

Review Petition No.699/2013

23.06.2014

Shri Vinay Saraf, Advocate for the petitioner.

Shri Vijay Assudani, Advocate for the respondent.

Heard counsel for the parties.

This review petition arises from the decision of the learned Single Judge dated 13.11.2013 in W.P. No.8276/2013.

The principal grievance of the review petitioner is that the learned Single Judge has examined the matter only in the context of Section 48 of the Arbitration and Conciliation Act, 1996, when infact, the core issue was whether award could be passed on the basis of agreement to which the petitioner was not a party, as is the mandate of Section 47 of the Act. According to the petitioner that fact is a jurisdictional fact and must be answered by the court before proceeding in the matter any further. In absence of finding on that fact, the Court cannot assume jurisdiction to deal with the matter; much less to proceed with the execution of the award against the petitioner who is not party to the arbitration agreement.

The argument, though attractive at the first blush, clearly overlooks the fact brought to our notice by the counsel for the respondent that this specific contention was raised before the trial Court in application under Section 48 of the Act which has been answered vide order dated 08.07.2011. Against that decision the petitioner carried the matter in Writ Petition No.8186/2011, which has been decided by the learned Single Judge of this Court on

28.09.2012. From paragraph-3 of the said decision it is noticed that the first contention raised by the petitioner was that he was not party to the arbitration agreement. The writ petition, as aforesaid, was dismissed. Once again this very plea was raised by the petitioner in subsequent petition filed before this Court being Civil Revision No.20/2013 against the decision of the trial Court dated 07.01.2013 in Execution Case No.442/2010. In para-6, the learned Single Judge pointedly referred to the plea taken by the petitioner in this behalf. The same has been considered in paragraph-7 and a clear finding of fact has been recorded that the petitioner has forgiven that plea without any leave of the Court and, therefore, it was not permissible for the petitioner to re-agitate the same issue.

Indisputably, the petitioner resorted to review petition against that decision and the observation made by the learned Single Judge being Review Petition No.166/2013. That review petition once again came to be dismissed by a speaking order as not bonafide. It is common ground that the petitioner did not carry the matter any further against the decisions in the earlier round of writ petition and review petition and, instead, allowed the same to attain finality. Having done so, it was not open to the petitioner to re-agitate the same issue once again before the trial Court in execution proceedings nor it was permissible for the trial court to entertain the same contrary to the findings of the High Court. The Executing Court, nodoubt, in the order which was impugned in Writ Petition No.8276/2013 has noted that aspect. The grievance

of the petitioner that it was incumbent upon the learned single Judge to analyze the grievance of the petitioner that at-least one Court ought to decide the question on merits does not commend to us. Inasmuch as, in paragraph-6 of the judgment under review the learned single Judge has, after analyzing the indisputable facts, which are referred to earlier and have been reproduced in the order under review in paragraph-2, noted that this plea has been repeatedly raised by the petitioner and has been turned down. That is the sum and substance of the order under review.

In our opinion, no case for review is made out.

Counsel for the petitioner relying on the decision of the Apex Court in the case of *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, (2005) 7 SCC 234, in particular paragraphs 102 to 104, was at pains to persuade us that notwithstanding the observations found in the earlier round of litigation resorted to by the writ petitioner it was open to the petitioner to agitate the same question of fact being mixed question of fact and law.

We are not impressed by this submission. The petitioner having given up the point, as has been noted in the judgment of the learned Single Judge of this Court in the earlier round of writ petition, and that finding having attained finality cannot be allowed to reopen the same in the subsequent proceedings. In our opinion, this review petition is ill-advised. If entertained, it will inevitably result in doing review of order passed in earlier Review

Petition. That is impermissible.

Counsel for the petitioner submits that the petitioner should not be punished for the mistake of the advocate.

This plea is once again an argument of desperation. The petitioner was represented by Advocate before the learned single Judge in earlier round of litigation as well as in review petition. Having filed review petition, it presupposes that petitioner was well advised about the incorrectness of the finding recorded on the earlier occasion. That finding has been reiterated in the previous review judgment, the question of petitioner having suffered any prejudice much less because of incorrect or improper advice of the Advocate for having given up the point in issue cannot be taken any forward.

Hence **dismissed**.

(A.M. Khanwilkar)
Chief Justice

(Shantanu Kemkar)
Judge

Saraf