(2020) 09 PAT CK 0066

Patna High Court

Case No: Civil Review No. 148, 149 Of 2019, Civil Writ Jurisdiction Case No. 16616, 15832 Of 2017

State Of Bihar And Ors	APPELLANT
Vs	
N/S Mahadev Enclave Pvt. Ltd.	RESPONDENT

Date of Decision: Sept. 18, 2020

Acts Referred:

- Indian Contract Act, 1872 - Section 54, 56
- Code Of Civil Procedure, 1908 - Order 47 Rule 1
- Bihar Minor Mineral Concession Rules, 1972 - Rule 21, 23, 24
- Punjab Minor Mineral Concession Rules, 1964 - Rule

Hon'ble Judges: Mohit Kumar Shah, J

Bench: Single Bench

Advocate: Naresh Dixit, Sumit Shekhar Pandey, Gyan Prakash Jha, Gautam Kejrial, Atal Bihari Pandey

Final Decision: Dismissed

Judgement

1. The aforesaid review petitions have been filed seeking review of the common order dated 30.11.2018 passed in CWJC No. 15832 of 2017 (giving

rise to Civil Review No. 149 of 2019) and CWJC No. 16616 of 2017 (giving rise to Civil Review No. 148 of 2019). Since both the writ petitions were

disposed of by a common order dated 30.11.2018, this Court deems it fit and proper to dispose of the aforesaid two review petitions by the present

common order.

2. At the outset, it must be stated that the aforesaid two writ petitions were disposed of by a common order dated 30.11.2018 with the consent of the

parties, which is reproduced herein below:-

â€œThe present cases are being disposed of with consent of the parties in view of the fact that the petitioner of both the cases do not intend to

prosecute their claims any further and merely want refund of security deposit and first instalment which they have deposited with the respondents.

The learned Special P.P. for the Mines Shri Naresh Dikshit submits that the only two issues which the respondents seek to raise is that the aforesaid

prayer of the petitioners can be acceded to in case the petitioners do not participate in the subsequent bids of the sites in question which are subject

matter of the present writ petitions.

The learned counsel for the petitioners submits that they are ready to abide by the conditions spelt out by the learned Special P.P. Mines as aforesaid.

In view of the aforesaid, the present writ petitions are disposed of with consent of the parties with a direction to the respondents to refund the security

deposit and the first instalment deposited by the petitioners since the learned counsel for the petitioners, in both the cases, has undertaken on behalf of

the petitioners that they would neither press for grant of interest nor they would participate in the next bid for the sites in question which are the

subject matter of the present writ petitions.

It is needless to state that the aforesaid refund should be made within a period of 12 weeks from today.

The writ petitions stand disposed of on the aforesaid terms.â€

3. The provision for review is contained in Order 47 Rule 1 of the Code of Civil Procedure, 1908, which is reproduced herein below:-

â€œ1. 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.

Explanationâ€"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.

4. A bare perusal of the aforesaid provision of review contained in the Code of Civil Procedure, 1908, would show that there are three grounds for

review of a judgment i.e.:-

(i) 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 order was made,

(ii) on account of some mistake or error apparent on the face of the record,

(iii) for any other sufficient reason.

5. In the present case, the grounds raised by the review petitioners for review of the Order dated 30.11.2018 passed in CWJC No. 15832 of 2017 and

CWJC No. 16616 of 2017 is that firstly, the counter affidavit filed in the writ proceedings by the review petitioners has not been taken into

consideration at the time of passing of the order under review and secondly, the department had not given any consent in the matter. This Court is of

the view that none of the grounds canvassed by the learned counsel for the review petitioners either orally or as mentioned in the review petitions, fall

within the ambit and scope of Order 47 Rule 1 of the Code of Civil Procedure, 1908, so as to warrant review of the aforesaid order dated 30.11.2018,

hence, apparently, the review petitions are misconceived and not maintainable.

6. This Court would like to dwell upon the proposition of law to the effect:-

â€œwhether the review petitioners-State authorities are bound by the orders passed by the Court on the basis of consent / compromise"", and also

regarding the professional conduct of a counsel.â€

7. I may now reproduce the extracts from the authorities on the aforesaid subject matter herein below:-

(i) Jang Bahadur Singh & Anr. v. Shankar Rai & Anr., (1890 SCC OnLine All 42):

This was a reference by my brother Mahmood to the Full Bench for expression of its opinion on a question raised as to the authority of advocates by

an application for review of a decree passed by my brother Mahmood. The applicant on the hearing of the appeal in this Court was represented by

Mr. Spankie, one of the advocates of this Court. His opponents [273] were represented by Mr. Conlan, another advocate of this Court. Those

gentlemen are also members of the English Bar. In the interest of their respective clients they agreed as to the form of the decree which should be

passed by my brother Mahmood in the appeal. My brother Mahmood made a decree according to the terms agreed upon by those two advocates. My

brother Mahmood acted under s. 577 of the Code of Civil Procedure. This applicant for review says, what we assume to be a fact, that he never

agreed to those terms. He also says that he had not authorized his advocates to agree to any such terms. The question is, could my brother Mahmood

interfere under the circumstances, review his judgment and alter his decree, dated the 23rd April 1890? It is not shown by the applicant that any unjust

advantage was obtained by his adversary, or that Mr. Spankie acted under any mistake in such a was as to produce any injustice, nor is there any

affidavit before us suggesting anything of the kind. From what I know of Mr. Spankie it is not at all likely that be lost sight of the interest of his client. I

have no doubt that if we were satisfied that any unjust advantage had been obtained by the other side, or that Mr. Spankie had acted under a mistake

in such a way as to produce injustice to this applicant, we could interfere. In order that I may not be misunderstood I had better say that what I

understand as unjust advantage is not the consenting to terms which the client may object to, and which he may consider unjust; but some substantial

injustice which should induce us to act. In most cases of compromise points have to be given up and concessions have to be made on each side. I may

say, after many years' experience at the bar, that I think a respectable and responsible advocate of experience is a much better judge of what course

he should take for the best interest of his client than the client ever is.

