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

% **Date of order: 14th February, 2025**

\+ REVIEW PET. 5/2025 in RFA 171/2022

EXECUTIVE ENGINEER .....Appellant

Through: None

versus

AAKASH CONSTRUCTION COMPANY & ANR. .....Respondents

Through: Mr. Roopansh Purohit, Advocate for Review Petitioner

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

CM APPL. 1176/2025 ***(seeking condonation of delay in filing Review Petition)***

1. The instant application under Section 5 of the Limitation Act, 1963 has been filed on behalf of the applicant/respondent no. 1 seeking condonation of delay in filing the review petition.

2. For the sufficient cause being shown in the application, the same is allowed and the delay of 105 days, in filing the review petition, is condoned.

3. Accordingly, the instant application stands disposed of.

REVIEW PET. 5/2025 ***(For review of the judgment dt. 21st August, 2024)***

4. The instant review petition under Section 114 read with Section 151

of the Code of Civil Procedure, 1908 (hereinafter "CPC") has been filed on behalf of the respondent no. 1/review petitioner seeking the following reliefs:

> *"(a) review the judgment dated 21.08.2024, passed by this Hon'ble Court in RFA No.171/2022 titled as "Executive Engineer vs. Aakash Construction Company & Anr", in the interest of justice.*
> *(b) consequently dismiss the appeal being the RFA No.171/2022 titled as "Executive Engineer vs. Aakash Construction Company & Anr."*
> *(c) pass any other order or orders as this Hon'ble Court may deem fit and proper in the facts & circumstances of this case."*

5. Learned counsel appearing on behalf of the respondent no. 1/ review petitioner submitted that the instant review petition has been filed against the impugned judgment as the error thereto is apparent on record as reflected in the finding recorded in paragraph no. 71, wherein, it is recorded that *"Clause* 28 *is neither to be found in the copy of the Agreement produced by the appellant nor to be found in the lower court's record"*.

6. It is submitted that a perusal of the trial court record would reveal that the appellant/plaintiff filed a list of documents before the learned Trial Court which contained contract documents that included detailed notice inviting tender. Section 1 of the same contained the tender conditions and Clause 28 read as *"28. Arbitration… As mentioned in the conditions of the contract"*.

7. It is submitted that the parties were *ad-idem* that the dispute resolution mechanism provided under Clause 19 of the agreement related to dispute resolution process was akin to arbitration and the parties unanimously agreed

to settle their dispute by resorting to out of court proceedings through the Empowered Standing Committee constituted by the Government of Haryana as prescribed by clause 19 of the agreement.

8. It is submitted that a combined reading of clause 28 of the notice inviting tender coupled with dispute resolution process contained in clause 19 of the agreement spelt out the intention of the parties to enter into an arbitration agreement.

9. It is submitted that while passing the impugned judgment, this Court failed to consider that a holistic reading of the above mentioned two clauses clearly indicate an intention of the parties to the agreement to refer their dispute to a private tribunal for adjudication. The absence of the word "arbitration" in clause 19 of the agreement does not have a bearing in the facts and circumstances of the present case in view of the two clauses referred to above that have the attributes of a binding arbitration agreement.

10. It is submitted that there is further error apparent on record in paragraph no. 76 of the judgment under review wherein this Court held that the learned Trial Court erroneously considered the RTI documents filed by the respondents/defendants as the same is beyond the scope of the jurisdiction conferred upon it under Order VII Rule 11 of the CPC.

11. It is submitted that the learned Trial Court duly framed a preliminary issue vide its order dated 15th December, 2017, i.e., *"Whether the decision of the Empowered Standing Committee dated 09.05.2014 is arbitration award or not, in view of clause 19 of the Agreement and its effects on maintainability of the present suit?"*

12. It is further submitted the learned Trial Court provided ample opportunity to the parties to the suit to file documents/lead evidence on the above said preliminary issue and thereafter decided the preliminary issue in favour of the defendant nos. 1 and 2 by holding that there exists an arbitration agreement as per work contract by virtue of clause 19. Therefore, as per Section 9 read with Section 5 of the Arbitration and Conciliation Act, 1996 (hereinafter "Act"), the jurisdiction of civil court is barred.

