Atul

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
REVIEW PETITION (L) NO. 5868 OF 2021
IN
COMM ARBITRATION PETITION NO. 434 OF 2021

1. **PRIYANKA COMMUNICATIONS (INDIA) PVT LTD**
143, Oshiwara Industrial Estate, Opp. Oshiwara Bus Depot, New Link Road, Goregaon (West), Mumbai 400 104

2. **MAHESH CHANDRA AGARWAL**
143, Oshiwara Industrial Estate, Opp. Oshiwara Bus Depot, New Link Road, Goregaon (West), Mumbai 400 104
Also at: 1101-1A, Green Acres, Lokhandwala Complex, Andheri (West), Mumbai 400 053

3. **MANISH CHANDRA AGARWAL**
143, Oshiwara Industrial Estate, Opp. Oshiwara Bus Depot, New Link Road, Goregaon (West), Mumbai 400 104
Also at: 2004, 5, 6, Meghdoot A Wing, Lokhandwala Complex, Andheri (West), Mumbai 400 053

...Petitioners
(*Org.Respondents*)

~ VERSUS ~

TATA CAPITAL FINANCIAL SERVICES LTD.
A non-banking finance company duly registered with the Reserve Bank of India and Incorporated under the provisions of the Companies Act 1956, having its registered Office at 11th Floor, Tower A, Peninsula Business Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013

...Respondent
(*Org. Petitioner*)

APPEARANCES

FOR THE PETITIONER: "AGARWALS"
Mr Premlal Krishnan,
with Dinesh Bhate, i/b Pan India Legal Services LLP

FOR THE RESPONDENT: "TATA CAPITAL"
Dr Birendra Saraf, *Senior Advocate*,
with Mr Rohan Savant, Mr Sachin Chandarana & Mr Chandrajit Das, i/b M/s Manilal Kher Ambalal & Co

CORAM : G.S.Patel, J.
DATED : 4th August 2021

ORAL JUDGMENT:

1. This Review Petition was adjourned yesterday at Mr Krishnan's request. He appears for the Review Petitioners ("**the Agarwals**"). I have heard him at some length this afternoon and, briefly, Dr Saraf for the contesting Respondent ("**Tata Financial**").

2. In my view, this Review Petition is not only thoroughly misconceived but is also deliberately mischievous, and quite possibly vexatious. I believe it is precisely the kind of proceeding that the Commercial Courts Act 2015 ("**the CCA**") deprecates. It has taken an unconscionable amount of the court's time. The CCA uses the expressions "frivolous claim", "vexatious proceeding" and "wasting the time of the Court". This Review Petition is all three; I will return to this part of the CCA towards the end of this judgment. Apropos the last of these, the phrasing in the CCA is not "*taking* the time of the Court" but "*wasting* the time of the Court". The difference is significant: every litigant is entitled to the Court's time. After all, the purpose of a court is to make time for a litigant. But no litigant is entitled to squander or waste the time of the court. That is as unfair to a court as it is to other litigants waiting in line. In the Commercial Division, governed by the provisions of the CCA, wasting the time of the Court invites an order of costs. I have, therefore, not only dismissed the Review Petition, but I have done so with costs.

3. The law on the power of review is now far too well-settled to warrant any larger discussion. There are two authorities that Dr Saraf cites that seem to me apposite to this case; I will come to those later. But it is not contentious that the power of substantive review — as opposed to procedural or "purely procedural" review — is, *first*, one that must be conferred by law,[1] and, *second*, the exercise of the power of review is narrowly constrained by the law that confers it. This law

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1 See *Patel Narshi Thakershi & Ors v Shri Pradyuman Singhi Arjunsinghji*, (1971) 3 SCC 844; *Patel Chunibhai Dajibha etc v Narayanrao Khanderao Jambekar & Anr*, AIR 1965 SC 1457; *Harbhajan Singh v Karam Singh & Ors*, AIR 1966 SC 641; *RR Verma & Ors v Union of India & Ors*, (1980) 3 SCC 402;

is not new either. In fact, it is very old. In the 1891 decision in *Drew v Willis*,[2] Lord Esher, M.R., said that no court or authority has the power to set aside an order properly made, unless it (viz., the power) is given by statute.