As an illustration as to the length to which the Courts in England have gone in upholding the acts of an advocate I may refer to the case of Strauss v.

Francis [L.R.1 Q.B. 379.], which decided that:â€

â€œIt is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within

the [274] counsel's apparent authority is binding on the client, notwithstanding he may have dissented, unless this dissent was brought to the knowledge

of the opposite party at the time.â€

I may refer also to the following passage in the judgment of Mr. Justice Blackburn in that case (at page 381):â€

â€œMr. Kinealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence.

But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client

is guided in his selection of counsel by his reputation for honour, skill and discretion. Few counsels, I hope would accept a brief on the unworthy terms

that he is simply to be the mouthpiece of his client. Counsel therefore being ordinarily retained to conduct a cause without any limitation, the apparent

authority with which he is clothed when he appears to conduct the cause is to do everything which in the exercise of his discretion he may think best

for the interest of his client in the conductor the cause; and if, within the limits of this apparent authority, he enters into an agreement with the opposite

counsel as to the cause, on every principle this agreement should be field binding.â€

I do not think, I could express my views on a matter of this kind more fully or clearly than by adopting the judgment of Lord Esher in the case of

Matthews v. Munster [L.R. 20 Q.B.D. 141.], which I think correctly lays down what the authority of the counsel is. I may quote the following

passage from that judgment; the judgments of Lords Justices Bowen and Pry are equally instructive:â€

â€œThis state of things raises the question of the relationship between counsel and his client, which is sometimes expressed as if it were that of agent

and principal. For myself I do not adopt and never have adopted that phraseology, which seems to me to be misleading. No counsel can be advocate

for any person against the will of such person, and, as he cannot put himself in that position, so he cannot continue in it after his authority is withdrawn.

But when the client has requested counsel to act, as his advocate be has done something more, for he thereby represents to the other side that counsel

is to act for him in the usual course, and he must be bound [275] by that representation so long as it continues, so that a secret withdrawal of authority

unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character

than that of advocate, or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of Court and to act

for him in Court, and, until his authority is withdrawn, he has, with regard to all matters that properly relate to the conduct of the case, unlimited power

to do that which is best for his client.â€

Now the meaning of this passage is this that a client employing an advocate cannot restrict the powers of that advocate to hind here in the suit unless

he gives notice to his opponent that he has withdrawn or limited the authority of the advocate to act for him. Then again:â€

â€œI have said that the relation of an advocate to his client can be put an end to it at any moment, but that the withdrawing of the authority roust be

made known to the other side, and this shows that the client cannot give directions to his counsel to limit his authority over the conduct of the cause,

and oblige him to carry them out; all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so.â€

In the case of In re West Devon Great Consols Mine [38 Ch. D. 51.] in which the counsel had agreed not to appeal on terms, and his clients

questioned his right to bind them, Lords Justices Cotton, Lindley and Bowen held that the clients were bound by the acts of their counsel. At page 54

of the report, Cotton, L.J., is reported to have said:â€

â€œThe questions were raised in argument whether an undertaking not to appeal could be given at all by counsel without express authority, and if it

could, whether it could he given after a decision on the merits. Now every compromise involves an undertaking not to appeal, it therefore cannot be

beyond the authority of counsel to undertake that his client shall not appeal. As to the other point the counsel in fact says:â€" â€˜The Judge has given

a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.â€™ That is a

compromise. The undertaking therefore is prima facie binding.â€

There are other cases [276] also which show how careful the Courts are not to interfere with compromises or settlements effected by counsel on

behalf of clients in suits. The case of Prem Sookh v. Pirthee Ram [N.W.P.H.C.R. 1867, p. 222.] that of Hakeemoonnissa v. Buldeo [N.W.P. H.C.R.

1868, p. 309.], and the case of Sirdar Begum v. Izzutoolnissa [N.W.P.H.C.R., 1876, p. 149.] are cases which relate to the authority of vakils and do

not affect the case before us. When the authority of vakils to bind their clients is called in question that authority must depend entirely on the terms of

the particular vakalatnama. For my part I should read a vakalatnama widely and liberally, unless it appears that the client intended to limit the authority

of his vakil. In my opinion my brother Mahmood should reject this application for review.

(ii) Rai Nundo Lal Bose v. Nistarini Dassi, (1900 SCC OnLine Cal 11):

There cannot, I think, be any reasonable doubt at the present day that counsel possesses a general authority,â€" an apparent authority,â€" which

must be taken to continue until notice be given to the other side by the client that it has been determined, to settle and compromise the suit in which he

is actually retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the

particular case in which he is so retained.

(iii) In Nilmoni Choudhuri v. Kedar Nath Daga; (AIR 1922 Pat 232):-

Two propositions are well-settled; first, that express authority is not needed for a counsel to enter into a compromise within the scope of the suit; and

secondly, that where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his

authority would be of no effect.

(iv) In B. N. Sen and Bros. v. Chuni Lal Dutt and Co., (AIR 1924 Cal 651):-

In my judgment the present case is not one in which the authority of the learned counsel was limited: and, in my judgment, the ordinary rule (which is

to be found at page 398 of the same volume of Lord Halsbury's Laws of England) will apply to this case. That is as follows:â€

â€œThe authority of counsel at the trial of an action extends, when it is not expressly limited, to the action and all matters incidental to it; the consent

of the client is not needed for a matter which is within the ordinary authority of counsel, and, therefore if a compromise is entered into by counsel in

the absence of the client, the client is bound.

