

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 579 OF 2025
IN
REVIEW PETITION (STAMP) NO. 9314 OF 2024
WITH
REVIEW PETITION (STAMP) NO. 9314 OF 2024

Kalyani Construction

...Applicant/Petitioner

Versus

Matrukrupa Enterprises & Anr.

...Respondents

- Ms. Preeti Walimbe, for the Applicant/Petitioner.
- Ms. Pallavi Bali a/w Mr. Gourav Shetye, for Respondent No.1.

CORAM : MANISH PITALE, J.

DATE : 23rd APRIL 2025.

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MALANI

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P. C. :

1. In these proceedings, the applicant/petitioner is not just seeking condonation of delay of 1 year and 72 days in approaching this Court to seek review of the order dated 14th December 2022, but, the review petition itself is being pursued on merits. Considering the delay of about 1 year and 72 days, this Court had permitted the respondents in this application to file reply affidavit. The said reply affidavit is filed and rejoinder affidavit on behalf of the review petitioner is also on record.

2. Since the learned counsel for the review petitioner made vehement submissions and alleged serious fraud perpetrated on the petitioner, this Court has taken up the review petition itself on merits. It is contended

that that delay has occurred as fraud was perpetrated on the review petitioner and hence, the review petition deserves hearing and disposal on merits.

3. In that light, this Court has heard the learned counsel for the rival parties on the merits of the matter.

4. On 14th December 2022, this Court passed the order, which is subject matter of the present review petition, whereby the petition filed by the respondent herein under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Arbitration Act”) was allowed and a substitute arbitrator was appointed for resolving the disputes between the parties. This Court took note of the fact that the respondent in the said petition i.e. the review petitioner herein was represented by an advocate, the parties were heard and upon taking into consideration the arbitration clause and the inability expressed by the arbitrator, this Court found that a substitute arbitrator could certainly be appointed. Thereupon, the parties agreed for appointment of a particular arbitrator, who was a retired District Judge available at Thane, and accordingly, the petition was disposed of by appointing the said substitute arbitrator. It was directed that all questions were kept open with regard to the disputes between the parties.

5. It is an admitted position that thereafter the parties appeared before the substitute arbitrator. The arbitration proceedings culminated in an

award dated 07th June 2024 and it is also an admitted position that the review petitioner has challenged the said arbitral award before the Competent Court at Thane under Section 34 of the Arbitration Act. It is brought to the notice of this Court that this review petition was filed during the pendency of the arbitral proceedings.

6. The learned counsel appearing for the review petitioner submits that the order dated 14th December 2022, is vitiated by fraud, for the reason that in the first place there was no existing arbitrator appointed for resolving the disputes between the parties. It was further submitted that a perusal of the clause in the Supplementary Development Agreement, treated as an arbitration clause, was merely an handwritten addition in the Supplementary Agreement and that these aspects were not brought to the notice of this Court. It was further submitted that even if a communication dated 17th July 2010, issued by the review petitioner to the then arbitrator was to be treated as an invocation of arbitration, admittedly between 17th July 2010 and the year 2022, no arbitration proceedings had been undertaken. It was further submitted that the respondents herein while approaching this Court relied upon a letter dated 01st April 2022, purportedly issued by the named arbitrator expressing inability to continue the arbitration and that the petition under Sections 14 and 15 of the Arbitration Act was filed by the respondent immediately on 05th April 2022. It was submitted that the said letter dated

01st April 2022, was obviously obtained from the named arbitrator, only with the purpose of filing the said petition under Sections 14 and 15 of the Arbitration Act, for appointment of a substitute arbitrator.

7. It was submitted that the documents filed alongwith this review petition sufficiently demonstrate that a fraud was perpetrated, not only against the review petitioner, but upon this Court by misrepresenting facts. There was no named arbitrator undertaking any arbitration proceedings and therefore, the occasion to exercise jurisdiction for appointing substitute arbitrator under Sections 14 and 15 of the Arbitration Act could not have been exercised by this Court. It was submitted that since this aspect goes to the very root of the matter, the order dated 14th December 2022, deserves to be reviewed and the petition originally filed by the respondent for appointment of the substitute arbitrator deserves to be dismissed. It was further submitted that this was a case of nullity and not mere irregularity, in support of which reliance was placed on the judgment of the Gujarat High Court in the case of **Commissioner of Income Tax Vs. Jolly Fantasy World Ltd.**¹

8. On the other hand, the learned counsel appearing for the respondent herein submitted that in the first place no cogent grounds are made out for condoning delay of about 1 year and 72 days in approaching this Court. It was further submitted that in any case, there is no merit in the

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present review petition, particularly when the arbitration proceedings, pursuant to the order of this Court, are over and the review petitioner has already challenged the arbitral award under Section 34 of the Arbitration Act.