4. In 1914, in *Hession v Jones*,[3] Bankes J held that no *court* has the power to review an order deliberately made after argument and to entertain a fresh argument upon it with a view to ultimately confirming or reversing it. The decision in *Hession* — a case about a contract for sale of eggs — is oddly prescient to the facts of this case, as the extract that follows shows.

> **BANKES J**. This is an application on behalf of the plaintiff, the respondent on an appeal to this Court, to restore the appeal to the list. Such an application may be made either (1.) to restore a case which has merely been struck out and has never been heard and decided because the appellant did not attend; or (2.) to restore a case in which the appellant has appeared and argued his appeal in the absence of the respondent and the Court has heard the appeal and come to a decision. In the first case the application is to restore an appeal which has not been heard; in the second case the application is to set aside a decision after a hearing which in the respondent's view is not satisfactory because he was not present. **This is an application of the second class, to set aside an order of this Court made by Ridley J. and myself after hearing.** The appellant was present and produced a copy of the county court judge's notes and was ready to proceed with his appeal. The respondent was not represented. The appellant was the defendant in the county

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2 (1891) 1 QB 450. Cited in *Harbhajan Singh*, *supra*.

3 (1914) 2 KB 421. Also cited with approval in *Harbhajan Singh*, *supra*.

court. An action had been brought against him for the price of certain cases of eggs ordered by him for delivery at a named station. The plaintiff delivered a larger quantity than that ordered. The defendant had refused to take delivery on the grounds (1.) that there was unreasonable delay in forwarding and (2.) that the eggs were not in proper condition. When he was sued in the county court he took the further point under s. 30, sub-s. 2, of the Sale of Goods Act, 1893, that the plaintiff could not succeed because he had tendered a different quantity from that ordered. The defendant claimed the right to reject on that ground also. **The point was taken before the county court judge.** The plaintiff contended that the defendant could not rely upon it, because he had not given it as his reason when he first rejected the goods. **The county court judge decided the point in favour of the plaintiff. In the opinion of Ridley J. and myself he was wrong in so deciding. Before deciding the appeal we considered whether there was any evidence that the defendant had waived or abandoned or in any way estopped himself from relying on this defence, and came to the conclusion that he had not done so. Accordingly we made an order allowing the appeal; we set aside the judgment of the county court, and ordered judgment to be entered for the defendant in that Court.** That order was duly drawn up by the officer of this Court; a copy of the order was obtained by the solicitor for the appellant, the defendant below, and he was thereupon in a position to have the record in the county court altered by striking out the judgment for the plaintiff and entering judgment for the defendant. I do not know whether that was done, but there is no doubt that the order of this Court was drawn up and perfected before any step was taken to set it aside. **It is clear therefore that this is an application to review an order deliberately made after argument and to entertain a fresh argument upon it with a view to**

> **ultimately confirming or reversing it.** Has the Court jurisdiction to do this? I may say at once that if we have I should not exercise it in the present case, because any application of this sort must be supported by an affidavit of merits. **I have read the affidavit in this application and can find nothing which would lead me to alter the opinion I formed on the hearing of the appeal. But it is necessary to consider the jurisdiction of the Court. The application is supported by an affidavit in which the solicitor for the plaintiff says that by an unfortunate mistake he did not instruct any one to appear for the respondent on the appeal.** … **Our jurisdiction therefore is in part a statutory jurisdiction regulated by the Rules of the Supreme Court, 1883, and partly an inherent jurisdiction which we possess as judges of the High Court. The question is whether either by the rules or by reason of our inherent jurisdiction we have the power to reinstate this appeal.**
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> Then as to the inherent jurisdiction of the Court. Before the Judicature Acts the Courts of common law had no jurisdiction whatever to set aside an order which had been made. The Court of Chancery did exercise a certain limited power in this direction. All Courts would have power to make a necessary correction if the order as drawn up did not express the intention of the Court; the Court of Chancery, however, went somewhat further than that, and would in a proper case recall any decree or order before it was passed and entered; but after it had been drawn up and perfected no Court or judge had any power to interfere with it. That is clear from the judgment of Thesiger L.J. in the case of *In re St. Nazaire Co* [(1879) 12 Ch D 88].
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> (*Emphasis added*)