I have always understood that a learned counsel has, in the usual course, full authority in the exercise of his judgment and discretion, to settle or

compromise a case on behalf of the client for whom he appears.

(v) In Askaran Choutmal v. E. I. Ry. & Co., (AIR 1925 Cal 696):-

It is in my opinion settled law that an advocate of the High Court in the course of conducting the cause is clothed with authority to compromise a suit

in which he has been retained as counsel In Nundo Lal Bose v. Nistarini Dassi, Maclean, C.J., observed that-

â€œthere cannot, I think, be any reasonable doubt at the present day that counsel possesses a general authority, an apparent authority, which must be

taken to continue until notice be given to the other side by the client that it has determined to settle and compromise the suit in which he is actually

retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular

case in which he is so retained.â€ [See also B.M. Sen & Bros. v. Chunilal Dull & Co.]

In my opinion, such a compromise would be valid and binding upon the parties even although it had been effected contrary to the express instructions

of the client, unless the prohibition had previously been communicated to the other side.

I am unable to subscribe to the doctrine that the status of an advocate of the Calcutta High Court differs from that of a barrister in England. Now it is

not unfrequently that the relation of a client to his counsel is that of a principal to an agent. In truth the relationship is of a very different nature.

(vi) S.P.M. Muthiah Chetti & Ors. v. Muthu K.R.A. R. Karuppan Chettiar & Ors., (AIR 1927 Mad 852):-

â€œ.....A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so

is for his client's advantage or benefit even though he has no express authority from his client.â€

(vii) In M. Ar. Rm. V. R. Viswanathan Chettiar v. Appa Naicken & Anr., (AIR 1943 Mad 672):-

Although it might be difficult to say that the clause unequivocally authorised the advocate to compromise, yet in construing such a clause, it was not

unreasonable to bear in mind that Advocates ordinarily have such an authority and to assume that the clause was intended to embody that authority,

which in the absence of a vakalatnama would be implied that the advocate concerned had the necessary authority to compromise.

(viii) Bhola Nath & Ors. v. Panna Lal, (AIR 1947 All 382):-

It is too late in the day to contend that a specific authority to compromise is necessary.

(ix) Jiwibai v. Ramkumar Shriniwas Murarka Agarwala; (AIR 1947 Nag 17), (FB):-

The authority to compromise is implicit in the appointment unless it is expressly countermanded, and that, whether there is express authority conferred

by the power or not.

(x) Supaji v. Nagorao Sakharam & Ors; (AIR 1954 Nag 250):-

8. The Full Bench examined the question whether an advocate can compromise claims without the authority or consent of his client and answered it

in the affirmative. The Full Bench extended the rule laid down by Lord Atkin in â€" â€˜Sourenaranath Mitra v. Tarubala Dasiâ€™, AIR 1930 PC 158

(F), with respect to an advocate entitled to appear without a power from his client to the case of all advocates. According to the Full Bench, the

authority to compromise is implicit in the appointment of an advocate unless it is expressly countermanded and that whether there is authority

expressly conferred by the power or not.

11. ..... a counsel's action in not prosecuting an appeal once filed because of a settlement must likewise be held to be included in his authority.

(xi) Laxmidas Ranchhoddas & Ors. v. Savitabai Hargovandas Shah,(R), (AIR 1956 Bom 54):-

(6) Now, both in India and in England it is well recognised that it is impossible for a member of the Bar to do justice to his client and to carry on his

profession according to the highest standards unless he has the implied authority to do everything in the interests of his client. This authority not only

consists in putting forward such argument as he thinks proper before the Court, making such admissions as he thinks proper, but also to settle the

client's litigation if he feels that a settlement will be in the interests of his client and it would be foolish to let the litigation proceed to a judgment. This

implied authority has also been described as the actual authority of counsel or an advocate practicing in India. This authority may be limited or

restricted or even taken away. After all, an advocate is the agent of his client and it is open to the client to tell his advocate that he has no right to

settle a suit without his consent or that he should only settle it on certain terms which he may indicate. If such a limitation is put upon his authority,

then the implied or the actual authority of the advocate disappears or is destroyed. Then he has only an ostensible authority as far as the other side is

concerned because it may be that although a limitation is put upon his actual authority the other side does not know of that limitation and the other side

may still proceed on the assumption that the advocate appearing for the other side has the actual authority which every advocate has.

(xii) In Govindammal v. Marimuthu Maistry And Others (AIR 1959 Mad 7):-

(3) The following authorities and extracts from standard publications on professional conduct, have been brought to my notice:

(1) I.L.R. 21 Madras 274 (1897 Dec.) Jagapati v. Ekambara (Su bramania Iyer and Benson, JJ.)

(2) (1912) 23 M.L.J. 381: Kollipara Venkamma, In Re (Sadasiva Iyer, J.)

A vakil in India is both the Solicitor who acts and the Counsel who pleads. Where the vakalat given to the vakil in a case empowered him to

compromise the suit no second or special vakalat is necessary to empower him to compromise it.

8. Having regard to the law laid down by the High Courts of this country, it can be clearly deduced that the various High Courts are of the unanimous

view that even in cases where there is no express authorization to enter into a compromise under the inherent authority impliedly given to the counsel,

he has power to enter into a compromise on behalf of his client for the benefit of the client, especially in absence of any express instruction by the

client to his counsel, limiting his authority to enter into a compromise or give reason.

