

Non-Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
MISCELLANEOUS APPLICATION NO.61/2022
IN
MISCELLANEOUS APPLICATION NO.1668/2021
IN
SPECIAL LEAVE PETITION(C) NO.14724/2021

Dharmesh S. Jain & another

...Applicants/Petitioners

Versus

Urban Infrastructure Real Estate Fund

...Respondent

ORDER

1. The present miscellaneous application has been preferred by the applicants – original petitioners with a prayer to recall order dated 28.10.2021 passed in Miscellaneous Application No. 1668 of 2021.
2. Shri Shyam Divan, learned Senior Advocate has appeared on behalf of the applicants and Shri Jayant Bhushan, learned Senior Advocate has appeared on behalf of the contesting respondent.

2.1 Shri Shyam Divan, learned Senior Advocate appearing on behalf of the applicants has made the following submissions in support of his prayer to recall order dated 28.10.2021 passed in M.A. No. 1668/2021:

i) that Miscellaneous Application No. 1668/2021 itself was not maintainable as the same was filed in a disposed of matter;

ii) that no notice was issued to the applicants, i.e., the original petitioners in Miscellaneous Application No. 1668/2021 and that no reply was filed on behalf of the applicants; and

iii) in a special leave petition filed by the applicants, such a direction could not have been issued by this Court as passed vide order dated 28.10.2021. It is submitted, assuming that the applicants had not complied with the order passed by the High Court dated 08.08.2019, which was impugned before this Court, and the amount was not deposited even within the extended period of time, as extended by this Court, in that case, the only consequence would be that there was no stay of the arbitral award and that the execution proceedings are to be proceeded further. Therefore, the direction issued in order dated 28.10.2021 directing the applicants – original petitioners to deposit the amount to be deposited as per the order of the High Court positively and within the time granted by this Court and non-compliance of the same shall be treated very seriously and non-deposit of the amount as directed

by the High Court in the impugned order shall be treated as non-compliance of our order also having a serious consequences, was not at all warranted and/or such an order could not have been passed.

3. We have heard Shri Shyam Divan, learned Senior Advocate appearing on behalf of the applicants at length.

At the outset, it is required to be noted that when this Court passed order dated 28.10.2021, Shri Kunal Vajani, learned advocate appeared on behalf of the applicants – original petitioners and this Court passed order dated 28.10.2021 after hearing the learned counsel appeared on behalf of the applicants – original petitioners. A copy of M.A. No. 1668/2021 was served upon the counsel and thereafter he appeared and after hearing Shri Kunal Vajani, learned advocate who appeared on behalf of the applicants, this Court passed order dated 28.10.2021. At that time, neither any request was made to adjourn the matter so as to enable the applicants to file reply nor any objection was raised with respect to non-maintainability of M.A. No. 1668/2021. Therefore, now it is not open for the applicants to make a grievance with respect to non-maintainability of M.A. No. 1668/2021 and/or that no notice was issued.

4. Even otherwise, it is required to be noted that the present application is nothing but an afterthought and only with a view to get out the contempt proceedings initiated by the respondent by way of

Contempt Petition No. 940/2021. It is to be noted that order dated 28.10.2021 was passed in the presence of the learned counsel appearing on behalf of the applicants. Learned counsel who appeared on behalf of the applicants was heard. The present application to recall order dated 28.10.2021 has been preferred after a period of almost two and a half months, i.e., on 17.01.2022 and that too after this Court issued notice in the contempt proceedings and after the notice of contempt petition was served upon the applicants. Therefore, the present application is, as such, nothing but an afterthought and only with a view to get out the contempt proceedings, which have been initiated and filed as far back as on 18.11.2021 and notice was issued on 10.12.2021.

5. Even otherwise on merits also, order dated 28.10.2021 passed in M.A. No. 1668/2021 is not required to be recalled. It is to be noted that the special leave petition was arising out of the order passed by the High Court of Judicature at Bombay dated 08.08.2019 in Notice of Motion No.960/2019 in Commercial Arbitration Petition No. 55/2019. Notice of motion was made absolute in terms of the prayer clause (a) on the condition that the applicants herein shall deposit 50% of the awarded sum within twelve weeks from 08.08.2019. Time granted by the High Court was extended from time to time at the instance of the applicants

herein but the applicants did not deposit the amount and prolonged the matter and even the execution of the award. That thereafter after getting extensions the applicants did not deposit the amount, belatedly, the applicants preferred the present special leave petition before this Court on 20.08.2021 with delay. Still, this Court condoned the delay ex-parte and granted further eight weeks' time from 17.09.2021 to comply with the order passed by the High Court dated 08.08.2019, as prayed by the learned counsel appeared on behalf of the applicants.

6. As order dated 17.09.2021 was passed ex-parte and without notice to the respondent, respondent preferred M.A. No. 1668/2021 to recall order dated 17.09.2021 contending, inter alia, that all attempts are made on behalf of the applicants to delay the execution and even further eight weeks' time was sought only to kill the time and there is no intention to deposit the amount and/or comply with order dated 08.08.2019 passed by the High Court. Therefore, having heard learned counsel for the respective parties and considering the apprehensions on behalf of the respondent that extension of time is sought only to kill the time and delay the matter further and there is no intention to comply with order dated 08.08.2019 and that the applicants though sufficient indulgence have been shown by way of extension of time by the High Court, the amount has not been deposited and therefore in the peculiar

facts and circumstances of the case, we passed the order dated 28.10.2021. Therefore, when order dated 28.10.2021 was passed in the peculiar facts and circumstances of the case, the same is not required to be recalled, which was passed after hearing the learned counsel appearing on behalf of the applicants also.

7. At this stage, it is required to be noted that even after order dated 17.09.2021, by which a further eight weeks' time was granted, the original petitioners – applicants herein have not complied with the order passed by the High Court for which they sought extension. This shows the conduct on the part of the applicants. Even thereafter, there is no application for extension of time.

Having taken the advantage/benefit of order dated 17.09.2021 of extension of time to comply with the order passed by the High Court, thereafter it would not be open for the applicants to contend that on non-compliance the necessary consequence under the Arbitration Act may follow and the execution proceedings may have to be proceeded further. Be that as it may, when order dated 28.10.2021 has been passed after hearing the learned counsel for both the parties and as observed hereinabove on considering the apprehensions on the part of the respondent that the applicants have no intention to comply with the order passed by the High Court and they just want to delay the proceedings,

order dated 28.10.2021 has been passed. Therefore, no case is made out to recall order dated 28.10.2021 passed in M.A. No. 1668/2021.

8. In view of the above and for the reasons stated above, the present application stands dismissed.

.....J.
[M.R. SHAH]

NEW DELHI;
JANUARY 25, 2022.

.....J.
[SANJIV KHANNA]