5. As we shall presently see, this Review Petition is in the same class as *Hession*. It seeks a reinstatement of the original Arbitration

Petition on grounds never argued, never taken, and some never pleaded; and it does so after the original Arbitration Petition was fully argued, and then decided by pronouncement in open court. The order under review was then 'perfected', that is to say its transcript was corrected, signed and uploaded, the very next day or perhaps shortly after pronouncement.

6. A power of review is conferred on our civil courts by Section 114 and Order 47 of the Code of Civil Procedure, 1908 ("**CPC**"). The relevant part of those provisions say:

> **114. Review**.—Subject as aforesaid, any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
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> (b) by a decree or order from which no appeal is allowed by this Code, or
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> (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.
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> **Order 47**
>
> **REVIEW**
>
> **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.]

2. [*deleted*]

3. …

4. Application where rejected.—(1) Where it appear to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) **Application where granted.**—Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

5. …

6. …

7. Order of rejection not appealable. Objections to order granting application.—(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.

(2) …

(3) …

8. …

9. …

7. The Agarwals were respondents to the original Section 9 Arbitration Petition. Tata Finance was the Petitioner. I made an order on 12th March 2021. I held against the Agarwals. I said they had,

prima facie, no defence at all — they were indubitably borrowers from Tata Finance under finance agreements, and, not having repaid the loan on the terms of the agreement, were in contractual default. I directed an asset disclosure and granted an injunction. This is the order the Agarwals seek to review.

8. But before they filed this Review Petition, the Agarwals filed an appeal. By the time of the Appeals, the Agarwals had changed lawyers. They had now engaged M/s Pan India Legal Services LLP. Counsel instructed by Pan India Legal Services LLP in the appeal court sought to contend that I had failed to consider the Agarwals' written submissions (filed at a much earlier date, on 15th December 2020) in my order of 12th March 2021. The Appeal Court disposed of the appeal by granting the Agarwals liberty to file a review.

9. It is actually correct that in my order of 12th March 2021 I did not consider the Agarwals' written submissions. I do not do so because nobody asked me to. Nobody even told me they had been filed. Nobody briefed for the Agarwals made any arguments on the written submissions. Before me, Mr SK Sen appeared for the Agarwals, not only on that date but on several previous occasions. He did not once reference these written submissions. Now, apart from his acuity and legal acumen, Mr Sen has built himself a reputation in this court for a preternaturally calm doggedness, and for being as undaunted as he is dauntless. I imagine that had he wanted to show me the written submissions and found any argument on them, no human force could have stopped him and I would have had no choice in the matter. But for whatever reason he did not once refer to them.

10. I dictated the order in open Court. Mr Sen was present throughout. At no point did he say that I had not dealt with a point he canvassed, or that I had not taken into account the written submissions — simply because he never argued the latter. No one for the Agarwals applied for a clarification or speaking to the minutes in the days that followed. The very first time that this ground — of the written submissions not being considered — was raised was by these new lawyers in appeal.

11. But this is not the frame of the Review Petition at all. Its grounds for review are, to put it mildly, astonishing.

12. Ground A says that this Court has no jurisdiction because the dispute between the parties is within the jurisdiction of the Debts Recovery Tribunal ("**DRT**"). This was never argued before me. More importantly, it is no part of the Affidavit in Reply. It is also not a part of these much-vaunted written submissions. Mr Krishnan insists this is a question of law that can be taken at any stage. He is wrong. In this case, it is at the very least a mixed question of fact and law. His case is that Tata Finance is covered by a Notification dated 5th August 2016 of the Ministry of Finance and hence cannot arbitrate its disputes. It must follow the special procedure under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("**the DRT Act**"). No copy of any such notification of 2016 regarding Tata Finance is annexed. Dr Saraf submits that the correct notification in question as regards Tata Capital is of 24th February 2020, not 5th August 2016. It is not under DRT Act but is under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**the SARFAESI**

Act"). Mr Krishnan's reliance on the decision of the Supreme Court in *Vidya Drolia & Ors v Durga Trading Corporation*[4] is misplaced: paragraph 58 says claims covered by the DRT Act are non-arbitrable. In any case, I do not see how this furnishes a ground of review. Nobody ever argued it.

