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Spanco Limited.Vs. A2z Maintenance and Engineering Services Limited and anr.

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Court : Mumbai

Decided On : Sep-01-2010

Judge : D.D. Sinha,;Mrs.Mridula Bhatkar,Jj.

**Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Section 114, Order XLVII Rule 1;
[Constitution of India](#) - Article 226**

Appeal No. : REVIEW PETITION NO.157 OF 2010,; WRIT PETITION NO.3859 OF 2010;

Appellant : Spanco Limited.

Respondent : A2z Maintenance and Engineering Services Limited and anr.

Advocate for Def. : Mr.Vivek Shetty,;Mr.Janak Dwarkadas,; Mr.S.R.Nargolkar,; Mr.Z. Andhyarjuna, Mr.Sagar Divekar,; Mr.Vikrant Negi,; Trilegal,Advs.

Advocate for Pet/Ap. : Mr.Rohit Kapadia,; Mr.Arif Bookwala,;Mr.Nidesh Gupta,; Mrs.Jyoti Singh,Ms Mrudula Khedekar,;Dhir & Dhir Associates,Advs.

Judgement :

Heard Mr.Kapadia, the learned Senior Advocate for the review petitioner, and Mr.Dwarkadas, the learned Senior Advocate for the respondent no.1, and Mr.Shetty, the learned counsel for the respondent no.2.

2. Maharashtra State Electricity Distribution Company Limited (original respondent no.1 in Writ Petition no.3859 of 2010) in the month of January, 2010, issued Request for Proposal (RFP) for appointment of franchisee for distribution areas i.e. Aurangabad and Nagpur. A2Z Maintenance & Engineering Services Limited (petitioner in Writ Petition No.3859 of 2010) submitted its bids for both the areas. Maharashtra State Electricity Distribution Company Limited (respondent no.2 herein) rejected the bids submitted by the original petitioner on the ground that the Power of Attorney submitted by the original petitioner (respondent no.1 herein) along with the bid was not notarised Power of Attorney as per the requirement of clause 5.1.1 read with clause 5.1.1.10. It was the case of the petitioner in the said Writ Petition that the bid submitted by another bidder M/s.GTL Limited in respect of Aurangabad Division, though was not in conformity with the requirement of clause 5.1.1 of the tender document, Maharashtra State Electricity Distribution Company Ltd. relaxed the said conditions and permitted M/s.GTL Limited to submit the requisite Power of Attorney as per clause 5.1.1, instead of rejecting it in view of clause 5.1.1.10, however, did not grant the same relaxation in respect of the bids submitted by the petitioner in the said Writ Petition. A2Z Maintenance & Engineering Services Limited, being aggrieved by the discriminatory action of Maharashtra State Electricity Distribution Company Limited had filed Writ Petition No.3859 of 2010, and the Division Bench after hearing Mr.Dwarkadas, the learned Senior Advocate for the original petitioner, and Mr.Dada, the learned Senior Advocate for the respondent no.2, as well as Mr.Bookwala, the learned Senior Advocate for the intervenor (review petitioner), allowed the petition vide judgement dated 28.7.2010. Spanco Limited (respondent no.2 in the said Writ Petition) filed the present Review Petition under section 114 read with Order XLVII Rule 1 of the Code of Civil Procedure, 1908 read with Article 226 of the [Constitution of India](#) for review of the judgement dated 28.7.2010.

3. The main thrust of the argument advanced by Mr.Kapadia, the learned Senior Advocate for the review petitioner, is that Article 14 of the [Constitution of India](#) embodies a guaranty against the arbitrariness, but it does not assume uniformity in erroneous actions or decisions, since the guarantee of equality being a positive concept, cannot be enforced in a negative manner. It is contended that the bids submitted by the respondent no.1 as well as M/s.GTL Limited were, if not in

conformity with clause 5.1.1, both these bids ought to have been declared by the respondent no.2 as non-responsive in view of clause 5.1.1.10 and should have rejected them. It is contended that, merely because the respondent no.2 by relaxing the said conditions permitted M/s.GTL Ltd. to submit the applicable Power of Attorney as laid down in exh.6 of RFP, this Court wrongly applied the guarantee of equality embodied in Article 14 of the Constitution in a negative manner and wrongly held that the respondent no.2 ought to have granted the same relaxation in respect of those terms and conditions in favour of the respondent no.1 and failure to do so by the respondent no.2, it has been wrongly held by this Court that the decision making process undertaken by the respondent no.2 as well as the decision taken whereby the bids submitted by the respondent no.1 came to be rejected was violative of Article 14. Mr.Kapadia, the learned Senior Advocate, therefore, submitted that the finding recorded by this Court in the said judgement being not in conformity with the concept of guarantee of equality embodied under Article 14 of the Constitution, needs to be reviewed and appropriate decision, consistent with the provisions of Article 14 of the Constitution is required to be given. In order to substantiate the condition, reliance was placed on the decision of the apex Court in the case of State of Kerala v. Prasad (2007) 7 SCC 140].

