* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 16th November, 2022***
Pronounced on: 06th December, 2022

\+ **ARB.P. 869/2022**

MR. KUSH RAJ BHATIA
S/o Mr. Rajesh Bhatia,
R/o C-8, Friends Colony,
Near Mata Ka Mandir on Main Road
Sriniwaspuri S.O South Delhi-11 0065

..... Petitioner

Through: Mr. Akhil Salhar, Mr. Sunanda Tulsyan and Mr. Arnav Pal Singh, Advocates.

versus

M/S DLF POWER & SERVICES LTD.
(erstwhile M/s DLF Utilities Limited)
l0th Floor, Gateway Tower, Phase-Ill,
DLF Cyber City, Gurugram-122002

..... Respondent

Through: Ms. Meghna Mishra and Mr. Taurn Sharma, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J.

REVIEW PET. 298/2022

1. A Review Petition under Order XLVII Rule 1 read with Section 114 of Code of Civil Procedure, 1908 (*hereinafter referred to as "CPC"*) has been filed on behalf of the petitioner seeking review of the order/judgement

dated 12th October, 2022. By this order/ judgment, the petition under Section 11 of the Arbitration & Conciliation Act, 1996 *(hereinafter referred to as "Act, 1996")* was dismissed by observing that this Court had no territorial jurisdiction to entertain the present petition.

2. It is submitted that traditionally the definition of *"Location"* as provided under the *Black's Law Dictionary* means *"the specific place or position of a person or thing"*. Inadvertently, the definition of Location as provided in the Black's Dictionary has not been considered by this Court.

3. It is further asserted that the submissions made by the petitioner had been over looked/not recorded to come to the finding that there is no territorial jurisdiction to entertain the present petition. This is sequitur to the judgments of the Co-ordinate Bench of this Court wherein similar Arbitration clause has been interpreted to hold that this Court has jurisdiction. The petitioner had filed a judgment compilation comprising 183 pages during the course of hearing and had relied on the following judgments:

(i) Cinepolis India Pvt. Ltd. v. Celebration City Projects Pvt. Ltd. & Anr. (2020) 2 Arb LR 355 (Del);

(ii) Balanchero India Private Limited v. Arthimpact Finserve Pvt. Ltd. Arb. P. 516 of 2020;

(iii) My Preferred Transformation and Hospitality Pvt. Ltd. v. Sumithra Inn 278 (202 1) DLT 297; and

(iv) Virgo Softech Ltd. v. National Institute of Electronics and Information Technology Arb. P. 802 of 2021 and Arb. P. 804 of 2021.

4. In *Cinepolis India Pvt. Ltd. (supra)* & *My Preferred Transformation and Hospitality Pvt. Ltd. (supra)* identical Clause came up for consideration and this Court observed that it is really the seat of arbitration which is akin to an exclusive jurisdictional clause. Similarly, reliance had been placed on *Dr. Ravinder Kumar Anand Versus DLF Commercial Pvt. Ltd. Arb. P. No.562/2021*. From the aforementioned judgments it is evident that *location* means the specific place or position of a person or thing. Therefore, it is interchangeable with the word 'place' and the word 'seat'. However, these Judgements have not been considered which amounts to an error apparent on the fact of the record.

5. It is further submitted that *Cravants Media Pvt. Ltd. Vs. Jharkhand State Cooperative Milk Food Federation Pvt. Ltd. & Ors., Arb. P. No.915/2021* decided on 06th December, 2021 is inapplicable as the Dispute Resolution Clause therein expressly used the word '*venue'* whereas the phraseology used in the present case is "*location*" which is akin to *"seat"*.

6. In the instant case, the Clause *"the arbitration proceeding shall be held at an appropriate location in New Delhi"* actually means the place of arbitration is New Delhi which is akin to exclusive jurisdiction. It is inadvertently observed in paragraph 31 of the judgment under review that while the venue of arbitration may be New Delhi but the seat of arbitration shall be Gurgaon and at High Court at Chandigarh.

7. It is asserted that in view of the aforesaid facts and circumstances, there is an error apparent on the face of the record and there are sufficient grounds for review of the impugned Order dated 12th October, 2022 and it may be held that this Court has territorial jurisdiction to entertain the petition under Section 11 of the Act, 1996 and to appoint the Arbitrator.