13. It is submitted that the impugned judgment proceeded on the basis that the RTI reply dated 26th June, 2019 relied upon by the defendant no.1 could not be considered at the stage of Order VII Rule 11 of the CPC, whereas, the learned Trial Court considered the said RTI application in the context of deciding the preliminary issue framed vide the order dated 15th December, 2017. As such, the judgment dated 18th December, 2021 did not require interference of this Court on the ground that the said RTI reply could not have been considered at the stage of Order VII Rule 11 of the CPC. The same was considered by the learned Trial Court at the stage of adjudication of preliminary issue.

14. Therefore, in view of the foregoing submissions, it is prayed that the instant review petition may be allowed and the reliefs be granted as prayed for.

15. Heard learned counsel appearing on behalf of the respondent no. 1/review petitioner. None appeared on behalf of the appellant. This Court shall decide the instant review petition on the basis of the material available before this Court as well as in light of the submission made on behalf of the

review petitioner.

16. It is a well settled principle of law that the power of review is exercised in cases where there is an error apparent on the face of the record and in such an event the order or judgment can be corrected.

17. A Court cannot act as an Appellate Court for its own judgments, nor can it allow the petitions for review based only on the claim that one of the parties believe the judgment has proven bane for them. The premise of the same is based on the reason that if the matters that the Court has already adjudicated upon could be reopened and reheard, the same would be detrimental to the public interest. The same was also held in the judgment of ***Kamlesh Verma v. Mayawati,* (2013) 8 SCC 320**, where the Hon'ble Supreme Court carved out the essential principles *qua* review and held as under:

> "*...**14.** Review of the earlier order cannot be done unless the court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. This Court in Col. Avtar Singh Sekhon v. Union of India [1980 Supp SCC 562 : 1981 SCC (L&S) 381] held as under: (SCC p. 566, para 12)*
>
> > *"12. A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In Sow Chandra Kante v. Sk. Habib [(1975) 1 SCC 674 : 1975 SCC (Cri) 305 : 1975 SCC (L&S) 184 : 1975 SCC (Tax) 200] this Court observed: (SCC p. 675, para 1)*

> *'1. ... A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. ... The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.'"*

15. *An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. This Court in Parsion Devi v. Sumitri Devi [(1997) 8 SCC 715] held as under: (SCC pp. 718-19, paras 7-9)*

> *"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P. [AIR 1964 SC 1372] this Court opined: (AIR p. 1377, para 11)*
>
> > *'11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record". The fact that on the earlier occasion the court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated*

by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.'

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury [(1995) 1 SCC 170] while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [(1979) 4 SCC 389] this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'."

(emphasis in original).."

18. This Court has meticulously perused the material available on record, including the judgment impugned in the instant review petition. The first limb of respondent no.1's argument heavily relies upon the ground that there exists an arbitration agreement among the parties and that the same is determinable upon the conjoint reading of Clause 28 (of Section – I of General) and Clause 19 (of Section – II of Conditions of Contract). Further, it has been argued that this Court erroneously decided that Clause 28 is

neither to be found in the copy of the Agreement produced by the appellant, nor to be found in the Lower Court's Record.

19. This Court has again perused the Lower Court's Record and it is observed that Clause 28 (of Section – I of General) exist, but, the same is illegible and thus, this Court had noted in the impugned judgment that the same is not to be found in the record.

20. However, it is pertinent to mention herein that at this stage, even though this Court has noted the aforesaid, the nature of the findings made in the judgment impugned in the instant review petition would not change and does not require any interference as there is no error apparent.

21. At this juncture, this Court has referred to paragraph no. 70, 72, 73, 74, 75, 82 and 85 of the impugned judgment. Upon reading of the aforesaid paragraphs, it is made out that this Court had duly noted the contention of the respondent no. 1 that there exists Clause 28 and upon reading of the same alongside Clause 19, it would show that there exist arbitration clause. However, despite noting the abovesaid, this Court was of the opinion that there exists ambiguity and vagueness with regard to the arbitration clause.