4. Mr.Kapadia further contended that the application for review is maintainable not only upon discovery of new and important piece of evidence or when there exists an error apparent on the face of the record, but also if the same is necessitated on account of some mistake or any other sufficient reason. It is contended that in the instant case, if the condition of tender was an essential eligibility criterion and the bids submitted by the respondent no.1 and M/s.GTL Ltd., were not in conformity with the said essential eligibility criterion, in that event, the respondent no.1 ought to have rejected both the bids. However, the respondent no.1 granted relaxation in respect of the said condition in favour of M/s.GTL Ltd., it was not open for the respondent no.1 to claim the same relaxation on the basis of Article 14 of the Constitution. However, this Court by applying the concept of equality embodied in Article 14 in a negative sense erroneously held that the respondent no.1 was also entitled to get the said relaxation of condition in view of Article 14 of the Constitution. It is, therefore, contended that the findings recorded by this Court in the judgment in this regard being erroneous, needs to be reviewed by this Court

and appropriate decision in this regard needs to be recorded.

5. Mr.Dwarkadas, the learned Senior Advocate appearing for the respondent no.1 (original petitioner), on the other hand, has criticized the contentions canvassed by the learned Senior Advocate for the review petitioner on the ground that the review jurisdiction of this Court is limited and review of the order can be permitted only on discovery of new and important matter or evidence which was not within the knowledge of the review petitioner. It is contended that the review petitioner, though was a party to this petition, did not argue anything at all before this Court at the time of hearing of the Writ Petition and, therefore, it does not lie in the mouth of the learned counsel for the review petitioner to contend that the Review Petition has been filed on discovery of new or important fact or evidence which after exercise of due diligence could not be placed before this Court at the time of hearing of the Writ Petition. Similarity, for the same reasons, the review petitioner cannot canvass now for the first time that the finding recorded by this Court on the issues referred are erroneous when the review petitioner did not canvass any argument before this Court at the time of hearing of the Writ Petition. It is contended that the review is by no means an appeal in disguise whereby an erroneous decision can be re-considered and corrected. Mr.Dwarkadas, the learned Senior Advocate, has vehemently argued that this Court after taking into consideration the facts involved and the law applicable recorded a positive finding that the condition mentioned in clause 5.1.1 of the tender document is not the essential condition of eligibility, non-compliance of which would disqualify the bids submitted by the present respondent no.1 since the said condition of tender was an ancillary and subsidiary condition of tender. This Court further specifically held that the respondent no.2 by relaxing the said condition permitted M/s.GTL Ltd., to rectify the defect, the respondent no.1 herein was also legally entitled to get the benefit of the said relaxation, however, not extending the benefit of relaxation to the present respondent no.1 rendered the action of the respondent no.2 arbitrary, discriminatory and violative of Article 14 of the Constitution and, therefore, cannot be sustained in law. Mr.Dwarkadas, the learned Senior Advocate, has submitted that this Court after taking into consideration the doctrine of equality embodied in Article 14 considered the decision making process undertaken by the respondent no.2 in the light of the facts and circumstances of the case as well as conditions of

tender and, thereafter, held that the action of the respondent no.2 was arbitrary, discriminatory and violative of Article 14 of the Constitution. It is, therefore, contended that the Review Petition itself is not maintainable nor this Court in its limited review jurisdiction can re-consider its own conclusive findings recorded in the judgement. Hence, the Review Petition is liable to be dismissed.

6. We have considered the contentions canvassed by the respective counsel.

7. At the outset, we want to express that it is well-settled that the power of review is limited in nature and the jurisdiction required to be exercised in this regard is circumscribed by the definite limits fixed by the language used in Order XLVII Rule 1. There are basically three grounds on which the review may be allowed. Those are: (i) discovery of new and important matter of evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order was made; (ii) mistake or error apparent on the face of the record; or (iii) for any other sufficient reason. In the instant case, since the counsel for the review petitioner did not advance any argument at the time of hearing of the Writ Petition, ground no.(i) is not attracted at all. So far as the mistake or error apparent on the face of the record is concerned, the contention canvassed by Mr.Kapadia, the learned Senior Advocate, in this regard, in our view, is wholly misconceived and devoid of substance. In the instant case, this Court after considering the conditions of tender stipulated in clause 5.1.1 as well as clause 5.1.1.10 and other relevant conditions and considering the controversy in issue framed two questions which were as follows:- "(i) Whether the conditions stipulated in clause 5.1.1 read with clause 5.1.1.10 in the tender document are essential conditions of eligibility and non-compliance of which would result in disqualifying the bids.

(i) Whether the act of the respondent no.1 allowing/permitting M/s.GTL to rectify the deficiency in respect of notarised power of attorney which was not consistent with the tender conditions stipulated in clause 5.1.1 read with clause 5.1.1.10 suffers from the vice of arbitrariness and is violative of Article 14 of the Constitution since the benefit of the said relaxation was not extended to the petitioner."