8. **Learned counsel on behalf of the respondent has argued** that the power of review has not been provided for under the Act, 1996 and thus, the present application is on the face of it, not maintainable. Reliance has been placed on the following judgments:

(i) Patel Narshi Thakershi and Ors. Vs. Shri Pradyuman Singhji Arunsinghji 1971 (3) SCC 844;

(ii) SBP & Co. vs. Patel Engineering Ltd. And Anr. (2005) 8 SCC 618;

(iii) Jain Studios Ltd. Through its President vs. Shin Satellite Public Co. Ltd. (2006) 65 SCC 501;

(iv) State of West Bengal & Ors. Vs. Associated Contractors (2015) 1 SCC 32;

(v) Manish Engineering Enterprises vs. Managing Director, IFFCO, New Delhi & Ors. SCC Online All 84;

(vi) Ankiteros Shipping Corporation vs. Adani Enterprises Ltd., Mumbai 2020 (3) Mh. L.J.;

(vii) Sanjay Gupta vs. Kerala State Industrial Development Corporation Ltd. 2009 SCC Online Ker 6361;

(viii) COBRA-CIPL JV vs. Chief Project Manager 2021 SCC Online MP 609;

(ix) Shivraj Gupta & Ors. Vs. Deshraj Gupta & Ors. MANU/DE/0441/2008;

(x) N.S. Atwal vs. Jindal Steel & Power Ltd. (2011) 178 DLT 454 (DB);

(xi) Steel Authority of India Limited vs. Indian Council of Arbitration & Ors. MANU/DE/3484/2015; and

(xii) Inder Mohan Singh vs. Tripat Singh (2012) 190 DLT 310.

9. It is also submitted that in an earlier similar matter between the parties, they had agreed for arbitration at Delhi but that was a concession and not on merits. Now they are not willing to submit to the jurisdiction in Delhi on account of the specific Clause agreed to between the parties.

10. **Submissions heard**.

11. The first aspect for consideration is whether this Court has the power to review its own Order.

12. In *Ram Chandra Pillai vs. Arunschalathammal & Ors. 1871 (3) SCC 847*, the scope of review in general has been defined and it is stated that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication and no power of review can be exercised in the absence of any express provision conferring this power of review.

13. In *Jain Studios Ltd. (supra)*, a reference was made to *SBP & Co. vs. Patel Engineering Ltd. And Anr. (2005) 8 SCC 618* and it was made clear that the powers exercised by the Chief Justice of High Court or its Nominee under Sub-section 6 of Section 11 of the Act, 1996 is judicial. It was further observed that specific power of Review was conferred on the Supreme Court by virtue of Article 137 of the Constitution. It specifically provided that the Supreme Court shall have the power to review any judgment pronounced or order made by it and because of conferring the review power on the

Supreme Court, the same can be exercised by the Supreme Court in respect of any judicial Order.

14. In *Ankiteros Shipping Corporation (supra)*, it was explained that unlike the Supreme Court which is vested with power of review under Article 137 of Constitution of India, High Court is not vested with any such similar power of review under the Constitution. The difference between substantive review and procedural review has to be considered in so much as the power of substantive review must be vested in a Court by a Statute and in the absence of any such power, no substantive review can be undertaken by the Court. However, a procedural review inheres in every Court and Tribunal to review its decision and if a procedural fault is found, to undo the same. This was explained by stating that if a party has been proceeded *ex-parte* or such like orders are made, the Court in exercise of its inherent powers can review such Orders, but any Order given on merit would entail substantial review which cannot be exercised in the absence of specific conferment of the power of review to the Court.

15. In *Sanjay Gupta (supra)*, the High Court of Kerala explained this principle by observing that the Review of Order under Section 11 of the Act, 1996 does not lie with the High Court. Even when a Judge of the High Court acts as a Nominee of Chief Justice, he acts merely as a Statutory Authority as designated by the Chief Justice in terms of Section 11 of the Act, 1996. Therefore, unless the power of review is expressly conferred under the Act itself, general power of review as may be available to the High Court under other jurisdictions: civil, criminal or writ, cannot be extended to review the earlier Order issued by the Nominee of the Chief Justice. The Review Petition is, therefore, not maintainable and is liable to be dismissed.

16. Similarly in *COBRA-CIPL JV (supra)*, the High Court of Madhya Pradesh while placing reliance on the observations of the Supreme Court in *Jai Singh vs. MCD (2010) 9 SCC 385* observed that while exercising its power under Article 227 of the Constitution, the High Court may exercise its powers to correct any patent perversity in the Order of the Tribunal or the Subordinate Court or where there is manifest failure of justice, but said power cannot be exercised to correct all Orders or Judgment of the Court or Tribunal acting within the limits of this jurisdiction.

17. By way of the present review petition, the petitioner is seeking review of the Order vide which an application under Section 11 of the Act, 1996 has been dismissed on the ground of this Court having no territorial jurisdiction. Since the Order made under Section 11 of the Act, 1996 is in exercise of the statutory powers as defined under the Act, 1996, any review of the same can be only within the parameters of the Statute. Since, there is no provision of review in the Act, 1996, this Court finds itself without any jurisdiction to review the present Order.

