IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :

Hon'ble Justice Moushumi Bhattacharya

IA No: GA 2 of 2022

in

RVWO - 20 of 2022

Everest Infra Energy Limited.

Vs.

Transmission (India) Engineers & Anr.

For the review applicant	:	Mr. Shuvasish Sengupta, Adv. Mr. Soumyajit Mishra, Adv.
For the respondents	:	Mr. Sakya Sen, Adv. Mr. Sukrit Mukherjee, Adv. Mr. Anirban Pramanick, Adv.
Last heard on	:	26.02.2024
Delivered on	:	19.03.2024

Moushumi Bhattacharya, J.

1. The applicant seeks review of a judgment and order dated 5.3.2021 arising out an arbitration petition filed by the award-debtor (respondent in the present application). The review applicant is the award-holder.

2. The alternative prayer of the review applicant is for a direction on the award-debtor to deposit an amount of Rs. 1,84,18,301.66/- for stay of the operation of the arbitral award dated 31.1.2020.

3. The judgment and order dated 5.3.2021 was passed in an application by the judgment debtor for stay of the award dated 31.1.2020. The application was made under section 36(3) of The Arbitration and Conciliation Act, 1996. The application was disposed of by directing the award-debtor (respondent herein) to put in an amount of Rs. 1,30,51,678/- in an interest-bearing fixed deposit within a fortnight from the date of the judgment upon intimation to the Registrar, Original Side of this Court. The award-holder was restrained from taking any steps for execution of the award on the compliance of the directions by the award-debtor.

4. Learned counsel appearing for the review applicant / award-holder submits that the Court directed the award-debtor to secure only the principal amount and not the interest component of the award dated 31.1.2020 overlooking the decision of the Supreme Court in *Hyder Consulting (UK) Limited vs. Governor, State of Orissa; (2015) 2 SCC 189* where the arbitral award + interest has been described as the "sum". Counsel submits that since *Hyder*

Consulting was not placed before the Court at the time of pronouncement of the order, the review becomes automatically maintainable on the Court having overlooked a settled principle of law. Counsel relies on *Nihar Ranjan Biswas vs. State of West Bengal; MANU/WB/0738/2016* in this context.

5. Learned counsel appearing for the respondent award-debtor submits that the review application is not maintainable since there is an absence of any error apparent on the face of the judgment. Counsel submits that the application is essentially an appeal in disguise and relies on *Perry Kansagra vs. Smriti Madan Kansagra; (2019) 20 SCC 753* in support of his submission. Counsel relies on Explanation to Order XLVII Rule 1 of The Code of Civil Procedure, 1908 to urge that *Hyder Consulting* cannot be a ground for review of the judgment dated 5.3.2021.

6. The first question which is required to be answered is on the maintainability of the present application for review of the judgment and order dated 5.3.2021. Order XLVII Rule 1 of The Code of Civil Procedure authorises any person aggrieved by a decree or order from which an appeal is allowed but no appeal has been preferred or where no appeal is allowed or a decision on a reference from a Court of Small Causes (Order XLVII Rule (1)(a)-(c)) to apply for review of the judgment to the Court which passed the decree / order on :

- The discovery of new and important matter; or
- Evidence which was not within the applicant's knowledge or could not be produced by him at the time when the decree was made despite exercise of due diligence; or
- On account of some mistake or error apparent on the face of the record; or

- For any other sufficient reason

7. Order XLVII Rule 1(2) deals with application for review notwithstanding the pendency of an appeal by another party and is not relevant to this application.

8. The Explanation inserted to the provision with effect from 1.2.1977 is as follows :

> *"The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."*

9. The Explanation to Order XLVII Rule 1 is not relevant to this matter and does not assist the respondent award-debtor since *Hyder Consulting* was pronounced on 25.2.2014 that is before the judgment under review was decided on 5.3.2021. Therefore, the position of law which was before the Court as on 5.3.2021 cannot be said to have been reversed or modified by any subsequent decision of a superior Court and bar review on that ground. In any event, the admitted position is that, learned counsel appearing for the award-holder (applicant herein) had forgotten to place *Hyder Consulting* before the Court on 5.3.2021.