13. Ground **B** is that no leave was obtained under Order II Rule 2 of the Code of Civil Procedure 1908. This is on the basis that the present Petition was lodged on 24th September 2020 and two days earlier Tata Capital filed Commercial Summary Suit on 22nd September 2020. Mr Krishnan insists that the subject matter of the two actions is the same. Dr Saraf disagrees. He says that the Summary Suit was on distinct cause of action on a transaction that did not have an arbitration clause. But I am not going into the merits of that at all. I cannot. Once again this ground was not argued by Mr Sen before me. It turns on a question of fact: that the cause of action in both proceedings is the same. Mr Krishnan insisting that the two are identical does not make it so. It ought to have been shown. There is a reference in paragraph 5(a) and 5(b) of the written submissions to the summary suit. But this only says that the Tata Capital is approaching multiple forums and it would be impermissible for the arbitration proceedings and summary suit to be adjudicated simultaneously. That is not the same as showing that the two causes of action and underlying transactions are the same. Mr Sen made no submission based on this. There is also no such averment in the Affidavit in Reply.

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4 (2021) 2 SCC 1.

14. Ground **C** says that there is no period of repayment in the sanction letter. I have dealt with this. I rejected it. I said that the submission amounted to saying that the Agarwals got a gift from Tata Finance. It is no ground of review and Mr Krishnan does not press it.

15. Ground **D** is on the question of insufficient stamping. Again, this was not argued. The ground incorrectly references the decision of the Supreme Court in *Garware Wall Ropes Ltd V Coastal Marine Construction*[5] and happily ignores the law thereafter, especially the decision of the Supreme Court in *NN Global Mercantile Pvt Ltd v Indo Uniqie Flame Ltd & Ors.*[6] That decision of 11th January 2021. This Review Petition was filed on 22nd July 2021. The omission could not have been accidental and prima facie seems designed to mislead on law.

16. Ground **E** is clearly on merits, saying that there was no justification for an order under Section 9. It seeks to distinguish authorities I noted in the order under review. That is impermissible in our limited review jurisdiction. Mr Krishnan does not press it.

17. A more fundamental point is this. The entire Review Petition does not explain nor does Mr Krishnan show how this Petition falls within the narrow limits of Section 114 or Order 47 of the Code of Civil Procedure 1908. It more or less assumes that a party's right to seek a review of a final order after arguments is, if not quite a fundamental right, something very close to it. The submission seems

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5 (2019) 9 SCC 209.

6 (2021) 4 SCC 379.

to be that anyone can file a Review Petition on any ground whatsoever even if it is not pleaded or argued. It is perfectly all right, the suggestion continues, to assail an order in appeal or in review on grounds never taken or submitted. A mere change of advocates is enough. Their latter-day epiphany on all matters — of fact and law both — is enough ground for a review.

18. More disturbing is the implicit suggestion that Counsel's arguments are almost entirely worthless; and, by necessary extension, that Counsel are entirely redundant. If the attorney has filed something on record, Counsel must argue it, no matter how trifling or irrelevant. Further, it is then the job of the Court to engage in some sort of forensic archaeological excavation of these often mountainous records, and go through them document by document and page by page, to ferret out some sort of case in favour of a Review Petitioner, even if counsel have never argued every single line of what is pleaded. Whether or not Mr Krishnan agrees with my interpretation of his arguments and the implication for Counsel is totally irrelevant. For that is indeed the implication of the submission he makes when he says that my order does not take into account some written submissions tucked away at the back of a large file and to which my attention was never drawn and on which Counsel then appearing made no submissions at all.

