

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****REVIEW APPLICATION NO.04/2018****IN****T.A. (AT)(COMPT.) NO.17 OF 2017****OLD APPEAL NO.55/2016****In the matter of :**

J.K. Cement Ltd

Applicant

Vs

Competition Commission of India & Anr

Respondent

For Applicant: Mr Ramji Srinivasan, Sr. Advocate and Mr. P.K. Bhalla, Advocate.

For Respondent: Mr Aishwarya Sinha, Mr Davandar Prasad, Dy. Director, CCI (Law).

Mr. Rahul Goel, Mr.Paritosh Dhawan, Ms Anu Monga, Advocates for R2.

ORDER

17.11.2022: Heard Mr. Ramji Srinivasan, learned senior counsel assisted by Mr. P.K. Bhalla, learned counsel appearing on behalf of the applicant, Mr. Aishwarya Sinha, learned counsel for the CCI/Respondent No.1 and Mr. Paritosh Dhawan, learned counsel for Respondent No.2.

The present application has been filed under section 53-O(2)(f) of the Competition Act, 2002 read with Regulation 18 of the Competition Appellate Tribunal (Procedure for Appeals & Applications) Regulations, 2010 against the final order dated 25.07.2018 passed by this Appellate Tribunal in Appeal No.17/2017 (Transferred Appeal No.55/2016 from Competition Appellate Tribunal (COMPAT). The present application has been filed by the applicant, J.K. Cement Ltd. It was submitted by Mr. Ramji Srinivasan, learned counsel

that immediately after the judgement was passed by this Tribunal, on 23.08.2018, the present Review Application was filed for review of the order on the plea that while imposing penalty relevant turnover/product was to be taken into account in terms of the judgement passed by the Hon'ble Supreme Court in the case of Excel Crop Care Vs Competition Commission of India. However, the Tribunal had considered total turn over.

While pressing this application Mr. Ramji Srinivasan, learned counsel submits that CCI earlier in Case No.29/2010 on 31.08.2016 had passed an order wherein penalty under Section 27(b) of the Competition Act was imposed to the tune of Rs.128.54 crores which was 10% of the turnover of all products. The said order was assailed by the applicant before the COMPAT. However, while admitting the appeal an interim order was passed directing the applicant to deposit 10% of the penalty amount on 21.11.2016. Accordingly in compliance of the order dated 21.11.2016, the applicant thereafter on 29.11.2016 deposited 10% of the penalty amount. Subsequently after noticing the fact that the penalty was imposed on the total turnover, the applicant filed a modification petition on 19.12.2016 to modify the penalty which was filed vide IA No.176/2016. The said modification was allowed on 16.02.2017 and the applicant was directed to deposit 10% of manufacturing of grey cement under relevant turnover. Meaning thereby that earlier penalty imposed to the tune of Rs.12.85 crore was reduced to Rs.6.55 crore. He submits that in view of the modified order the penalty was reduced to the tune of Rs.6.55 crores and the remaining amount was refunded by the CCI to the

applicant. However, finally after detailed hearing this Tribunal by its order dated 25.07.2018 approved the order of the CCI in totality.

After the judgement/order was passed by this Tribunal approving the decision of the CCI, the applicant filed the present Review Application for review. He submits that it is true that the present application was filed on 23.08.2018, but since the limitation period for filing appeal was going to expire for filing SLP, on 18.02.2019 the applicant filed appeal before the Hon'ble Supreme Court, which was registered as Civil Appeal No.9882-9883 of 2018. During the hearing of this application, learned senior counsel for the applicant, Shri Srinivasan accepted that the appeal before the Hon'ble Supreme Court is still pending. He submits that the Hon'ble Supreme Court has passed an interim order restraining CCI to take any coercive steps. On being asked as to whether in view of the pendency of the appeal before the Hon'ble Supreme Court this Tribunal is competent to entertain the Review Petition, Learned senior counsel has argued that Section 53-O(2)(f) categorically authorises this Tribunal for "*REVIEWING ITS DECISIONS*". Meaning thereby that this Tribunal has power to review its decision. He submits that the Hon'ble Supreme Court Judgement in the case of Kunhayammed and others Vs State of Kerala and Another (2000) 6 Supreme Court Cases 359 makes it clear that even if the appeal is pending before the superior court, there is no bar to entertain a review petition. According to him this Appellate Tribunal is within its jurisdiction to review its order He has specially referred to para 36 and 37 of the judgement which is quoted below:-

“36. For our purpose it is clause (a) sub-rule(1) which is relevant. It contemplates a situation where an appeal is allowed but no appeal has been preferred. The Rule came up for consideration of this Court in Thungabhadra Industries Ltd. Vs. The Govt. of A.P. (AIR 1964 SC 1372) in the context of [Article 136](#) of the Constitution of India. The applicant had filed an application for review of the order of the High Court refusing to grant a certificate under [Article 133](#) of the Constitution. The applicant also filed an application for special leave to appeal in respect of the same matter under [Article 136](#) along with an application for condonation of delay. The Supreme Court refused to condone the delay and rejected the application under [Article 136](#). When the application for review came up for consideration before the High Court, it was dismissed on the ground that the special leave petition had been dismissed by the Supreme Court. This Court held that the crucial date for determining whether or not the terms of Order 47 Rule 1(1) CPC are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end. On the date when the application for review was filed the applicant had not filed an appeal to this Court and therefore there was no bar to the petition for review being entertained.