9. It would also be useful to refer to a judgment rendered by the Hon'ble Apex Court, reported in 2001 (6) SCC 688 (Salkia Businessmen's

Association & Ors. vs. Howrah Municipal Corporation & Ors.), paragraph no. 8 whereof is reproduced herein below:-

â€œWe have carefully considered the submissions of the learned senior counsel on either side. The learned Single Judge as well as the Division

Bench of the High Court have not only over simplified the matter but seem to have gone on an errand, carried away by some need to balance

hypothetical public interest, when the real and only question to be considered was as to whether the respondent-Authorities are bound by the orders

passed by the court on the basis of the compromise memorandum, and whether the proposed move on their part did not constitute flagrant violation of

the orders of court very much binding on both parties. The High Court failed to do justice to its own orders. If courts are not to honour and implement

their own orders, and encourage party litigants be they public authorities, to invent methods of their own to short circuit and give a go-bye to the

obligations and liabilities incurred by them under orders of the court- the rule of law will certainly become a casualty in the process- a costly

consequence to be zealously averted by all and at any rate by the highest Courts in the States in the country. It does not, in our view, require any

extraordinary exercise to hold that the memorandum and terms of the compromise in this case became part of the orders of the High Court itself

when the earlier writ petition was finally disposed of on 13.2.1991 in the terms noticed supra, notwithstanding that there was no verbatim reproduction

of the same in the order. The orders passed in this regard admit of no doubt or give any scope for controversy. While so, it is beyond oneâ€™s

comprehension as to how it could have been viewed as a matter of mere contract between the parties and under that pretext absolve itself of the

responsibility to enforce it, except by doing violence to the terms thereof in letter and spirit. As long as the earlier order dated 13.2.1991 stood, it was

not permissible to go behind the same to ascertain the substance of it or nature of compliance when the manner, mode and place of compliance had

already been stipulated with meticulous care and detail in the order itself. The said decision was also not made to depend upon any contingencies

beyond the control of parties in the earlier proceedings.â€

10. Last but not the least, this Court finds it useful to reproduce paragraphs no. 32 and 37 of a judgment rendered by the learned Division Bench of

this Court, reported in 2001 (1) PLJR 191 (Rotary Club, Begusarai vs. State of Bihar & Ors.), herein below:-

32. At the time of hearing of the writ petition/review petition, while trying to dutifully pay attention to the submission being made on behalf of the

petitioner, I was all the time reminded of the observations made by the constitution Bench of the Supreme Court in L.I.C. v. Escorts Limited (1986) 1

SCC 264 :

.....Indeed, and there was no way out, we also had the advantage of listening to learned and long drawn out, intelligent and often ingenious

arguments, advanced and dutifully heard by us. In the name of justice, we paid due homage to the causes of the high and mighty by devoting precious

time to them, reduced, as we were, at times to the position of helpless spectators. Such is the nature of our judicial process that we do this with the

knowledge that more worthy cause of lesser men who have been long waiting in the queue have been blocked thereby and the queue has

consequently lengthened,â€

37. But before parting with the records of the case I would briefly like to address to the important issue of the conduct of lawyers and litigants which

has been sharply brought into focus by these two petitions. I feel quite troubled by the way the Civil Review Petition was drafted and was pressed

heedless of the warning sounded by the Court. When I first read the Civil Review Petition I was so shocked by the statement made in paragraph 5

that I pointedly asked Mr. Basudeo Prasad, Sr. Advocate whether the petition was shown to him before it was filed. He said that he had vetted the

petition. I then asked Mr. Manik Ved Sen, Advocate assisting Mr. Pd. whether he had drafted the petition. He answered in the negative and stated

that it was drafted by some lawyer at Begusarai and he had simply filed it under his name. To my mind as Mr. Ved Sen was appearing in the

proceedings for the first time which had already had a round in this Court earlier common prudence required him to have the facts stated in review

petition verified from the earlier lawyer Mr. Rajiv Ranjan Prasad. Had he done so he would have not only saved the Court from this unpleasent

proceedings which turn out to be a complete waste of time but would have also saved himself from acute embarrassment. Recourse to review by

change of lawyers is normally depricated by Courts. The practice becomes all the more reprehensible when review is sought on grounds pertaining to

the previous conduct of the case or other grounds of fact normally within the knowledge of the previous lawyer(s). To my mind a lawyer must be very

reluctant to take up a brief of review unless he had appeared in the case, the order passed in which is the subject of review. In case for some reasons

a change of lawyer is unavoidable, the newly engaged lawyer would owe it to himself and to the profession to have the statement of facts duly

verified by the lawyer earlier conducting the case. In case a review is filed by a new lawyer a certificate ought to be appended to the review petition,

preferably by the previous counsel, stating that the facts stated in the petition were correct or alternatively by the newly engaged lawyer testifying that

he had got the facts stated in the review petition verified by the previous lawyer.

11. A bare perusal of the review petitions, filed by the Department of Mines and Geology, Government of Bihar, Patna, would show that there is no

pleading to the effect that the learned Special P.P., Mines was expressly barred from giving his consent to orders being passed by the Hon'ble Patna

High Court, keeping in mind the interest of the Department. It is a well settled law that the power to give consent or enter into a compromise in a

particular given case is inherent in the position of an advocate in India and such power is deemed to exist because its existence is necessary to

effectuate the relations between advocate and client, to make possible the duties imposed upon the advocate by his acceptance of the cause of his

client. The advocate is to conduct the cause of his client to the best of his skills & understanding. He must, in the interest of his client, be in the

position, hour by hour, almost minute by minute, to advance this argument, to withdraw that; he must make the final decision whether evidence is to be

given or not on any question of fact; skill in advocacy is largely the result of discrimination.

12. It is equally a well settled law that a compromise settlement made in good faith by a counsel, when sanctioned by the Court in its order, is binding

upon the client, as is also deducible from the various Judgments referred to herein above in paragraph No. 7 of this Judgment. Therefore, this Court is

of the view that even in cases where there is no express authorization to enter into a compromise under the inherent authority impliedly given to the

counsel, he has power to enter into a compromise on behalf of his client for the benefit of the client, especially in absence of any express instruction

by the client to his counsel, limiting his authority to enter into a compromise or give reason. Consequently, it is held that the review petitioners-State

authorities are bound by the orders passed by the Court on the basis of consent / compromise.

