M/S. JAIN STUDIOS LTD. THROUGH. ITS PRESIDENT A

v.

SHIN SATELLITE PUBLIC CO. LTD.

JULY 11, 2006

[C.K. THAKKER, J.] B

Constitution of India, 1950—Article 137—Review of Order passed in Arbitration Petition, its restoration—Petition seeking Permission to nominate Mr. Satpal, retired Judge of High Court as one of the Arbitrators in accordance with UNCITRAL Model—Preliminary objection that review petition not maintainable since the decision of Chief Justice of India or his nominee under section 11(6) appointing Mr. Pendse, retired Judge of High Court as sole arbitrator is judicial and final—Prayer as to appointment of arbitrator was made earlier and was rejected—Held: Order passed by Chief Justice of India or his nominee under section 11(6) appointing sole arbitrator, is an Order covered by Article 137 and is subject to review, thus Review Petition is maintainable—Once prayer to appoint arbitrator was refused in arbitration petition, it cannot be sought by indirect method by filing review petition—It is not rehearing of the original matter—Power of review is to be exercised with extreme care, caution and circumspection and only in exceptional cases—Prayer for clarification of Order as to stand taken by applicant granted—However, reconsideration of the Order and nomination of arbitrator rejected—Arbitration and Conciliation Act, 1996—Section 11(6). C D E

SBP & Company **v.** *Patel Engineering Ltd.,* **[2005] 8 SCC 618, referred to.** F

CIVIL ORIGINAL JURISDICTION : Review Petition (Civil) (D) No. 5970 of 2006

(Under Article 137 of the Constitution of India).

G

IN

Arbitration Petition No. 1 of 2005.

K.N. Bhat, Ugra Shankar Prasad for the Petitioner.

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A Nikhil Nayyar for the Respondent.

The Order of the Court was delivered by

C.K. THAKKER, J. The present review petition is filed against an order dated January 31, 2006 passed in Arbitration Petition No.1 of 2005, in B *Shin Satellite Public Co. Ltd* v. *M/s Jain Studios Ltd.*, [2006] 2 SCC 628. The prayer is to review the said order and restore the Arbitration Petition to the file for reconsideration. A further prayer is made to permit the applicant to nominate Hon'ble Mr. Justice Satpal, Retd. Judge, High Court of Punjab and Haryana as one of the arbitrators.

C Notice was issued by me on May 4, 2006 by making it returnable on May 11, 2006. On returnable date, the parties were heard.

It is not necessary to narrate the facts in detail in the present review petition since they had been stated in the main order. It was submitted by the D learned counsel for the applicant that there were two obvious errors in the order wherein it was observed as if the applicant (respondent in the Arbitration Petition) submitted that arbitration may be held in London or in Singapore where arbitration proceedings were going on between the parties and the applicant had no objection if the matter was referred to arbitration in London or in Singapore.

E

On merits, it was submitted by the learned counsel for the applicant that the dispute between the parties under the agreement was to be finally resolved by arbitration under the rules of UNCITRAL. Article 5 relates to composition of arbitral tribunal and provides that if the parties had not F previously agreed to the number of arbitrators and if within fifteen days after the receipt by the respondent of the notice of arbitration, the parties had not agreed that there should be only one arbitrator, three arbitrators should be appointed. According to the applicant, Shin Satellite, through its advocate, served a notice and called upon the applicant herein to appoint an arbitrator but no appointment was made by the applicant. On that eventuality, submitted G the counsel, three arbitrators ought to have been appointed. It is not disputes that the applicant contested the matter urging that there was no legal and valid arbitration agreement between the parties. It is also not disputed that in the light of the objection by the applicant herein, an application was made by Shin Satellite to the Hon'ble the Chief Justice of India for appointment of H arbitrator under sub-section (6) of Section 11 of the Arbitration and

Conciliation Act, 1996 ('Act' for short) and as a nominee of the Hon'ble the Chief Justice of India, by an order dated January 31, 2006, allowed the application and appointed Hon'ble Mr. Justice M.L. Pendse, Retd. Judge as the sole arbitrator. The counsel, however, submitted that as per UNCITRAL Model, three arbitrators ought to have been appointed. To that extent, therefore, the order deserves to be reviewed and an appropriate order requires to be passed for appointment of three arbitrators.

The learned counsel for the respondent contested the review petition. He raised a preliminary objection that review petition is not maintainable and it is liable to be dismissed on that ground alone. He submitted that there is no inherent power of review in a Court or in any other authority. Such power must be conferred expressly by a statutory provision. It is also submitted that the judgment of a larger Bench of this Court in *SBP & Company* v. *Patel Engineering Ltd.*, [2005] 8 SCC 618 makes it clear that the power exercised by the Chief Justice of a High Court or his nominee or by the Chief Justice of India or his nominee under sub-section (6) of Section 11 of the Act is 'judicial'. Relying on sub-section (7) of Section 11 of the Act, the counsel submitted that the decision of the Chief Justice or his nominee is 'final' and no review lies against such order.

On merits, it was submitted that the applicant seeks to reagitate the same point which was advanced at the time of hearing. A prayer was made when the main matter was argued that the applicant may be granted time to make the appointment of an arbitrator but the prayer was rejected. By invoking review jurisdiction, virtually the same prayer has been made, which was expressly negatived earlier. The learned counsel submitted that the review is yet another dilatory tactic adopted by the applicant who is not interested in speedy resolution of dispute between the parties. He, therefore, submitted that the review application may be dismissed with costs.

So far as the maintainability of review petition is concerned, in my opinion, the preliminary objection raised by the learned counsel for the respondent is not well-founded. In *Patel Engineering Ltd.*, this Court by majority of 6:1 held the function performed by the Chief Justice of a High Court or his nominee or by the Chief Justice of India or his nominee to be a '*judicial*' one. Once the function performed by the Chief Justice of India or his nominee is held to be judicial, it cannot be contended that an application for review of an order passed by the Chief Justice of India or his nominee is not maintainable. In my opinion, the learned counsel for the applicant is

A right in relying upon Article 137 of the Constitution which reads thus:

> 137. *Review of judgments or orders by the Supreme Court.*—Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

B

An order passed by the Chief Justice of India or his nominee under Section 11(6) of the Act is indeed an 'order' within the meaning of Article 137 of the Constitution and is subject to review under the aforesaid provision.

I accordingly hold the review petition to be maintainable and proceed C to consider it on merits.

Regarding correction of errors shown by the applicant, the learned counsel for the opponent does not dispute the position and accordingly the submission is accepted by observing that it was not the case of the applicant herein (respondent in the main matter), that arbitration be held in London or D in Singapore. The mistake is ordered to be corrected accordingly.

So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, E no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded F adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the Arbitration Petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review G petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted.

For the aforesaid reasons, the limited prayer to the extent of clarification of the order as to the stand taken by the applicant and the statement made on its behalf is granted. The larger prayer for reconsideration of the order passed H

in the Arbitration Petition and allowing the applicant to nominate Hon'ble Mr. Justice Satpal, Retd. Judge of the High Court of Punjab & Haryana as one of the arbitrators, however, is rejected. In the facts and circumstances of the case, however, there shall be no order as to costs. A

N.J. Review Petition Rejected. B