19. We have Counsel for a reason. We expect of them certain skills. Foremost among these is their ability to sanguinely render assistance to the Court. This purpose is fundamental. It is not achieved by saying that Counsel's arguments are irrelevant. It is not achieved by saying that counsel overlooked or were not properly briefed or that

counsel ought to have but did not take some point. Counsel often realize, as well they should, that not all arguments taken in affidavits or even in written submissions are worth pursuing. They confine their arguments to a few points. They know that the rest do not matter and will not convince. If Counsel has not urged a point, the fact that there were written submissions is immaterial if those written submissions were never in fact argued.

20. Counsel's failure to argue written submissions is not a ground of review or, I dare say, even appeal. It is no ground to assail any order of any judge of any court. If the written submissions were to be relied on, that ought to have been done during arguments, or, at any rate, while judgment was being dictated in open court or at best shortly after the judgment or order was uploaded. These never-argued written submissions cannot be taken in hindsight.

21. Sometimes, after arguments close, we permit written submissions. That requires an order of the Court, and the Court then always references the written submissions it called for. There is no such order calling for the written submissions. The original Arbitration Petition was before me and no other court since the time it was instituted. It was listed on 13th October 2020, 2nd November 2020, 7th December 2020, 16th December 2020, 5th January 2021, 11th February 2021, 12th February 2021 and 12th March 2021 (this being the order under review). The orders of 7th December 2020 and 16th December 2020 are important for today's purposes. The order of 7th December 2020 only stood over the matter by consent to 16th December 2020. It did not permit any written submissions to be filed. Neither did any previous order. The written submissions are of 15th

December 2020, one day before the next listing date. Even on 16th December 2020, and in no order thereafter, did anyone mention these written submissions. I do not pretend to understand how, without a specific order of the court, the Agarwals could have entered these written submissions on record. There is no inward stamp of December 2020 showing receipt. I do not know how the registry permitted this filing. It seems to have been done by email — but still without an order permitting the filing — for the printed document has only the scanned signature of Mr Vishwas Deo. Therefore, I do not know, and cannot say, whether *as a matter of record*, i.e., with a court order, these written submissions were filed. It is possible that they were simply printed out when we moved from online / email filings to physical filings. There is no praecipe asking the written submissions to be taken on record.

22. In fact, I do not know whether Mr Sen in March 2021 even knew of these written submissions or had himself seen them. He certainly did not argue on them.

23. This is the situation of which Mr Krishnan seeks to take advantage. I do not see how it cannot be termed undue advantage. There is no order permitting those written submissions. There is no inward entry from the registry. There is no physically signed set of written submissions. There is only a print out and it has somehow been tucked at the back of the file. That is the level of unfairness with which I am sought to be confronted.

24. That arguing counsel often confine themselves to a single point or a few points is, indeed, exemplified by this Review Petition itself. For the only point Mr Krishnan has canvassed is the one about the summary suit. He has not pressed anything else. I have heard him in open Court after giving him a date to prepare as he requested yesterday, and I have dictated this order in open Court.

25. Dr Saraf says this point about the summary suit being based on the same transaction and the same cause of action is not taken even in the Review Petition. Mr Krishnan's reply is to point to Ground **F**(d) at page 19:

> "d) That this Hon'ble Court failed to appreciate that the alleged sanction letter is distinct from the consortium loan as the alleged sanction letter is a part of the alleged Loan Agreement. Furthermore, the alleged account statement and alleged recall notice are common in respect of both alleged loans and there are no bifurcation of amount under the alleged facilities. The alleged One Time Temporary Limit Finance and/or Working Capital Demand Loan facility are one and the same and are not distinct to each other. Had it been that One Time Temporary Limit Finance and Working Capital Demand Loan facility would be a separate facility, there would have been:-
>
> - Separate Agreement;
> - Separate Sanction;
> - Separate Account Statement;
> - Separate Documentation;
> - Separate Demand Letter.
>
> However, as there is no separate Agreement/Separate Sanction/ Separate Account Statement/ Documentation/

> Demand Letter, it is presumed that the One Time Temporary Limit Finance/ ad hoc is part of the alleged original loan agreement and extension of original sanction letter."