8. This Court, after taking into consideration various contentions canvassed by the learned counsel for the petitioner and the respondent no.1 in the said petition, the law declared by the apex Court in its various decisions and after taking into consideration the relevant conditions of tender as well as the doctrine of guarantee of equality embodied in Article 14 of the Constitution, answered the questions by recording its finding in paragraph 52 of the judgement which reads thus:- "52. For the reasons stated hereinabove, we answer question nos.(i) and (ii) mentioned in paragraph 33 by observing thus:-

The condition mentioned in clause 5.1.1.10 in the tender document is not the essential condition of eligibility, non-compliance of which would disqualify the bids submitted by the petitioner, since the said condition of the tender being an ancillary and subsidiary condition of the tender. Similarly, the respondent no.1 by relaxing the said condition permitted M/s.GTL Ltd., to rectify the defect, the petitioner was also legally entitled to get the benefit of the said relaxation. The action of the respondent no.1 permitting only M/s.GTL Ltd. to rectify the deficiency by relaxing the said condition and not extending the benefit of relaxation in respect of the petitioner, undoubtedly, renders the action of the respondent no.1 arbitrary, discriminatory and violative of Article 14 of the Constitution and, therefore, cannot be sustained in law."

It is necessary to mention that while answering the questions involved in the Writ Petition, the findings recorded by the Division Bench were after due deliberation, proper application of mind and after taking into consideration the relevant conditions of the tender and the law applicable in this regard. These findings are conclusive in nature and decisive in character and the said findings recorded by this Court, by no stretch of imagination, can be said to be by mistake nor can it be treated to be an error apparent on the face of the record. The findings recorded are in the nature of final conclusion, based on facts and law involved in the said case and, therefore, the second ground for entertaining the Review Petition is also not available to the review petitioner. The scope of review is for review of an error apparent only and not to review the judgement or order, even if the parties are in a position to satisfy the Court that the order under review is an erroneous order. The object of review is not to enable the Court to write a second judgement even if it is

presumed that the first one was wrong since review is by no means an appeal whereby a wrong decision can be re-considered and corrected. We have carefully gone through the judgement sought to be reviewed in the present Review Petition. In our view, no error, much less any patent one of law, could be shown by the review petitioner for supporting his contentions and, therefore, the contentions canvassed by the learned senior Advocate Mr.Kapadia, in this regard, in our view, are wholly unfounded and devoid of substance.

9. Insofar as the third ground (any other sufficient reason) is concerned, the same is also not available to the review petitioner since the review petitioner did not advance any argument at the time of hearing of the Writ Petition and, therefore, the Writ Petition which stands disposed of by the judgement passed by the Division Bench, there is no scope of re-opening the issues, at the behest of such review petitioner, who did not choose to argue any issue involved in the petition at the time of hearing of the Writ Petition, which stand concluded by the said decision. The question which is finally decided cannot be re-opened except in the circumstances mentioned hereinabove and those exceptions do not exist in the present Review Petition. The present review petitioner cannot take the shelter of the third ground (any other sufficient reason) since the review petitioner failed to canvass any argument at the time of hearing of the Writ Petition. The contentions raised by the parties and decided by the Court in the main proceedings cannot be re-opened, agitated under the guise of the Review Petition, much less by the party who failed to argue the matter at the time of hearing of the Writ Petition.

10. Review can only lie if one of the grounds mentioned in Order XLVII Rule 1 is made out. In the instant case, considering the judgement sought to be reviewed and the conduct of the review petitioner at the time of hearing of the Writ Petition, none of the grounds mentioned in Rule 1 is made out by the review petitioner and, therefore, the Review Petition is liable to be dismissed.

11. Before we part with this order, we would like to express that there is no quarrel with the proposition that the guarantee of equality embodied under Article 14 of the Constitution cannot be enforced in a negative manner. However, the guarantee of equality, in fact, was applied in a positive sense by the Division Bench while

considering the decision making process undertaken by the respondent no.2 as well as the decision taken pursuant to the said process. The condition stipulated in clause 5.1.1 of the tender document requires the tenderer to submit notarised Power of Attorney along with the bid and as per clause 5.1.1.10, the bid/s which is not in conformity with clause 5.1.1 stands rejected/disqualified. This Court has already held that the conditions stipulated in clause 5.1.1 in the tender document was not the essential condition of eligibility, non-compliance of which would disqualify the bids submitted by the petitioner. The present respondent no.2 by relaxing the said condition permitted M/s.GTL Limited only to rectify the deficiency by relaxing the said condition and not extending the said benefit of relaxation in favour of the respondent no.1, the said action of the respondent no.2 has been held to be discriminatory and in violation of Article 14 of the Constitution. It is, therefore, evident that the doctrine of equality embodied in Article 14 was applied in a positive sense and, therefore, the contentions canvassed by Mr.Kapadia, the learned Senior Advocate, in this regard being devoid of substance are rejected.

12. For the reasons stated hereinabove, the Review Petition suffers from lack of merit and the same is dismissed.

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