37. Let us assume that the review is filed first and the delay in the SLP is condoned and the special leave petition is ultimately granted and the appeal is pending in this Court. The position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree - the one before review - becomes infructuous.”

Taking clue from the aforesaid judgement the learned senior counsel, however, submits that this Tribunal may exercise its Reviewing Jurisdiction and review the judgement dated 25.07.2018 passed by this Tribunal to the extent of reducing the penalty on calculation on the basis of relevant turn over not on total turnover.

Mr Aishwarya Sinha, learned Counsel appearing on behalf of CCI has opposed the prayer. He by way of referring to Regulation 18 of Competition Appellate Tribunal (Procedure for Appeals and Applications) Regulations, 2010 (hereinafter referred to as Regulation, 2010) submits that though the Tribunal is empowered to review its own order but it is limited to reviewing clerical or arithmetical mistakes. He submits that Section 53-O(2)(f) can be read with Regulation 18 of Regulations, 2010. He further submits that the judgement on which reliance has been placed was mainly dealing with the power of review under Section Order 47 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as CPC).

Before proceeding it would be appropriate to reproduce Order 47 Rule 1 as under:

“1. APPLICATION FOR REVIEW OF JUDGMENT.

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record of for any other sufficient reason, desires to

obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation:

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.”

He submits that in view of above referred provisions contained in the CPC itself reviewing jurisdiction is not enlarged to the extent of reviewing and recalling of its own orders. He further submits that the Review Petition has been filed under the Competition Act and the provisions contained in Section 53-O(2)(f) itself indicates about limited application of provisions of CPC. According to Mr Sinha, learned counsel for CCI besides non-maintainability of the present review petition, the review petition is otherwise not required to be entertained due to the reason that against the same impugned order number of appeals alongwith appeal filed by the Applicant have been filed

before the Supreme Court, which are still pending. As such this review petition may not be entertained.

Mr. Paritosh Dhawan, learned Counsel for the Respondent No.2 adopting the arguments of learned counsel for the CCI has further argued that in respect of same order under present review other review petition was filed before this Appellate Tribunal in Review Application No.06/2018 (TA(AT) (Compt.) No.11/2017 (Old Appeal No.49/2018) and a Bench of this Tribunal has rejected the review petition recording as it was not maintainable. He submits that once in a similar situation this court exercising its jurisdiction has rejected the review petition as not maintainable this Court may not pass a different order.

In rejoinder Shri Srinivasan though he did not dispute regarding rejection of earlier review petition by order dated 13.04.2022 but he argued that from the said order it is not clear whether the said review was filed before filing of appeal before Supreme Court or after filing of the appeal. However, the present review was filed even before appellant went to the Hon'ble Supreme Court.

Besides hearing learned counsel for the parties we have minutely examined the material available on record. For just decision it is appropriate to reproduce Section 53-O of Competition Act and Regulation 18 of Regulations 2010 respectively as follows:-

“Section 53-O in the Competition Act, 2002

53-O Procedure and Powers of Appellate Tribunal. —

(1) The Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Appellate Tribunal shall have power to regulate its own procedure including the places at which they shall have their sittings.

(2) The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1972), requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing a representation for default or deciding it ex parte;

(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte;

(i) any other matter which may be prescribed. (3) Every proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).]”

Regulation 18 of Regulations 2010

18.Rectificaion of errors-Any clerical or arithmetical mistakes in any proceedings, amendment of proceedings, declaration or order of the Tribunal or error may, at any time, be corrected by the Tribunal either on its own motion or on the application of any party.”

On perusal of the aforesaid two provisions there is no confusion in our mind that of course this Tribunal is competent to entertain a review petition, but while entertaining review petition we are required to keep in our mind that in exercising review jurisdiction we are competent to review clerical or

arithmetical mistakes and are not permitted to review our own order in its entirety. Besides aforesaid restrictions, we are of the opinion that if the Court starts entertaining a review petition for review of the entire order there will be no end of litigation. At every stage after judgement, review petition will be filed and even on review, 2nd or third review can be filed. To avoid such situation it is not advisable to entertain review petition which goes into the merits of the case.

Besides this of course, Hon'ble Supreme Court in Kunhayaammed & Ors case (Supra) has observed that even during the pendency of the appeal review petition can be entertained but it was observed in different context and also on examination the same it is evident that considering the provisions contained in Order 47 Rule 1 of the CPC, the said judgement was passed. On examination of the provisions i.e. Order 47 Rule 1 of CPC which has been quoted hereinabove, it is also clear that even civil court may not exercise review jurisdiction for altering or recalling the entire order and review jurisdiction can be exercised in a special facts and circumstances, not in the present context.

After hearing the parties, without recording any opinion on the point of maintainability of the review petition, we are of the opinion that since against the order under review an appeal preferred by the Applicant herein is pending before the Hon'ble Supreme Court and Hon'ble Supreme Court has also passed interim order, if we entertain the present review petition this may amount to interfere with the jurisdiction of the Hon'ble Supreme Court. Whatever points have been raised before this Tribunal in the present review

application, can be raised before the Hon'ble Supreme Court. Moreover it is not in dispute that in respect of same impugned order, one review petition was filed and a Co-ordinate Bench of this Tribunal vide order dated 13.04.2022 has already dismissed the Review Petition as not maintainable. In all fairness it would not be advisable to pass any inconsistent order. Therefore, the Review Application No.04/2018 stands disposed off.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

Bm/gc