IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION (CIVIL) NO.8 OF 2022
IN
WRIT PETITION NO.10764 OF 2015

Microvision Technologies
Through its Proprietor,
Shri. Atul Nemichand Dhadiwal,
Age 45 years, Occu: Business,
R/o 9, Suraj Enclave, B/h Thomas
Cook, Near ABB Circle,
Mahatma Nagar, Nashik,
District Nashik … Applicant
[Orig. Respondent No.1]

Versus

Dhule Municipal Corporation
Through its Commissioner
C/o Dhule Municipal Corporation
Dhule, Taluka and District Dhule … Respondent
[Respondent/Orig. Applicant No.1]

…

Mr. Vijay Thorat (Senior Advocate) i/b Mr. A. S. Bajaj, Advocate for the Applicant
Mr. Amol Sawant, Advocate for Respondent

…

CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 22nd August, 2022
PRONOUNCED ON : 14th November, 2022

JUDGMENT :

1. The applicant seeks review of the judgment of this Court (Coram: V. K. Jadhav) in Writ Petition No.10764/2015. By the said judgment, the writ petition filed by the respondent was allowed and the judgment and award dated 13-02-2015 passed by Micro, Small Enterprises Facilitation Council (MSEFC), Nashik Division, Nashik in

Petition No.8/2011 (M/s. Microvision Technologies, Nashik v/s Commissioner, Dhule Municipal Corporation, Dhule) was quashed and set aside and the petition filed by the applicant was dismissed.

2. Heard the learned Senior Advocate Mr. Vijay Thorat i/b Mr. A. S. Bajaj for the applicant and the learned Advocate Mr. Amol Sawant for the respondent.

3. The learned Senior Advocate for the applicant submits that, this Court has wrongly interpreted the provisions of Micro, Small and Medium Enterprises Development Act, 2006 (for short 'MSMED Act') and has erred in coming to the conclusion that Facilitation Council had no jurisdiction to entertain the arbitration proceedings. In fact, according to him, since the applicant was provisionally registered as a small scale industry under the Interest on Delayed Payments to Small Scale and Ancillary Industries Undertaking Act, 1993 (for short 'the Act of 1993') and since the applicant was permanently registered as a small scale industry on 06-05-2003 under the Act of 1993, and as tender notice was issued in the year 2005, agreement between the parties was executed on 11-10-2005 and the work order was issued on 13-10-2005 prior to the enactment of MSMED Act, only the Act of 1993 is applicable in the present case. He submits that as a result of repeal of the Act of 1993 and Section 32 of MSMED Act is enacted, the Facilitation

Council has jurisdiction. Section 32(2) of MSMED Act, provides that anything done under the repealed Act shall be deemed to have been done or taken under corresponding provisions of MSMED Act. He further submits that the applicant falls in the category of 'supplier' as defined under Section 2(f) of the Act of 1993, being a small scale industrial undertaking, holding permanent registration certificate, the applicant is deemed to be continued under Section 32 of MSMED Act since the words used in definition clause of MSMED Act are "unless the context otherwise requires". Therefore, according to him, the definition of 'supplier' under Section 2(n) of MSMED Act must be read along with Section 8 of the said Act. Under Section 8, memorandum is discretionary at the behest of an industrial unit, provided it has obtained a registration certificate.

4. Clarification issued on 01-08-2007 under Section 31 of MSMED Act is confirmed. He submits that the words, "may, at his discretion" used in proviso (a) gives a discretion to the unit to get registered under MSMED Act.

5. Section 18 of MSMED Act, provides that Arbitration and Conciliation Act, 1996 shall apply. Under Section 16 of the Arbitration Act, an arbitrator is entitled to consider the question of his own jurisdiction and accordingly, the Facilitation Council has considered the question and has held that it has jurisdiction.

6. He further submits that remedy against an award under the Arbitration Act is by filing a petition under Section 34 of the Act of 1993. The Court therefore is entitled to consider the question of jurisdiction as well as award on merits. Thus, the respondent ought to have availed the remedy under Section 34 of the Arbitration Act and could not have filed writ petition. The decision of the Division Bench in **Union of India V/s Maharashtra Steel Fabricator and Erectors** in Writ Petition (L) No.4049/2020, which relies on decision of the Hon'ble Supreme Court, clearly states that after the expiry of period of limitation provided under Section 34 of the Arbitration Act, petition under Article 226 of the Constitution of India is not maintainable. Further submission is that taking into consideration the law laid down by the Hon'ble Supreme Court and the Hon'ble Division Bench of this Court, the judgment under review is *per incuriam* and there is an error apparent on the face of record. The judgment under review does not give reasons, as to why the petition under Article 226 and 227 is entertained. He further submits that the ratio in **Whirlpool Corporation Vs. Registrar of Trademarks, Mumbai and Others** reported in **(1998) 8 SCC 1** and **Harbanslal Sahnia and Another Vs. Indian Oil Corporation Ltd. and Others** reported in **2003 (2) SCC 107** are not applicable to the facts of the present case. Question of jurisdiction of the Facilitation Council can only be decided in the