26. But this is no answer at all to Dr Saraf's objection. And this is how it goes. Mr Krishnan makes a submission. When Dr Saraf points out this is not a ground taken in the Review Petition, Mr Krishnan shows me something totally irrelevant and on another aspect (which is on merits and not a ground for review). Mr Krishnan's submission is that no matter what the controlling law is, I must strain every nerve to find for his clients, even if I have to do this in some circuitous, inferential way. It is clearly not possible for him to argue that the Agarwals were unaware of the summary suit — they were, and most certainly so by the time of my order of 12th March 2021. But it was never argued and it is, as I noted earlier, a question of fact.

27. A very similar case came up before the Hon'ble Mr Justice SC Gupte in *Mohinder Rijhwani & Ors v Hiranandani Construction Pvt Ltd*.[7] Several months after he delivered a reasoned judgment, an application for review was made before him suggesting that during the course of hearing he indicated his mind in a certain way and that counsel had according trimmed and tailored arguments and not pressed the point or not made it fully. Gupte J said:

> **12.** In *Moran Mar Basselios Catholicos* (*supra*), [*Moran Mar Basselios Catholicos v Most Rev. Mar Poulose Athanasius* ((1955) 1 SCR 520 : AIR 1954 SC 526)] the controversy concerned a statement made by the judges of the Full Bench

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7 2019 SCC OnLine Bom 1827 : (2019) 6 Bom CR 837.

of the High Court of Travancore (per majority of two judges) that the defendants' advocate had conceded that the plaintiffs had not left the Church and they were as good members of the Church as anybody else. It was the case of the defendants (the review petitioners) that this statement was said to be inaccurate, incomplete and misleading. The argument before the Supreme Court was that the majority decision proceeded on a misconception as to the concession said to have been made by the defendants' advocate. This misconception was sought to be proved through affidavit and other documentary evidence. That was objected to by the Attorney General. The learned Attorney General's argument was that the affidavit and document could not be said to be part of the "record" within the meaning of Order 47 Rule 1. The Supreme Court did not countenance the objection. According to the court, there was no reason to construe the word "record" in any restricted sense. The court observed that when the error complained of was that the court assumed that a concession was made when none had in fact been made or that the court misconceived the terms of that concession or the scope or extent of it, it would not generally appear on record but would have to be brought before the court by way of an affidavit and this could only be done by way of review. Once again, these facts are clearly distinguishable. **In our case, the court did not proceed on any concession made by Counsel; the order under review mentions none. If it was Counsel, who was under a misconception as to the position of the court and therefore, chose not to argue a point, that by itself is no ground for review and cannot be brought in by way of an affidavit.** In any event, the affidavit in support of review petition does not refer to any such misconception, as noted above. As for what transpired in court, there is, as noticed above, a serious contest between the parties and there is no

question of taking a view one way or the other based on a unilateral statement of the review petitioners.

14. The Review Petitioners' case here is neither supported by law or authority of court. If anything, it would set a bizarre precedent, if accepted, that it is open to seek review of a judgment or order, if the court had indicated its mind one way in court whilst reserving the judgment and the judgment came the other way or that Counsel appearing before the court was under an impression that the case would be decided one way and in reality, it was decided otherwise.

(*Emphasis added*)

28. Even if that decision can fairly be set to turn on the facts of this case, the general principle that it propounds is not only salutary but is essential. If this practice is to be encouraged — that a party faced with an adverse order first files an appeal on a ground never taken or argued before the court of first instance — then that injects an impermissible level of uncertainty into the whole decision-making process. A Review Petition that follows a disposal of that appeal with liberty to the appellants to file a Review Petition, again on grounds never taken, argued or even pleaded only aggravates the matter.

29. To take a step back from all of this, it is necessary, I think, to see the Review Petitioners for what they really are. There is no dispute that they are borrowers from Tata Capital. These are all attempts to avoid the inevitable. They must come a point when a Court must say enough is enough and they cannot succeed in taking this further.

