respondents in the arbitration petition) and that it was "impossible or impermissible, in these facts, for any fair and judicially minded person to hold that there was no case of fraud or concealment (for the purposes of

Section 17 of the Limitation Act) for want of particulars”. This court, thus, held the claimants to be within time. On merits, after extensively considering the case of alleged breaches of the tripartite agreement, the agreement to lease and exemption order, and after taking into account the discussion of the arbitrator on it, this court observed as follows:

“15. The discussion of the learned arbitrator in this behalf (on Issue No.2) opens on an entirely incorrect note, and that is absolutely unstatable. The learned arbitrator opens his statement of reasons on Issue No.2 by narrating that admittedly, there were no restrictions on amalgamating/merging tenements of 40 sq.mtrs. and 80 sq. mtrs. This observation, to say the least, is shocking to the conscience of the court.”

After noting about five clear breaches on the part of Hiranandani, which the record unmistakably showed, this court observed as follows:

“Of these breaches, the learned arbitrator appears to have applied his mind to only the last of the breaches, i.e. item no. (e) noted above. And even there the learned arbitrator has come to a wholly unreasonable or impossible finding as is presently pointed out below.”

After analyzing the award and its conclusions, this court had the following to observe:

“21 The absurdity of these conclusions is all the more apparent, if we have regard to the very basic premise of the whole PADS and tripartite agreement entered into for its execution, which was to make available affordable housing to the citizens; that was the idea behind keeping sizes of flats within an affordable range, i.e. 40 to 80 sq.mtrs. That was also the basis for ULC permissions for construction of housing in lands in excess of ceiling limits. All

this would stand turned on its head, if the artificial construction adopted by the learned arbitrator were allowed to prevail.”

After all this, the court held the arbitrator's conclusions on both Issue Nos. 2 and 3 as vitiated. This court also found fault with Issue No.4 (on the claimants' entitlement of damages). This court, in the premises, allowed the arbitration petition and set aside the award.

9. This order makes it clear that the discussion in court and application of mind by this court to it centered around all five breaches of Hiranandani, and it is impossible to conceive that this court, at any time during the hearing, much less at its conclusion, should have indicated that the award would be upheld as a possible view on the alleged breaches.

10. The suggestion that this court had no recollection of the arguments due to passage of time or would have to re-read the matter for passing order or that any such reason was given by the court during the hearing, are nothing short of being mischievous. The hearing and all arguments advanced were not only present to the mind of the court, but were noted down in great detail in written notes of the hearing kept by the court.

11. The factual matrix, thus, being set right, let me now deal with the authorities cited at the Bar. In the Federal Court decision of **Musammat Jamna Kuer** (supra), the court was concerned with a mistake that had crept in the High Court's judgment owing to an oversight. The facts of that case indicate that properties listed in the application, which

were claimed in succession under Section 11 of the United Provinces Encumbered Estates Act, were not correctly reflected in the decree of the High Court in appeal, though these properties were part of the decree of the trial judge. The opponents, who claimed as debtors, had actually accepted through their pleader that they were owners only of two properties mentioned in the Gazette notification and that properties at Sr. Nos. 3 to 37 of the notification belonged to the legal heirs of the deceased who claimed them. The High Court, however, refused to correct its decree, holding that this was due to Counsel's mistake and not an error by the court. The Federal Court disagreed with the High Court, holding that the error was apparent on the face and it was immaterial how that error had occurred – whether by reason of Counsel's mistake or because of oversight on the part of the court. The Federal Court was of the view that a mere look at the trial court's decision indicated the error apart from anything else. This case has no bearing on the facts of our case. Unlike in that case, where the error was in the description of properties though oversight or mistake and it was apparent on the face of the record, in our case not only is any such error not apparent, but it is a matter of keen contest. Surely, that cannot be a matter of review.

12. In **Moran Mar Basselios Catholicos** (supra), the controversy concerned a statement made by the judges of the Full Bench of the High Court of Travencore (per majority of two judges) that the defendants' advocate had conceded that the plaintiffs had not left the Church and they were as good members of the Church as anybody else. It was the case of the defendants (the review petitioners) that this statement was said to be inaccurate, incomplete and misleading. The argument before

the Supreme Court was that the majority decision proceeded on a misconception as to the concession said to have been made by the defendants' advocate. This misconception was sought to be proved through affidavit and other documentary evidence. That was objected to by the Attorney General. The learned Attorney General's argument was that the affidavit and document could not be said to be part of the "record" within the meaning of Order 47 Rule 1. The Supreme Court did not countenance the objection. According to the court, there was no reason to construe the word "record" in any restricted sense. The court observed that when the error complained of was that the court assumed that a concession was made when none had in fact been made or that the court misconceived the terms of that concession or the scope or extent of it, it would not generally appear on record but would have to be brought before the court by way of an affidavit and this could only be done by way of review. Once again, these facts are clearly distinguishable. In our case, the court did not proceed on any concession made by Counsel; the order under review mentions none. If it was Counsel, who was under a misconception as to the position of the court and therefore, chose not to argue a point, that by itself is no ground for review and cannot be brought in by way of an affidavit. In any event, the affidavit in support of review petition does not refer to any such misconception, as noted above. As for what transpired in court, there is, as noticed above, a serious contest between the parties and there is no question of taking a view one way or the other based on a unilateral statement of the review petitioners.

13. The case of **Vrajlal Kapurchand Gandhi** (supra) merely

supports the maintainability of a review petition, when the order under review does not reflect what transpired in court at the hearing. It has no applicability directly to our facts. In our case, the order does not incorrectly reflect what transpired in court; it is rather the review petition which is solely premised on what is said to have happened in court. There is no case that any wrong record was made by the court which needs to be corrected.

14. The Review Petitioners' case here is neither supported by law or authority of court. If anything, it would set a bizarre precedent, if accepted, that it is open to seek review of a judgment or order, if the court had indicated its mind one way in court whilst reserving the judgment and the judgment came the other way or that Counsel appearing before the court was under an impression that the case would be decided one way and in reality, it was decided otherwise.

15. There is, accordingly, no merit in the petition. The review petition is dismissed.

(S.C. GUPTE, J.)