13. In the present review petitions, the review petitioners have nowhere pleaded that impliedly, which actual authority of the counsel of the review

petitioners i.e. the learned Special P.P., Mines was ever limited or restricted or even taken away, hence, it is apparent that there was no restriction on

the authority of the said Advocate i.e. the learned Special P.P., Mines in the present case, so as not to bind the review petitioners with the consent

order dated 30.11.2018 passed in the aforesaid writ petitions. Thus, it is apparent that the review petitions are not maintainable in the given facts and

circumstances of the present case.

14. Though, it has been held hereinabove that the present review petitions are not maintainable, hence, are required to be dismissed, nonetheless,

touching upon the merits of the case, it would be relevant to state the brief facts herein below and for the said purpose, I propose to refer to the facts

of the writ petition bearing CWJC No. 15832 of 2017, inasmuch as the facts & circumstances of the other writ petition bearing CWJC No. 16616 of

2017 are almost same and similar.

FACTS OF CWJC NO. 15832 Of 2017 (M/s Sainik Foods Pvt. Ltd. vs. The State Of Bihar & Ors.)

15. The review petitioners had vide letter dated 12.11.2014 decided to invite tenders for settlement of stone mines located at different districts in the

State of Bihar for a period of five years from the date of execution of the agreement / deed, which also included the stone mines in the District of

Nawada as well. Accordingly, notice inviting tender for settlement of stone mines at Nawada district was advertised, inviting offers from intending

applicants. The writ petitioner had also purchased the tender document and had submitted the technical and financial bids after completing all the

formalities. Since the writ petitioner had made the highest bid, he was declared successful bidder in the auction whereupon a letter of acceptance

dated 10.2.2015 was issued to the writ petitioner herein by the review petitioners. One of the conditions for award of settlement of stone mines and

permission for mining operation / issuance of work order was execution of agreement in Form â€˜Dâ€™ by both the parties in terms of Rule 21 of the

Bihar Minor Mineral Concession Rules, 1972 as well as Clause 7 (iii) of the NIT. The writ petitioner had paid 20 % of the settlement amount, being

the first instalment to the tune of Rs. 3.40 crores, apart from the earnest money deposited of Rs. 1.75 crores. As per the provisions of the Bihar Minor

Mineral Concession Rules, 1972 and the notice inviting tender, the writ petitioner was required to obtain environment clearance certificate, as also was

required to submit a mining plan of the mining area in settlement for approval by the Department. After submission of the mining plan by the writ

petitioner, the approval to the mining plan was granted by the Department of Mines and Geology, Government of Bihar, Patna vide letter dated

21.5.2015. In the meantime, the writ petitioner had also applied for environmental clearance certificate before the State Level Agency on 17.6.2015

and since the environmental clearance certificate was awaited from the end of the State level Agency, neither the agreement in Form â€˜Dâ€™ could

be executed nor the mining site was handed over to the writ petitioner nor any work order was issued to the writ petitioner. Finally, the environmental

clearance certificate was issued on 27.6.2017 in favour of the writ petitioner for the mining site in question after a period of more than two years.

16. It is the further case of the writ petitioner that as per the approved mining plan dated 21.5.2015, the maximum height of the mining area, settled in

favour of the writ petitioner, was 115 meter, which had been found to be correct by the writ petitioner after inspection of the site, before the tender

exercise had begun, however, when the writ petitioner had undertaken inspection, after grant of environmental clearance certificate, it was found that

illegal mining had been carried out in the mining site of Block No. 8 situated at plot No. 4256 in Mauza- Bhadokhara, village- Nawada and there had

been a drastic change in the mining site, settled in favour of the writ petitioner, hence, the writ petitioner had filed a detailed representation before the

District Magistrate-cum-Collector, Nawada for making an enquiry into the matter on 8.7.2017 and a copy of the same was also forwarded to the

review petitioners no. 1 and 2 whereupon an inquiry team was constituted and an enquiry report dated 25.7.2017 was submitted by the enquiry team,

wherein the following condition was reported about Block No. 8:-

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17. Thus, it is apparent that the inquiry team had admitted that the mining area settled in favour of the writ petitioner has lost the mining material on

account of illegal mining done at the site prior to the execution of the agreement. In such view of the matter, the writ petitioner had again filed a

representation before the review petitioners stating therein that entering into an agreement with the review petitioners, would result in colossal loss to

the writ petitioner and would result in unjust enrichment of the review petitioners since the writ petitioner was yet to touch the mining site in question

inasmuch as the agreement had not been executed and according to Clause 11 of the Tender notice, the period of mining lease was to commence

from the date of execution of agreement and its validity would be for a period of five years from such date, hence, the entire issue required re-

examination. Since the review petitioners did not take any interest in the matter to resolve the aforesaid issue, the writ petitioner had filed the

connected writ petition, inter alia praying therein to direct the review petitioners to consider, deal and take appropriate action regarding the aforesaid

grievances of the writ petitioner and further hold and declare that the writ petitioner cannot be forced to pay the settlement amount for the stock of

material already removed by way of illegal mining from the mining site, which though had been settled in favour of the writ petitioner but was yet to be

handed over to the writ petitioner, hence the settlement amount was required to be reduced to the extent, the stock of material is actually available at

the site, on the date of handing over / delivery of possession of the mining area. However, in the meantime, under compulsion and coercion of the

review petitioners, the writ petitioner was forced to execute a lease deed, which was registered on 9.1.2018 i.e. during the pendency of the connected

writ petition, which was also challenged by way of filing I.A. No. 7268 of 2018 in the said writ petition.