30. As to the contours of a Review Petition, I need only refer to the Division Bench Judgment of this Court in *Radhakrishna CHSL & Anr v State of Maharashtra & Ors.*[8] The decision quoted at length from the decision of the Supreme Court in *Kamlesh Verma V Mayawati & Ors.*[9] The relevant portions read thus:

> [*Citing from Kamlesh Verma*]:
>
> > 14. **Review is not re-hearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court.**
> >
> > 15. **Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same.**
> >
> > *Summary of the Principles:*
> >
> > 16. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:
> >
> > (A) When the review will be maintainable:-
> >
> > > (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

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8 2017 SCC OnLine Bom 9855 : (2017) 6 Mh LJ 932.

9 (2013) 8 SCC 320 : AIR 2013 SC 3301.

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in *Chhajju Ram v. Neki*, AIR 1922 PC 112 and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius & Ors.*, (1955) 1 SCR 520: (AIR 1954 SC 526), to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors.*, JT 2013 (8) SC 275 : (2013 AIR SCW 2905).

(B) When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) **Review proceedings cannot be equated with the original hearing of the case**.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) **A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and**

corrected but lies only for patent error.

(vi) **The mere possibility of two views on the subject cannot be a ground for review.**

(vii) **The error apparent on the face of the record should not be an error which has to be fished out and searched.**

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) **Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.**"

9. The above principles are culled out from the judgment of the Hon'ble Supreme Court itself. That is a law of the land. They are salutary in character and by virtue of Article 141 of the Constitution of India bind all the judicial authorities. We cannot override the law declared by the Hon'ble Supreme Court of India as that binds all courts within the territory of India. The review petitioners before us are aware of the same. **Yet, they have, in the garb of the order of the Hon'ble Supreme Court passed in this case, preferred this review petition not through the same advocates/counsel, who argued the matter when the order under review was passed by this court.** They were aware that respondent No. 6 had challenged the acquisition of the land/property in issue unsuccessfully. The property stood acquired and the owner has lost his right, title and interest therein. He/it could not have propped-up the tenants/occupants of the building/structure standing on the

land to question the acquisition. Therefore, as a strategy, the alleged dilapidated and unsafe condition of the structure/building was put in issue in the original writ petition purely to gain sympathy from this court. The very purpose of the writ petition was to take another chance or, to put it differently, initiate a second round to wriggle out of the acquisition of the property. **Therefore, advisedly, the counsel arguing the matter at the initial stage and when the order under review was passed, did not base his arguments on the pleadings, which we have reproduced above. When no argument was raised based on such pleadings and advisedly and purposely, though the pleadings were on record, now, through different advocates on record and distinct set of counsel, the petitioners are seeking to get over a binding order of this court. This is a third round and in the garb of a review, a re-hearing of the case is sought. That is why we have deprecated the practice and routinely adopted in this court of litigants filing review petitions not through the same advocates and counsel, who were engaged when the orders under review are passed.** ***A different set of advocates/counsel is engaged and the same contentions and submissions, which were either not raised, given up or negatived earlier, are sought to be re-introduced*** **by taking advantage of the liberty granted by the Hon'ble Supreme Court of India. Should we, therefore, encourage this trend, which destroys long-standing, healthy practices and traditions of this court. The professionals and litigants may not feel anything about the rich heritage and healthy practices and traditions of this court, but surely we cannot abandon or ignore them. More so, when they are deep rooted and have stood the test of time."**

(Emphasis added)

31. A litigant has a right to be heard by a court. He has a right to engage a lawyer, who will be heard on that party's behalf. But no party has the right to keep changing lawyers and then having the new lawyers attempt to argue points not raised, given up or rejected. Certainly no lawyer is entitled to say to a court, "I am entitled to urge anything and everything, even points my client's previous lawyer did not argue, or may have given up or which you negatived. I am entitled to do all this because I am now newly engaged and therefore it matters not a whit what my client's previous lawyer, no matter how illustrious or brilliant, said or did." There is no such right.