10. Hence, the review application is maintainable. Whether the application will be allowed will depend on the applicant satisfying the grounds under Order XLVII Rule 1(1) which will be tested in the following part of this judgment.

11. The entire case of the review applicant / award-holder is mounted on *Hyder Consulting* where the Supreme Court specified that there can be no segregation of the awarded sum and the interest component as being independent of each other. The Supreme Court was of the view that the interest component loses its independent character and takes the colour of "sum". The Supreme Court's interpretation of the awarded amount and the interest merging into a "sum" arose from a construction of section 31(7)(a) and (b) of The Arbitration and Conciliation Act, 1996 and later stretched the description across the board i.e. pre-award, *pendentelite* and post-award interest. The applicant award-holder hence urges that the judgment under review should have included 14% interest awarded by the learned arbitrator on the principal amount of Rs. 1,30,51,678/- as *pendente lite* interest.

12. Although the present review is sought on the pronouncement of the Supreme Court in *Hyder Consulting* i.e. the Court should have granted stay of the award not only on the deposit of the principal sum but also on *pendente lite* interest, of 14%, this Court is unable to agree to this argument for the following reasons.

13. Section 36(2) of the 1996 Act preserves enforcement of an arbitral award subject to the Court granting stay of the operation of the arbitral award on a separate application being made for that purpose which is further subject to section 36(3) of the Act. Section 36(3) preserves the discretion of the Court considering an application for stay of the arbitral award in the matter of imposition of conditions for grant of stay which is to be articulated by way of

reasons recorded in the order. The first proviso to section 36(3) brings the Court to the provisions of The Code of Civil Procedure, 1908 for grant of stay of a money decree where the arbitral award is for payment of money.

14. Section 36 (2) and (3) read with the first proviso thereto thus makes it clear that the Court, deciding an application for stay of an arbitral award, has discretion on the conditions to be imposed for stay of the operation of the award. This means that there cannot be a straightjacket formula or even a mandate on the Court to grant stay of an award by directing the award-debtor to deposit a specified quantum, i.e., the principal sum + interest or the principal sum without interest or even the entire principal sum or the entirety of the interest component for stay of the Award. In other words, the Court has complete discretion on the quantum which an award-debtor must put in for stay of the award. The discretion must of course be wisely-exercised and expressed in writing.

15. To clarify, the award-holder does not say that the discretion was wrongly exercised, but that the Court should have considered the dictum in *Hyder Consulting* in directing the award-debtor also to deposit the interest component together with the principal amount and should now review its judgment since that was not done.

16. The question which would hence fall for consideration is whether the Court would be denuded of its discretion under sections 36(2) read with (3) in the face of *Hyder Consulting.* For a blunt re-phrase, would the failure to follow

Hyder Consulting render the judgment under review erroneous or contrary to statute?

17. Order XLVII Rule 1 of the CPC, which forms the substratum of the present application, provides a wide berth to an applicant for review of a judgment. The width of the grounds is virtually without limits – reinforced by the last condition under Order XLVII Rule 1(1) : "*... or for any other sufficient reason...*". This phrase must however fall within the bounds of the first two conditions which is new and important matter being subsequently discovered or were apparent on the face of the record. Any other interpretation given to "any other sufficient reason" would result in negating the parameters of review and merging review with an appeal which would be contrary to the first part of Order XLVII Rule 1(1) itself.

18. The foremost ground taken for application of a review of a judgment is an error apparent on the face of the record. By definition this would mean an error which is obvious to the eye and one that is evident from the judgment even at a cursory first-glance. It would certainly not mean an error which is required to be discovered and brought to the surface after unraveling the layers of the judgment.

19. The judgment under review did not consider *Hyder Consulting* because the said case was not placed on behalf of the award-holder before the Court. It is relevant that *Hyder Consulting* was pronounced on an interpretation of section 31(7)(a) and (b) of the 1996 Act and was not a decision on section 36(2) and (3) of the 1996 Act. Significantly, *Hyder Consulting* did not disturb the

discretion conferred on the Court in sections 36(2) and (3) that is the Court deciding an application for stay of an arbitral award. Therefore, the failure to consider *Hyder Consulting* or following the dictum thereof would not amount to an error apparent on the face of the record. i.e. forming a ground for altering the judgment under review.