18. The learned Special P.P., Mines appearing for the review petitioners has submitted that even on merits, the writ petitioners of both the cases have

got no case inasmuch as after issuance of the letter of acceptance, it is the responsibility and obligation on the part of the writ petitioners, apart from

the district authorities to prevent and stop any illegal mining and to take action against the wrong doer at the settled site. It is further submitted that

neither the writ petitioners prevented the illegal mining at the Block No. 8/ Block No. 5 nor did they inform the district authorities or the review

petitioners about the illegal mining being conducted at the said Block No. 8/ Block No. 5. It is further submitted that once, the writ petitioners were

awarded settlement of the stone mines, situated at Block No. 8/ Block No. 5, situated at village- Bhadokhara, in the district of Nawada, for a period of

five years, it was the obligation of the writ petitioners to deposit the settlement amount and mining plan along with the agreement documents under

Form â€˜Dâ€™, in terms of Rule 21 of the Bihar Minor Mineral Concession Rules, 1972 and Clause 7 (iii) of the NIT and since an agreement had

already been signed by the writ petitioners with the review petitioners, the writ petitioners were required to pay the balance amount of the settlement

amount. It is also submitted that after the Department had accorded approval to the mining plan submitted by the writ petitioner on 21.5.2015, the writ

petitioner was required to ensure safety of the mines in question. Lastly, it is stated that under the provisions of the Bihar Minor Mineral Concession

Rules, 1972, especially under Rules 23 and 24, only two escape routes are available for a lessee viz. are:- (i) transfer of lease (ii) surrender of lease by

the lessee, hence, it is submitted that there is no provision for either reduction of the settlement amount or modification of the stipulation / covenant

forming part of the lease dated 5.10.2017, registered on 9.1.2018 and the one dated 15.11.2017, registered on 10.2.2018, or for refund of the earnest

money / security deposit / first instalment of the settlement amount, deposited by the writ petitioners. In such view of the matter, the learned Special

P.P., Mines submits that the order passed by this Court dated 30.11.2018, in the connected writ petitions is required to be reviewed and the writ

petitions are required to be dismissed, being devoid of any merit.

19. Per contra, the leaned counsel for the respondents herein i.e. the writ petitioners (by referring to the facts of CWJC NO. 15832 Of 2017) has

submitted that though the review petitioners had taken a decision to settle the stone mines in question vide letter dated 12.11.2014 and had issued a

letter of acceptance dated 10.2.2015, containing a specific clause to the effect that an agreement would have to be handed over under Form

â€˜Dâ€™ along with mining plan, which the writ petitioner had submitted immediately and was approved by the Department of Mines and Geology,

Government of Bihar on 21.5.2015, but the environmental clearance certificate was also required to be submitted as per the terms and conditions of

the said letter of acceptance dated 10.2.2015, which though was applied for by the writ petitioner herein promptly, but was issued by the State

Environment Impact Assessment Authority, Bihar only on 27.6.2017, whereupon the writ petitioners had examined the mining sites settled in favour of

the writ petitioners and it was found that on account of illegal mining having taken place, there was shortage of stock of materials inasmuch as the

height of the stone mines had been reduced from 115 meter to 50 meter. The factum of the mining sites settled in favour of the writ petitioner having

been subjected to illegal mining resulting in huge depletion in the mining materials was also inquired into by a Committee formed by the review

petitioners, and the said fact has stood substantiated in the report of the Committee dated 25.7.2017. The report regarding Block No. 8 has already

been reproduced hereinabove and as far as the other writ petition is concerned i.e CWJC No. 16616 of 2017, the findings of the inquiry committee in

connection with Block No. 5 is being reproduced herein below:-

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20. It is the contention of the learned counsel appearing for the respondents-writ petitioners that in view of the fact that there was acute shortage of

stock of materials as a result of illegal mining, the respondents could not have been forced to enter into an agreement without reducing the settlement

amount, by granting adjustment in the form of deductions for the illegal mining carried out at the mining sites in question and depletion in the mining

materials. It is submitted that the Principal Secretary-cum-Commissioner, Department of Mines and Geology, Government of Bihar, Patna coerced the

writ petitioners to execute the agreement, failing which the writ petitioners were threatened that the settlement would be cancelled immediately and

the earnest money / security amount, deposited by the writ petitioners shall be forfeited apart from forfeiture of the first instalment of 20% of the

settlement amount, deposited by the writ petitioners. In such view of the matter, the agreement dated 5.10.2017 was executed in between the writ

petitioner and the review petitioners, which was registered on 09.01.2018.

21. The learned counsel for the writ petitioner has pointed out that admittedly, prior to the execution of the agreement dated 5.10.2017 and its

registration on 09.01.2018, the enquiry committee formed by the review petitioners had already submitted its report on 25.07.2017, wherein it has been

concluded that on account of illegal mining, there has been huge depletion in the mining materials. Thus, it is the submission of the learned counsel for

the writ petitioners that since the possession of the mines in question had not been handed over to the writ petitioners, the said agreement executed by

the writ petitioners with the review petitioners, on account of pressure and coercion by the review petitioners was void and the review petitioners

were liable to refund the security deposit and the first instalment deposited by the writ petitioners. In this connection, the learned counsel for the writ

petitioners has relied upon a judgment rendered by the Hon'ble Apex Court, reported in (2004) 3 SCC 381 (Jai Durga Finvest (P) Ltd. vs. State of

Haryana & Others).