32. No matter how long and tortuous litigation in India may be, it must have some finality. If what Mr Krishnan seems to believe is legitimate — that appeals can be filed on grounds not argued and that review petitions can be similarly pressed — then there is no end in sight at all. This is anathema to our jurisprudence.

33. The Review Petition is entirely bereft of merit. Allowing it would set a dangerous precedent. The Review Petition is dismissed.

34. As to costs, this being in the Commercial Division, the amendment to CPC Section 35 effected by the CCA will operate: costs must ordinarily follow the event. If not, reasons must be recorded. Dr Saraf presses for an order of costs. I can see no reason not to make that order.

35. In response, it is now suggested by Mr Krishnan for the Review Petitioner was "not his choice" but "was suggested by the Division

Bench". Those are his exact words. The argument is quite possibly the most repellent I have heard in a long time. Mr Krishnan leaves me with no choice. I will now reproduce the whole order of 20th June 2021 of the Appeal Court. It is at Exhibit 'D' at pages 103-104. This is what it says:

> "By the above Appeal, the Appellants have impugned the Order dated 12th March 2021 passed by the Learned Single Judge whilst disposing off the Arbitration Petition (L) NO. 3628 of 2020 filed by the Respondent No. 1 seeking reliefs by way of interim protection under Section 9 of the Arbitration and Conciliation Act, 1996. The learned Advocate for the Appellants has made several submissions before this Court. **However, it appears that though the said submissions were set out in the written submissions filed by the Appellants, much prior to the commencement of arguments, the same were not advanced before the learned Single Judge at the time of making oral submissions.** In view thereof, **we grant liberty to the Appellants to file a Review Petition seeking review of the impugned Order dated 12th March, 2021 before the Learned Single Judge.** Since the execution proceedings are fixed on 26th July 2021, the Review Petition may be moved before the Learned Single Judge on or before 23rd July 2021. Needless to add that the Review Petition shall be heard strictly on merits. The Appeal is accordingly disposed off. The above Interim Application also stands disposed off."
>
> (*Emphasis added*)

36. The emphasized words above show clearly that the Division Bench merely granted liberty to the Agarwals to file a Review Petition. The Division Bench did not 'direct' the Review Petitioner to do so. It did not 'suggest' that. It did not order it. The reason to

grant this liberty, and it was not an idle indulgence, is set out in the previous part where the Court noted that the Counsel briefed by Mr Krishnan made several submissions that were based on the written submissions but were not advanced during the arguments either in my order of 12th March 2021.

37. It lies ill in Mr Krishnan's mouth to say that this Petition was filed because "the Division Bench directed" or "suggested" it. Nothing could be further from the truth. This is a deliberate and entirely unacceptable distortion of an unambiguous and clear order of a Division Bench of this Court. Frankly, to my mind, it is probably deserving of censure, but I will let that pass. But this does not mean that this serves as a reason not to award costs.

38. I should also reiterate that the filing of the written submissions is in more than murky — and certainly ambiguous — circumstances as I have set out earlier: with no order of a court permitting it, no stamp of receipt, no praecipe, and a mere print-out of some digital document. That only makes matters worse.

39. In my view, it is now time to send a clear message that this kind of conduct will not be tolerated. It will be dealt with severely. The factors that the CCA says must be taken into account while ordering costs are in Section 35(3) of the amended CPC:

> (3) In making an order for the payment of costs, the Court shall have regard to the following circumstances, including—
>
> **(a) the conduct of the parties;**

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;

(c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the case;

(d) whether any reasonable offer to settle is made by a party and unreasonably refused by the other party; and

(e) whether the party had made a frivolous claim and instituted a vexatious proceeding wasting the time of the Court.

(*Emphasis added*)

40. The Review Petitioners' conduct is deplorable. The Review Petition is certainly frivolous and vexatious and it is an unforgivable waste of judicial time — which, not incidentally, has been to the time-disadvantage of other litigants as well.

41. Consequently, the dismissal of the Review Petition will be accompanied by an order of costs in the amount of Rs. 5 lakhs. These costs are to be paid by the Review Petitioners directly to the Respondent within two weeks from the day this order is uploaded.

42. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)