petition under Section 34 of the Arbitration Act. He further submits that this Court in judgment under review failed to notice and refer to documents on record regarding provisional and permanent registration under the Act of 1993. He submits that this Court has wrongly interpreted the ratio in Whirlpool Corporation (*Supra*) and Harbanslal Sahnia (*Supra*), holding that it gives unfettered right to High Court to entertain writ petition under Article 226, according to him, Section 8 applies to new industry and registration under MSMED Act is not mandatory. In support of his submissions, learned Senior Advocate relied on **Navayuga Engineering Company Vs. Bangalore Metro Rail Corporation Limited** reported in **2021 SCC Online SC 469, K.G. Derasari and Another Vs. Union of India and Others** reported in **(2001) 10 SCC 496, Board of Control for Cricket in India and Another Vs Netaji Cricket Club and Others** reported in **(2005) 4 SCC 741** and **Division Bench Judgment** in **Writ Petition (L) No.4049/2020.**

7. Per contra the learned Advocate for the respondent submits that SSI units and small enterprises are different entities. By referring to the object of MSMED Act, he submits that 'small enterprise' is defined under Section 2(m) of MSMED Act and 'supplier' under Section 2(n) of MSMED Act, which means a micro or

small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, which is an inclusive definition. By referring to Section 7, he submits that applicant does not fall within the definition of 'small enterprise'. According to him under clause 9 of sub-section 2 of section 7 of MSMED Act, the Central Government has not classified the applicant as small enterprise. According to him, the applicant also does not fall within the definition of 'enterprise' under Section 2(e) of MSMED Act. By referring to Section 8(1) proviso (b), he submits that it is mandatory for the applicant to file memorandum in accordance with the provisions of MSMED Act, within 180 days from the commencement of the Act. Since the applicant failed to file memorandum, arbitration proceedings before Facilitation Council were not maintainable. According to him, the Division Bench decision in Writ Petition (L) No.4049/2020 is not applicable to the facts of the present case. By pointing out the form/application filled by the applicant, he submits that the category of enterprise is declared as 'small' and the certificate to that effect is issued to the applicant on 03-07-2014. According to him, only after registration of memorandum, the proceedings before Facilitation Council are maintainable. He further submits that this Court has dealt with all the arguments advanced by the applicant and has rightly delivered the judgment. There is no error apparent on the face of record as is being claimed by the applicant. By relying on **Kamlesh Verma Vs. Mayawati and Others** reported in **(2013) 8 SCC 320** and **State of West Bengal and Others Vs. Kamal Sengupta and Another** reported in **(2008) 8 SCC 612** he submits that no case for review is made by the applicant.

8. Heard the learned Senior Advocate for the applicant and learned Advocate for the respondent at length. Perused the citations relied upon by both the parties and the judgment under review.

9. In the judgment under review, this Court has considered preliminary objection of the Corporation about maintainability of arbitration proceedings due to lack of jurisdiction. This Court has held that the applicant is existing from the year 2002 and was registered under the Act of 1993 on 06-05-2003 as 'tiny enterprise' and the said registration is valid upto 05-05-2008.

10. By referring to sub-section (1) of Section 8 of MSMED Act, it is held that, after filing of memorandum on 03-07-2010 for the first time, the applicant-enterprise is classified as small enterprise considering the investment in the plant and machinery and prior to it, the applicant-enterprise was not classified as small enterprise. Therefore, this Court has accepted the contention of the respondent that at the time of agreement dated 11-10-2015, the applicant-

enterprise was not 'supplier' and the respondent-corporation was not 'buyer'.

11. By referring to the definition of small scale industrial undertaking as provided under Section 2(e) of the Act of 1993, which has the same meaning assigned to it by clause (j) of Section 3 of the Industries (Development and Regulation) Act, 1951 (for short "the Act of 1951") a finding is recorded that the applicant-enterprise is not small scale industrial undertaking in accordance with the requirements as specified under Section 11B of the Act of 1951. It is further held that on the date on which, contract was entered into between the parties, applicant-enterprise had not filed memorandum, as per the provisions of Section 8 of MSMED Act and hence, applicant-enterprise would not be entitled for the benefit under Chapter V of MSMED Act.

12. By considering the citations relied upon by both the parties, this Court by relying on the ratio in Whirlpool Corporation (*Supra*) and Harbanslal Sahnia (*Supra*) held that writ petition filed by the respondent has to be entertained as the order passed by the Facilitation Council is wholly without jurisdiction.

13. It is thus clear that this Court accepted the challenge raised to the jurisdiction of Facilitation Council and has recorded a finding that Facilitation Council had no jurisdiction.