22. I have heard the learned counsel for the parties and perused the materials on record.

23. At the outset, it would be relevant to reproduce herein below, the relevant portion of the agreement in question:-

â€œNOW THIS INDENTURE WITHNESSED that in consideration of the rents and royalties, and agreement by an in these presents and the said

schedule reserved and contained and on the part of the lessee to be paid, observed and performed the Governor both hereby grant and demise unto

the lessee all those this mines beds / beins seams of stone hereinafter and in the said schedule referred to as the said minerals situated lying and being

in or under the land mentioned and described in Part I of the said schedule, together with the land, liberties, powers and privileges to be exercised on

or enjoyed in connection there with which are mentioned in part II of the of the said schedule subject to the restrictions and conditions as to the

exercise and enjoyment of liberties, powers, and privileges which are mentioned in part III of the said schedule Except all reserving out of this demise

unto the state government the liberties, power and privilege mentioned in part IV of the said schedule to hold the premises hereby granted and demised

unto the lessee from the dayâ€¦â€¦...2017 for the term of five years hence next ensuing yielding and paying unto the state government the several rent

and royalties mentioned in part V of the said schedule at the respective time there in specified subject to the provisions contained in part VI of the said

schedule and the lessee / lessee hereby covenants / covenant with the state government hereby covenants with the lessee / lasses as Part VII of the

said schedule is expressed and it is hereby mutually agreed between the parties hereto as in part IX of the said schedule is expressed.

PART IX

General Provisions

5. Failure to fulfill the terms of lease due to â€œForce mejeureâ€- Failure on the part of the lessee to fulfill any of the terms and conditions of this

lease shall not give the collector any claim against the lessee or be deemed a breach of this lease, in so far as such failure is considered by the said

collector to arise from force majeure, and if through force majeure the fulfillment by the lessee of any of terms and condition of this lease by delayed

the period such delay shall be added to the period fixed by this lease. In this clause the expression force majeureâ€ means act of god, war,

insurrection, riot, civil commotion, a strike, earthquake, tide, storm, tidal wave flood lightening, explosion, fire, earthquake and other happenings which

the lessee could not reasonable prevent or control.â€

24. This Court finds from the pleadings made in the connected writ petition that admittedly as per the inquiry report of the review petitioners dated

25.7.2017, illegal mining had been carried out at the mining sites in question i.e. Block Nos. 8 and Block No. 5, much prior to the execution of the

agreement by the writ petitioners herein and this aspect of the matter has not been controverted or rebutted by the review petitioners i.e. the

departmental authorities. It is also an admitted fact that the possession of the mines have not actually been given to the writ petitioners. Nonetheless,

even for the sake of argument, if it is accepted that on account of execution of agreement dated 5.10.2017, registered on 9.1.2018, actual possession

of the mines in question was handed over to the writ petitioner, then also, one would find that the mines in question are not in the same condition, as

had been promised to be handed over by the review petitioners as per the aforesaid provisions of the agreement and in terms of the tender dated

12.11.2014, notice inviting tender and the letter of acceptance dated 10.2.2015. Thus the review petitioners have themselves committed breach of the

agreement dated 5.10.2017, in view of the inquiry report dated 25.7.2017. Moreover, the review petitioners have forcefully executed agreements with

the writ petitioners, with regard to such mines which are not in the same condition as was existing on the date of tender i.e. 12.11.2014 or on the date

of notice inviting tender or for that matter on 10.2.2015 i.e. the date of issuance of letter of acceptance inasmuch as admittedly, now the mines in

question are in dilapidated condition on account of illegal mining having been carried out resulting in huge depletion of the mining materials. Therefore,

this Court is of the view that since the review petitioners themselves have committed breach of the aforesaid agreement, by not performing their part

of the contract, which was required to be performed first, the same has resulted in cessation the contract and the writ petitioners, who have been

precluded from performing their part of the contract on account of the review petitioners having failed to perform their part of the contract, shall be

entitled to compensation for the loss suffered due to non-performance of the contract by the review petitioners since the said act of the review

petitioners of not performing their part of the contract has resulted in frustration of the contract. In this regard, it would be relevant to refer to Section

54 and Section 56 of the Contract Act, 1872.

25. This Court further finds that on account of the Force majeure clause referred to hereinabove, which specifically provides that on account of

happenings which the lessee could not reasonably prevent or control, the lessee is precluded or prevented from fulfilling the terms of the lease, the

lessor / the Collector shall have no claim against the lessee and the same shall not be considered as a breach of the conditions of the lease. This Court

is of the view that in light of the aforesaid force majeure clause, since the writ petitioners have been precluded from fulfilling the terms of the lease on

account of illegal mining having been conducted in the mines in question, which stands admitted by the review petitioners, and has resulted in

denudation of the stock of materials in the mines as also in diminution of the settlement amount, the review petitioners are precluded from making any

claim against the writ petitioners, hence, are liable to refund the earnest money and the 1st instalment of the settlement amount.

26. At this juncture, it would be relevant to refer to a judgment rendered by the Hon'ble Apex Court in the case of Jai Durga Finvest (P) Ltd. Vs.

State of Haryana & Others, reported in (2004) 3 SCC 381, paragraph nos. 6 to 12 whereof are reproduced herein below:-

â€œ6. The appellant thereafter filed a Writ Petition before the Punjab and Haryana High Court which was marked as CWP No. 12114 of 2000,

praying inter alia therein the following reliefs:-

(a) issue a writ of certiorari quashing the impugned notice dated 4-8-2000 to the extent it demands contract money and interest thereon @ 24% p.a.

after expiry of one monthâ€™s notice dated 19.1.2000 terminating the contract or in the alternative, demand of contract money and interest thereon

from 9-3-2000 to 7-4-2000, be declared null and void and quashed;

(b) issue an appropriate writ, order or direction declaring clause 19 of the agreement (P/l) as null and void to the extent it stipulates non- payment of

interest on the heavy amount of security deposited by the petitioner and that direction be issued to respondents to pay interest @ 24% p.a. on the

amount of security till final adjustment qua the outstanding contract money;

(c) issue further an appropriate writ, order or direction to the respondents not to charge interest on the amount of contract money being demanded

from the petitioner vide order dated 10-7-2000, P/3 and notice dated 4-8-2000.