18. Moreover, the contentions raised are in the realm of Appeal as the findings of this Court have been challenged which cannot be brought within the scope of "*error apparent on the face of the record*."

19. Even on merits, it is claimed that once the place of arbitration was determined as New Delhi, the exclusive jurisdiction clause of Chandigarh/ Gurgaon would be *non-est* and the Delhi Courts would be conferred with the jurisdiction in terms of the Agreement between the parties. The conclusion of this Court in the impugned Order is contrary to the following judgments of the Co-ordinate Benches interpreting similar Clauses:

(i) Cinepolis India Pvt. Ltd. v. Celebration City Projects Pvt. Ltd. &Anr. (2020) 2 Arb LR 355 (Del);

(ii) Balanchero India Private Limited v. Arthimpact Finserve Pvt. Ltd. Arb. P. 516 of 2020;

(iii) My Preferred Transformation and Hospitality Pvt. Ltd. v. Sumithra Inn 278 (202 1) DLT 297; and

(iv) Virgo Softech Ltd. v. National Institute of Electronics and Information Technology Arb. P. 802 of 2021 and Arb. P. 804 of 2021.

20. It is submitted that the impugned Order thus, needs to be reviewed to hold that this Court has the jurisdiction.

21. The entire gamut of controversy is around the concept of "*place*" and the "*seat*". The Arbitration Law envisages two jurisdictions, one is the place where the arbitration may take keeping the convenience of the parties in mind, and other is the "seat" which determines the jurisdiction of the Courts where the parties may agitate any controversy arising out of the Arbitration. The most significant judgment on this aspect is of *Roger Shashoua vs. Mukesh Sharma (2009) EWHC 957*, wherein it has been held that the *"seat"* of the Arbitration would have an exclusive jurisdiction over all the proceedings that arise out of arbitration.

22. The controversy about location and Seat has been arising frequently since the Act does not specifically use either word but uses the word *"place"*. The Constitution Bench of the Supreme Court in the case of *BALCO (supra)* had made a reference to Section 2(1)(e) of the Act which defines the *"Court."* It was observed that the Section 2(1) (e) of the Act has to be construed keeping in view the provisions in Section 20 of the Act

which gives recognition to party autonomy. It refers to a *Court* which would essentially be a court of the *seat* of arbitration process. The legislature has intentionally given jurisdiction to two courts i.e. court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the Agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes places, would be required to exercise supervisory control of the arbitration proceedings.

23. In *Indus Mobile Distribution Pvt. Ltd. (supra)* it was observed that conspectus of Section 2(1)(e) and 20 of the Act would show that the moment a seat is designated, it is akin to exclusive jurisdiction clause. In the said case, the Agreement provided that the seat of arbitration shall be Mumbai. Clause 19 of the Agreement further provided that jurisdiction exclusively vests in Mumbai Courts. It was held that the venue may have been agreed to be Mumbai, but that it was intended to be a seat, is further reinforced and indicated by the following Clause 19 which provided that the Mumbai Courts would be vested with the exclusive jurisdiction. It was thus held that the moment a seat is designated, it is akin to exclusive jurisdiction clause. It was further held that under the law of arbitration unlike CPC which applies to suits, reference to a seat is a concept by which a neutral venue can be chosen by the parties which may not in the classic sense, have jurisdiction i.e. no part of the cause of action may have arisen and neither would any of the provisions of Section 16 to 21 of CPC may be attracted.

24. In *BGS SGS Soma JV vs. NHPC Ltd. 2019 SCC OnLine SC 1585* following the *Roger Shashoua case (supra)*, the Supreme Court had laid

down the test for determination of the seat. It was held that whenever there is an express designation of a venue and no designation of any alternate place as the seat combined with the supernational body of Rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is that the venue is actually a juridical seat of arbitration. It observed thus:

> *"It will thus be seen that wherever there is an express designation of a "venue" and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding."*

25. In the said case, the Supreme Court was examining an arbitration clause which stated that the arbitration proceedings shall be held at New Delhi/ Faridabad, analyzed the arbitration clause to ascertain the real intent of the parties as to whether the expression *"shall be held*" indicated a venue or a seat. It was observed that Faridabad/ Delhi were chosen as "*Seat*" of arbitration. Since all the three Appeals were finally heard at New Delhi, it would lead to the conclusion that the courts at New Delhi have been chosen as Seat of Arbitration and therefore, the Courts at Delhi would have jurisdiction.