14. From the judgment under review, it is clear that all the arguments which are now advanced by the learned Senior Advocate in support of review, were advanced at the time of hearing of writ petition by the learned Advocate representing the applicant. All these arguments were considered and dealt with in detail in the judgment under review. Reference to the citations relied upon by both the parties can be found in the judgment under review. This Court has also taken into consideration the relevant provisions of MSMED Act, Act of 1993 and after considering all the aspects, judgment under review is rendered and petition filed by the respondent is allowed.

15. In Kamlesh Varma (*Supra*), the Hon'ble Apex Court has observed thus;

> *"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.*
>
> ***Summary of the Principles**:*
> *20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*
> *20.1 When the review will be maintainable:-*
> *(i) Discovery of new and important matter or evidence which,*

after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram vs. Neki and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors.

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.”

16. Applying the above principles to the case in hand, this Court is of the considered view that the applicant has repeated old and overruled arguments, which were concluded by the judgment under review. There is no material error, manifest on the face of record or error apparent on the face of record to exercise review jurisdiction. The present review application appears to be an appeal in disguise and the same is not maintainable.

17. In State of West Bengal and Others (Supra), the Supreme Court has observed;

> *"22. The term "mistake or error apparent" by its very connotation signifies an error which is evidence per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court-tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."*

18. In the light of the above legal principles, the judgment under review cannot be corrected merely because, according to the applicant, it is erroneous in law, which in fact is not so, or a different view could have been taken by this Court, on a point of

fact or law. This Court cannot sit in appeal over its own judgment while exercising the power of review.

19. In Navayuga Engineering Company (Supra), the Hon'ble Apex Court held that"

> *"4) Despite this Court repeatedly referring to Section 5 of the Arbitration Act in particular and the Arbitration Act in general and despite this Court having laid down in Deep Industries Ltd. Vs. ONGC & Anr. (2020) 15 SCC 706 that the High Court under Article 226 and 227 should be extremely circumspect in interfering with orders passed under the Arbitration Act, such interference being only in cases of exceptional rarity or cases which are stated to be patently lacking in inherent jurisdiction, we find that High Courts are interfering with deposit orders that have been made. This is not a case of exceptional rarity or of any patent lack of inherent jurisdiction."*

20. In the present case, a clear finding is recorded in the judgment under review that the Facilitation Council lacked inherent jurisdiction.

21. In K. G. Derasari (*Surpa*), the Apex Court was considering the issue, whether CAT while considering a contempt petition could issue certain directions which would have the effect of reviewing the original order passed by it. The Tribunal reviewed its order as it failed to take into consideration a Supreme Court judgment. In these facts, the Apex Court held that, review is maintainable against the order passed by the Tribunal without taking into

consideration earlier judgment of the Supreme Court. This ruling is cited in support of the contention that the Division Bench judgment in Writ Petition (L) No.4049/2020 was not taken into consideration by this Court, while rendering the judgment under review.

22. In Writ Petition (L) No.4049/2020, the Division Bench has held that, "Contours of Section 34 of the Act of 1996 are now settled by various judicial pronouncements. The concept of inherent lack of jurisdiction and nullity of arbitral awards have acquired a distinct meaning such as non-existence of arbitration agreement and non-arbitrability of the disputes. It is not the Petitioners case that there was no arbitration agreement or that the dispute was not arbitrable. Therefore the contention that arbital Award itself was nullity and the Arbital tribunal lacked inherent jurisdiction, cannot be accepted, even assuming this aspect can be gone into."

23. In view of the above observations and since this Court has relied upon the decisions in Whirlpool Corporation (*Supra*) and Harbanslal Sahnia (*Supra*), in my opinion, the Division Bench decision would not assist the applicant.

24. In Board of Control for Cricket in India (Supra), it is held;

"88. We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. Section 114 of the Code empowers a

court to review its order if the conditions precedents laid down therein are satisfied. The substantive provision of law does not prescribe any limitation on the power of the court except those which are expressly provided in Section 114 of the Code in terms whereof it is empowered to make such order as it thinks fit.

89. Order 47, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason' in Order 47, Rule 1 of the Code is wide enough to include a misconception of fact or law by a court or even an Advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit".

92. Yet again in Lily Thomas (supra), this Court has laid down the law in the following terms:

"52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which

transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error"

There cannot be any dispute about the aforesaid ratio laid down by the Apex Court. In the case in hand, this Court however does not find any error apparent on the face of record or a misconception of fact or law by the Court, while rendering the judgment under review.

25. This Court while exercising review jurisdiction is not sitting in appeal. Merely because different view is possible, review cannot be entertained, particularly when the same arguments were advanced and were considered while rendering the judgment under review.

26. For the aforesaid reasons, there is no substance in the review application and the review application is rejected.

[NITIN B. SURYAWANSHI, J.]

Sameer