



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO. 2 OF 2023
IN
ARBITRATION PETITION NO. 10 OF 2020

Rau Dilip More,
Giri Vihar Society, Nandurbar, Taluka
Nandurbar, District Nandurbar 425 412.

**..Applicant
/Original
Respondent
No.3**

In the Matter Between:

Sanjay Kailasnaryan Agarwal,
Residing at E-5, Hermes Heritage Shastri Nagar,
Yerwada, Pune 411 006.

...Petitioner

Versus

1. **Limitless Hospitality, LLP,**
Haivng its office at Flat No.7, MIT Corner,
North Main Road, Koregaon Park,
Pune 411 001.
2. **Mukesh Mukundlal, Moorjani,**
Residing at 301/A, Pooja Building, Pushpa
Park Road No.1, Malad, Mumbai 400 097.
also residing at Flat No.89, Krushna Kunj,
Timaya Road, Camp, Pune 400 001.
3. **Rau Dilip More,**
Giri Vihar Society, Nandurbar, Taluka
Nandurbar, District Nandurbar 425 412.

...Respondents

Mr. Nirman Sharma, with Mr. Ansh Kamawat, i/b. Dharam & Co.,
for the Review Applicant/Original Respondent No.3.

Mr. S. V. Sadavarte, for the Original Petitioner.

**Mr. Abhishek Adke, with Mr. Sagar Vichare, i/b. Mr. Abhishek
Adke, for Respondent No.2.**

CORAM : DR. NEELA GOKHALE, J.
RESERVED ON : 10th January 2024.
PRONOUNCED ON : 16th January 2024.

JUDGMENT:

1. The Applicant seeks review of order dated 29th November 2023 by which a sole arbitrator was appointed to enter reference and adjudicate disputes between the parties arising out of an agreement dated 20th May 2016. By order dated 18th December 2023, the Respondents were permitted to file their replies to the application and the order sought to be recalled was stayed till the next date.
2. Parties were given liberty to file written submissions and both the parties have filed their notes of arguments.
3. Mr. Nirman Sharma, learned counsel for the Applicant seeks review of the order on the following grounds:
 - (a) The order was passed without hearing the Applicant.
 - (b) The Respondent/original Petitioner did not give notice of listing and hearing of the petition to the Applicant. Since the application was moved around the advent of COVID-19 in March 2020, the Applicant is unsure if a copy of the petition was served or was untraceable.
 - (c) There was no valid invocation of the arbitration clause as per the agreement between the parties. There was a two tier process in the arbitration clause requiring a written request for consultation and it was only if consultation failed that

arbitration could be invoked. According to Mr. Sharma, the clause invoking arbitration is not clear.

(d) The agreement between the parties provided for an Arbitral Tribunal of three members and a sole arbitrator is appointed in the order.

4. Mr. Sharma relies upon the following decisions which he says supports his arguments regarding the power of the Court to recall an order passed under Section 11 of the Arbitration and Conciliation Act, 1996 (“the Act”):

(i) *Jain Studios Ltd. v. Shin Satellite Public Co. Ltd.*,¹

(ii) *Radha Bhattad v. Rashmi Cement Limited*,²

(iii) *D. P. Construction v. Vishvaraj Environment Pvt. Ltd.*,³

(iv) *Antikeros Shipping Corporation v. Adani Enterprises Ltd., Mumbai*,⁴

(v) *Municipal Corporation of Greater Mumbai & Anr.*⁵

(vi) *Srei Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd.*⁶

5. Mr. Sadavarte, learned counsel appearing for the original Petitioner while contesting the contentions of the Applicant says that he has no objection to rectifying a procedural error, if any, only to the extent of marking the presence of the Applicant. He, however,

1 (2006) 5 SCC 501.

2 2023 SCC OnLine Cal. 2570.

3 2022 SCC OnLine Bom. 1410.

4 2020 (3) Mh.L.J. 855.

5 (2019) 3 SCC 203.

6 (2018) 11 SCC 470.

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submits that the order sought to be recalled was passed on the merit of the matter only after verifying that the Respondent No.3 was duly served and did not appear despite valid service. He further states that by notice dated 28th August 2019, all the partners including the Applicant were called to settle the accounts of the firm and in failure thereof to refer the dispute to arbitration. Despite receiving the invocation notice, the Applicant failed to reply and virtually accepted his liability to the firm. It is only, thereafter, that the petition for arbitration was filed. Thus, Mr. Sadavarte summarizes that the Applicant was duly served and the invocation letter is perfectly valid.

6. Mr. Adke, learned counsel for original Respondent No.2 supports the contentions of the Petitioner. He says that the Court has jurisdiction to recall its order passed under Section 11 of the Act only to correct a procedural error. He points out that the Applicant seeks a substantial review of the order which is impermissible in law. He places reliance on the decision of the Supreme Court in the matter of *M.M.Thomas v. State of Kerala & Anr.*⁷ to support his argument in respect of power of the Court to recall its order under the Act.

7. I have gone through the record. Affidavit of service along with the postal receipt is on record. The Respondents No.2 and 3 were duly served. However, none appeared for Respondent No.3 on the date on which the order appointing an arbitrator was passed and

⁷ (2000) 1 SCC 666.
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hence appearance of the Respondent No.3/Applicant is not marked. The contention of the Respondent No.3 that the Petitioner did not give notice of listing is unacceptable. The matter appeared on the causelist and the Petitioner is not obliged to give additional notice of a petition being listed in the causelist of the Court.

8. The arbitration clause no.22 in the agreement dated 22nd May 2016 requires an attempt by the parties to resolve their disputes through good faith consultation in the first instance and, if such consultation does not result in a resolution of the dispute within 60 days of that consultation having commenced, the dispute shall be referred to an Arbitral Tribunal.

9. Notice of 28th August 2019 was issued by the Petitioner through his counsel calling upon the other party to enter into consultation and, thereafter, refer the dispute to arbitration in case the consultation process failed. The Applicant did not respond to this notice suggesting his refusal to attempts of consultation thereby invoking reference to arbitration as indicated in the notice. Thus, the invocation notice is valid. No attempt is seen to be made by the Applicant to resolve their dispute. There is an arbitration agreement in existence. In the circumstances, there is neither any procedural nor substantive error on the face of the order. No ground for recall of the order dated 29th November 2023 is made out. All the decisions cited by the parties are in respect of the power of the Court to recall

an order passed under Section 11 of the Act. Since the Court has exercised this jurisdiction and considered the application on merits, the decisions have not been discussed in detail.

10. The application seeking recall of order dated 29th November 2023 is dismissed. No order as to costs.

(DR. NEELA GOKHALE, J.)