20. In *Nihar Ranjan Biswas* a Co-ordinate Bench of this Court found an error apparent on the face of the order passed by the Bench since a Division Bench judgment was not brought to its notice at the time of disposal of the writ petition. The Court found the Division Bench judgment expressing a contrary view to that expressed by the Co-ordinate Bench. The facts before this Court are entirely different since the dictum of the Supreme Court in *Hyder Consulting* is not a proposition for stay of an arbitral award. *Tinkari Sen vs. Dulal Chandra Das; AIR 1967 Cal 518* held that overlooking a proposition of law settled beyond controversy furnishes good grounds for review as does an error apparent on the face of the record. The aforesaid judgment would indeed have furnished a ground for review had the judgment passed by this Court on 5.3.2021 been on a construction of section 31(7)(a) and (b) of the 1996 Act.

21. *Morgan Securities and Credits Private Limited vs. Videocon Industries Limited; (2023) 1 SCC 602* was also on the construction of section 31(7)(a) of the 1996 Act where the Supreme Court held that the discretionary power of the arbitrator under that provision is subject to the contract between the parties as opposed to section 31(7)(b) for post-award interest where the discretion is not subject to any contract. *Morgan Securities* was purely on section 31(7)(a) and

(b) of the 1996 Act and does not assist the review-applicant for treating *Hyder Consulting* as a ground for review of the judgment and order dated 5.3.2021.

22. The question before the Court in *Government of NCT of Delhi vs. K.L. Rathi Steels Limited; (2023) 9 SCC 757* was whether the judgment in *Pune Municipal Corporation vs. Harakchand Misirimal Solanki; (2014) 3 SCC 183* having been overruled in *Indore Development Authority vs. Manoharlal; (2020) 8 SCC 129*, would call for review of all the judgments which had attained finality between the parties. The Supreme Court relied on the Explanation to Order XLVII Rule 1 to hold that the expression "*any other sufficient reason*" has to be interpreted in light of the other grounds specified in the said provision and further that an erroneous decision cannot be corrected in the guise of exercise of the power of review. The Supreme Court also relied on *Parsion Devi vs. Sumitri Devi; (1997) 8 SCC 715* to opine that it is not permissible for an erroneous decision to be re-heard and corrected under Order XLVII Rule 1 of the CPC. The dictum laid down by the Supreme Court in *Government of NCT* makes the "*but for*" test irrelevant.

What does this mean?

The judgment dated 5.3.2021 would have been un-reviewable *"but for" Hyder Consulting.*

23. The above proposition, i.e. the "*but for*" reasoning is however riddled with chaotic consequences and contrary to the regimen of Review under Order XLVII Rule 1 of the CPC. A judgment containing an erroneous point of law is not reviewable; it is an appealable judgment. A judgment pronounced on a

question of law which is subsequently reversed or modified by a superior Court is also not a reviewable judgment. A judgment which fails to consider a decision which was available at the time of pronouncing the judgment, but was not shown to the Court, by the same logic, is not reviewable on the ground of being *per incuriam*. Such a judgment would be open to challenge before a superior Court. It is significant that the Explanation to Order XLVII Rule 1 preserves the finality of a decision even where the question of law is subsequently unsettled by a superior Court.

24. In any event, the above discussion to the extent of the Explanation to Order XLVII Rule 1 would be academic in view of *Hyder Consulting* not being a legal proposition of law which was relevant to the judgment under review. The judgment was entirely on the discretion conferred on a Court for stay of an arbitral award under section 36(2) and (3) of The Arbitration and Conciliation Act, 1996.

25. This Court is accordingly of the view that there is no error apparent on the face of the judgment and order dated 5.3.2021. The contention of the review applicant of the Court overlooking the dictum in *Hyder Consulting* and pegging the security only to the extent of the principal amount awarded to the review applicant / award-holder may be the subject-matter of an appeal but not a review under Order XLVII Rule 1(1) of the CPC.

26. RVWO 20 of 2022 is accordingly dismissed. GA 2 of 2022 is disposed of in terms of this judgment. There shall be no order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)