26. The test thus laid for determination of Seat was:

> *(i) there is an express designation of a "venue" and no designation of any alternative place as the "seat",*
> *(ii) combined with a supranational body of rules governing the arbitration, and*
> *(iii) there is no other significant contrary indicia specifying the seat.*

27. In the recent judgment of Apex Court in *M/s Ravi Ranjan Developers Pvt. Ltd. vs. Aditya Kumar Chatterjee 2022 SCC OnLine SC 568* similar question arose in regard to the jurisdiction of the Court to entertain the petition under Section 11(6) of the Act, 1996. The Apex Court made a reference to the definition of *"Court"* in Section 2(1) (e) of the Act and held that it could never have been the intention of Section 11(6) of the Act, 1996 that arbitration proceedings could be initiated in any Court in India irrespective of whether the respondent resided or carried on business within the jurisdiction of the High Court and irrespective of whether any part of the cause of action arose within the jurisdiction of that Court, as this would put the opponent at a disadvantage and steal the march over the opponent. It was observed that since no part of cause of action arose within the jurisdiction of Calcutta High Court, then irrespective of the Agreement between the parties, Calcutta High Court could not have entertained the petition under Section 11 of the Act, 1996 to appoint an Arbitrator. It was explained that from the terms of the Agreement it would be clearly inferred that the intention of the parties was not to have the seat of arbitration at Calcutta. It was only intended to be a venue for sittings and therefore, no exclusive jurisdiction could be conferred on the Calcutta High Court to the exclusion of other courts.

28. The Supreme Court in *Mankastu Impex Pvt. Ltd. vs. Airsual Ltd. (2020) 5 SCC 399* observed that the Arbitration Agreement did not use the word "Seat or Venue". It provided that the arbitration would be administered in Hong Kong and the place of arbitration would be Hong Kong. It further stated that the governing law was Indian Law and the Courts of New Delhi

would have jurisdiction. It was held that the Seat of arbitration and Venue of arbitration cannot be used interchangeably. Mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "Seat of Arbitration". The intention of the parties as to "Seat" should be determined from other clauses in the Agreement and the conduct of the parties. It was further explained that "Seat of arbitration" is a vital aspect of any arbitration proceedings and it determines the law applicable when deciding the arbitration proceedings and the arbitration procedure as well as judicial review over the arbitration Award. Seat of arbitration is not just about where an institution is placed or where the hearings shall be held, but it is about which Court would have supervisory power over such proceedings. It was thus held that an agreement between the parties choosing Hong Kong as place of arbitration would not lead to the conclusion that Hong Kong would also be the Seat of arbitration.

29. Applying the tests as laid down in the aforementioned judgments to the present case, it was held that while the Clause clearly provided that the place of Arbitration would be New Delhi; there was a *contra indica* as it specified that the exclusive jurisdiction would be Courts at Gurgaon/ High Court at Chandigarh. The cause of action arose essentially in Gurgaon where the suit property is located. The Courts at Gurgaon has thus, been held to be having the exclusive jurisdiction.

30. In *Virgo Softech Ltd. vs. National Institute of Electronics and Information Technology* Arb. P. 802/2021 decided on 05th August, 2022 by the Co-ordinate Bench the facts involved were distinguishable. While the Special Conditions of Contract *(hereinafter referred to as "SCC")* provided that the arbitration proceedings shall take place in New Delhi, the General

Conditions of Contract made a reference to the Court in Aurangabad, Maharashtra. However, it was specifically provided in SCC that whenever there is a conflict, the provisions of SCC shall prevail. The court thus, came to the conclusion that it is New Delhi as provided in SCC which would have jurisdiction in terms of the express provisions of the SCC and GCC. The said judgment is therefore, no applicable.

31. Learned counsel on behalf of the petitioner has placed reliance on various judgments of the Co-ordinate Benches, as mentioned above, to argue that the *place* of arbitration is in fact the *seat* of arbitration conferring the jurisdiction upon that court and *exclusive jurisdiction clause* is not the determinative factor for the seat of arbitration. However, this cannot be a ground for review when a detailed Order has been made on its facts to hold that this Court has no jurisdiction to entertain the petition under Section 11 of the Act, 1996.

32. It would be significant to observations made in *Jain Studios Ltd. (supra)* that once a case has been decided on merits, the applicant on the ground of review cannot be permitted to argue the main matter afresh. Once the prayer has been refused, no review petition would lie which would amount to re-hearing of the original matter. The power of review cannot be confused with appellate powers which enable a superior Court to correct all errors committed by the subordinate court. There cannot be any re-hearing of the original matter. A repetition of old and overruled argument is not enough to reopen the concluded adjudication. The power of review should be exercised with extreme care, caution and circumspection and only in exceptional cases. It was further observed that when a prayer to appoint an Arbitrator has been heard and rejected, the same relief cannot be sought by

an indirect method, by filing a review petition. Such a petition is in the name of second innings which is impermissible and unwarranted and cannot be granted.

33. The submission made on behalf of the petitioner are in fact, in the domain of challenging the Order on merits which is beyond the scope of review.

34. The review petition is accordingly dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

DECEMBER 6, 2022
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