7. The High Court allowed the writ petition in part i.e. as regards the demand of the amount for the period 10-3-2000 to 7-4-2000 of the contract

money. As regards the other contentions of the appellant, the High Court proceeded on the basis that as it was not coerced into bidding by any of the

representatives of the State nor was the contract signed under undue influence or pressure, the appellant cannot be discharged of its liability as it

entered into the contract voluntarily and as in terms thereof it was obliged to deposit the amount in question.

8. It appears to us that the High Court committed an error in not going into the principal issue involved in the matter.

9. We may notice that the second respondent in its order dated 10-7-2000 held :

It is an admitted fact that the appellant did not operate the Bega Murthal Sand Zone, even if by their own choice, but facts remain that they did not

derive any benefit from the contract. On the other hand, they had bound themselves by condition No. 18-A of the contract agreement not to seek any

relief in payment of contract money on the plea of non-extraction of sand"".

10. The question, thus, which was required to be posed and answered was as to whether Clause 18-A of the agreement would remain enforceable

despite the fact that the appellant allegedly could not extract any sand by reasons of omission and commission on the part of the concerned

respondents. The appellant herein has raised a plea that the contract became impossible to be performed as the landowners of the area in question did

not receive compensation and despite request, the 3rd respondent did not enforce clause 27 of the agreement.

11. It is not in dispute that the grant of mining lease in favour of the appellant herein for the extraction of mineral sand by the respondents is governed

by the provisions of Punjab Minor Mineral Concession Rules, 1964. In terms of Rule 33 the bidder is required to execute a deed in Form 'L'. Clause 27

of the agreement in Form 'L' obligates the respondents to comply with the request made in terms thereof. The Appellate Authority had not considered

this aspect of the matter. The High Court also did not apply its mind in this behalf. The first question that arises is whether the respondents complied

with their statutory obligations when the request was made by the appellant. If not, the second question would be the effect on non- compliance with

the statutory obligation of the respondents which formed part of the contract insofar as they did not comply with the appellant's request as

aforementioned which had a direct bearing to the right of the appellant to raise sand. The High Court, as noticed hereinbefore, has merely proceeded

on the basis that the appellant had entered into the contract with his eyes wide open; but, the same would not, in our opinion, mean that they were

bound to pay the contract amount, get its security amount forfeited, as also pay interest at the rate of 24 per cent, although it could not, by reason of

acts of omission and commission on the part of the respondents, carry out the mining operation as per the terms of the agreement.

12. Whether in such a situation the doctrine of frustration will be invoked or not should have been considered by the High Court. (See M.D. Army

Welfare Housing Organisation v. Sumangal Service (P) Ltd, (2003) 8 Scale 424(2).â€

27. Now adverting to the submission of the learned Special P.P., Mines, appearing for the review petitioners, to the effect that since there are only

two options under Rules 23 and 24 of the Bihar Minor Mineral Concession Rules, 1972, i.e (i) transfer of lease and (ii) surrender of lease by the

lessee, the prayer of the writ petitioners regarding modifying the lease deed dated 5.10.2017, as registered on 9.1.2018 and the one dated 15.11.2017,

as registered on 10.2.2018 and revising the settlement amount, is not tenable in the eyes of law inasmuch as the only other option available to the

review petitioners is to invoke the forfeiture clause. This Court finds that the aforesaid argument advanced by the learned Special P.P., Mines is

wholly misplaced inasmuch as both the lessor and lessee are circumscribed by the stipulations / covenants of the lease deed dated 5.10.2017, as

registered on 9.1.2018 as also the one dated 15.11.2017, as registered on 10.02.2018 and in case of any breach by either of the parties, the

consequence has to follow and in the present case, since the review petitioners have first committed a breach, they are liable to compensate the writ

petitioners for the loss caused to them, apart from refunding the earnest money deposit and the amount of first instalment of the settlement amount

deposited by the writ petitioners. It is needless to state that since no argument has been advanced on behalf of the review petitioners regarding

maintainability of the writ petitions, this aspect of the matter is not being dealt with.

28. Having regard to the facts and circumstances of the case and for the reasons mentioned hereinabove, this Court finds that on account of admitted

failure on the part of the review petitioners to perform their part of the obligation under the agreement dated 5. 10.2017, registered on 09.01.2018 and

the one dated 15.11.2017, registered on 10.02.2018, the writ petitioners have been unable to perform their part of the contract, thus, the same has

resulted in breach of the agreement by the review petitioners resulting in cessation of the contract, hence the review petitioners have become liable to

compensate the writ petitioners for the loss suffered by them. This Court further finds that on account of the admitted fact that due to illegal mining,

the mines in question have been denuded and the mining materials, as originally shown to the writ petitioners while participating in the tender process

at the mining sites, are no longer available, meaning thereby that there has been a huge diminishment in the mining materials, it has become impossible

for the writ petitioners, after the contract has been made, to fulfil its obligations under the agreement resulting in the agreement being rendered void.

Consequently, the doctrine of frustration of contract would come into play, since under the given facts and circumstances, as discussed hereinabove,

the agreement has become impossible to be performed, on account of the circumstances beyond the control of the writ petitioners. This aspect of the

matter is fully covered by Section 56 of the Indian Contract Act, 1872. Therefore, even on merits, the instant review petitions are fit to be dismissed,

being devoid of any merit, both on facts as also in law, however this Court finds that since the review petitions have already been held to be not

maintainable, as aforesaid, in the given facts and circumstances of the present case and moreover, none of the grounds canvassed by the learned

counsel for the review petitioners either orally or as mentioned in the review petitions, fall within the ambit and scope of Order 47 Rule 1 of the Code

of Civil Procedure, 1908, so as to warrant review of the aforesaid order dated 30.11.2018, this Court holds that the instant review petitions are

misconceived and not maintainable, hence are dismissed on this ground alone, however without any order as to cost.