22. Further, a reading of Clause 19 showed that Clause 19.4 states that the party aggrieved by the decision of the Empowered Standing Committee may approach the Court of law. With respect to the same, this Court had arrived to the conclusion that although the wordings of the said Clause may seem to hint at the applicability of the Act on a *prima facie* basis.

23. However, in light of the apparent ambiguity and vagueness in the terms of arbitration, the same cannot be taken merely on the face of it as the

same would be detrimental to the rights of the appellant and against the interest of justice. Relying upon various judgments, it was held that there cannot be any ambiguity with regard to the existence of an arbitration clause. Thus, the respondent no. 1/review petitioner's arguments do not hold any merit.

24. The other limb of the respondent no. 1/review petitioner's argument is that this Court erroneously held that the RTI reply dated 26th June, 2019 could not be relied upon at the stage of Order VII Rule 11 of the CPC since the learned Trial Court considered the same in the context of deciding the preliminary issue framed vide the order dated 15th December, 2017 and thus, the judgment dated 18th December, 2021 (challenged in the appeal) did not require interference of this Court.

25. With regard to the aforesaid contention, this Court has referred to paragraph no. 77, 78, 81 and 85 of the impugned judgment. Upon perusal of the same, it is made out that this Court was of the opinion in light of the ambiguities noted with regard to the existence of arbitration clause; the learned Trial Court ought to have first determined the validity of the documents (RTI application and reply thereto) by giving the appellant a chance to examine and rebut the same. It was also observed by this Court that unless the ambiguity surrounding the existence of terms of arbitration is decided, allowing the preliminary issue *prima facie* violates the settled position of law.

26. Noting the aforesaid discrepancies and contradictions, this Court, in paragraph no. 85 of the impugned judgment, had duly concluded and

determined the irregularity arising out of the order dated 18th December, 2021 (impugned order in the appeal). Paragraph no. 85 reads as under:

> "*..85. Insofar as the impugned order is concerned, this Court has summarised the illegality/irregularity arising out of the same in terms of the following points:*
>
> *a. Contradictory clauses in the Agreement with regard to the alleged existence and non-existence arbitration clause.*
>
> *b. The learned Trial Court failed to ascertain the ambiguity regarding the arbitration when at one place in the contract it is mentioned that there will be no arbitration, however, the defendants/respondents heavily contend that the decision of the ESC is an award in terms of the Act.*
>
> *c. While deciding the applications under Order VII Rule 11 of the CPC, the learned Trial Court went beyond the plaint and relied upon the arguments/defence of the defendants/respondents.*
>
> *d. The learned Trial Court also erred in relying upon the RTI documents in the impugned order when the same was not a part of the evidence of the plaint, to which the appellant/plaintiff did not have any chance to rebut or refute.*
>
> *e. The impugned order is passed in haste manner as it seems that the learned Trial Court failed to interpret the essence of the terms of the Agreement, and it merely took the contention of the defendants/respondents as it is…*"

27. Reading of the aforesaid paragraph shows that only after due consideration of the entire facts and circumstances as well as the documents available on record and in light of the settled position of law, this Court had remanded the matter back to the learned Trial Court as certain 'facts-in issue' and 'issue of law' were apparent on the surface level itself, which requires a

proper adjudication, i.e., a full-fledged trial to arrive at a legally tenable decision.

28. Insofar the law is concerned, in a review petition, the error must be an error of inadvertence as the power of review can be exercised for correction of a mistake but not to substitute a view already taken to conclude the case. Further, the mere possibility of two views on the subject is not a ground for review.

29. Taking into consideration the observations made in the preceding paragraphs, it is held that no error which is apparent on the record exists in the present case, and the instant review petition is a gross misuse of the process of law and thus, the same is liable to be dismissed being devoid of any merit.

30. Accordingly, the instant review petition stands dismissed along with the pending application(s), if any.

31. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

FEBRUARY 14, 2025
gs/ryp/mk

Click here to check corrigendum, if any