9. This Court has considered the rival submissions. As noted hereinabove, the aspect of condonation of delay has been considered by this Court in the light of serious allegation of fraud made by the review petitioner, claiming that not only was fraud perpetrated on the review petition, but on this Court also. Since fraud goes to the very root of the matter, this Court as a Court of Record is of the opinion that the questions sought to be raised on behalf of the review petitioner ought to be decided on merits and therefore, this Court is inclined to condone the delay and to take up the review petition on merits.

10. The principal argument raised on behalf of the review petitioner is that there was no arbitrator and there were no arbitration proceedings undertaken between the parties, when the petition under Sections 14 and 15 of the Arbitration Act for appointment of a substitute arbitrator, bearing Arbitration Petition No.62 of 2022, was filed by the respondent herein and that therefore, this aspect goes to the very root of the matter. It is claimed that fraud was perpetrated on this Court as there was no existing named arbitrator and hence, there was no question of exercising jurisdiction for appointing a

substitute arbitrator. There were certain submissions made with regard to the nature of the arbitration clause and it was indicated that the said clause being incorporated as a handwritten addition to the basic clause of damages also indicated that the fraud was perpetrated on the review petitioner.

11. This Court is of the opinion that the review petitioner is not justified in raising the aforesaid contentions, for the reason that when the petition under Sections 14 and 15 of the Arbitration Act was filed by the respondent, it was very much party before this Court and it was represented by counsel. The order dated 14th December 2022, specifically records that the respondent therein i.e. the review petitioner herein was represented by learned counsel and that this Court specifically heard the rival parties before passing the order dated 14th December 2022.

12. The petition filed by the respondent herein under Sections 14 and 15 of the Arbitration Act for appointment of the substitute arbitrator specifically placed reliance on the arbitration clause contained in the Supplementary Development Agreement and also on the letter dated 01st April 2022, issued by the named arbitrator in the arbitration clause. It was on the basis of such documents that the aforesaid petition for appointment of substitute arbitrator was pursued by the respondent herein.

13. The review petitioner, being a party in the said petition and

having been heard before this Court on 14th December 2022, was clearly aware about the aforesaid documents and the basis on which the petition for appointment of substitute arbitrator was filed. Having been aware of all such documents and facts and having made submissions before this Court on 14th December 2022, when the petition for appointment of substitute arbitrator was allowed, it cannot now lie in the mouth of the review petitioner to turn around and claim that fraud has been perpetrated. It is not possible for this Court to believe that the review petitioner was completely unaware about the assertions made in the petition filed by the respondent herein for appointment of substitute arbitrator. Being aware of all facts and having made submissions before this Court, not only has the review petitioner appeared before the substitute arbitrator, but the proceedings have reached culmination in the form of the aforesaid arbitral award. It is also an admitted position that the review petitioner has already filed the petition/application under Section 34 of the Arbitration Act before the Competent Court to challenge the said arbitral award.

14. This Court is unable to accept the contention raised on behalf of the review petitioner that since the review petitioner was not properly advised, it can be said to be a situation of fraud having been perpetrated on the review petitioner or upon this Court. The said contention is absolutely without merit and do not deserve any consideration. It is for the same reason that the

judgment of the Gujarat High Court in the case of **Commissioner of Income Tax Vs. Jolly Fantasy World Ltd. (supra)**, upon which the review petitioner placed much reliance, can be no assistance to the review petitioner as this is certainly not a case of either nullity or irregularity.

15. This Court is of the opinion that the order dated 14th December 2022, was passed after hearing the rival parties on merits. In fact, paragraph No.5 of the said order specifically records that rival parties agreed to appointment of the substitute arbitrator, who was a retired District Judge. In face of these facts, there is no substance in the present review petition.

16. In view of the above, the application for condonation of delay is allowed in the peculiar facts and circumstances of the present case and the review petition is dismissed.

(MANISH PITALE, J.)