
Mr. Nikhil Sadhardande, Senior Counsel a/w Ms. H.V. Tamanna, Mr. Sharad Bansal, Mr. Deepak Shukla, Mr. Niranjana Shimpi & Mr. Satsang Tailor for the Petitioner.

Mr. Zal Andhyarujina, Senior Counsel a/w Ms. Maithili Parikh, Mr. Jatin Pore, Sreerani V.G., Vishal Mandal i/b DSK Legal for the Respondent.

Mr. Pratik Jha a/w Mr. Shailesh Patil, the Representative of Petitioner present.

CORAM : R.I. CHAGLA, J.

DATED : 28TH NOVEMBER, 2024.

ORDER :

1. By this Interim Application, the Applicant/Original Petitioner has sought a stay on execution, implementation, operation and / or effect of the Award dated 13th September, 2021 as well as Correction Award dated 15th November, 2021 passed by the Arbitral Tribunal.

2. On the prior date i.e. 26th March, 2024, this Court had whilst hearing the present Interim Application, recorded the statement of Mr. Sakhardande, learned Senior Counsel appearing for the Applicant/Petitioner on instructions viz. that the Petitioner is willing to deposit the entire amount awarded for stay of the impugned Award as well as Correction Award. This was objected to by Mr. Zal Andhyarujina, learned Senior Counsel for the Respondent

on the ground that there are no valid grounds raised by the Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (“*the Arbitration Act*”). Accordingly, this Court had made it clear that arguments are being advanced on issue as to whether the impugned Award is required to be stayed or the Petition is liable for dismissal.

3. There was a change of Assignment and by an Administrative Order, the Hon’ble the Chief Justice of this Court placed the matter before this Bench. Considering that this Bench is now taking up the Assignment of Section 34 Petitions, it naturally falls within the Assignment of this Bench.

4. The arbitration proceedings which have culminated in the Arbitral Award dated 13th September, 2021 and Correction Award dated 15th November, 2021 (referred to collectively as “*the impugned Award*”) has emanated out of a contract viz. Agreement No.DGNP(MB)/01 of 2009-2010 dated 18th June, 2010 (hereinafter referred to as the “*said contract*”). The said contract was for the execution of works, being ‘Reconstruction and Completion of Dry Dock and Associated North and South Wharves at Naval Dockyard, Mumbai (“*the Works*”).

5. It is pertinent to note that the Respondent herein has invoked arbitration on three other occasions in relation to disputes arising out of the said contract. These three arbitrations have culminated in Award dated 19th July, 2019 (read with the Correction Award dated 24th August, 2019) (collectively referred to as the “**2019 Award**”); Award dated 20th March, 2021 (read with the Amended Award dated 15th July, 2021) (collectively referred to as the “**2021 Award**”); and Award dated 8th February, 2023 (read with the Rectification Award dated 6th April, 2023) (collectively referred to as the “**2023 Award**”). The Petitioners have filed the respective Arbitration Petitions under Section 34 of the Arbitration Act being Commercial Arbitration Petition No.1594 of 2019 (“**2019 Petition**”), Commercial Arbitration Petition No.658 of 2021 (“**2021 Petition**”) and Commercial Arbitration Petition (L) 18306 of 2023 (“**2023 Petition**”) challenging the respective Awards.

6. This Court by two separate Orders dated 18th October, 2022 has stayed the execution of the 2019 Award and the 2021 Award subject to the conditions as laid down therein. Similarly, execution of the 2023 Award has also been stayed by the Order dated 9th November, 2023 passed by this Court.

7. The remaining Arbitration Petition which is the present Arbitration Petition forming part of the group of Arbitration Petitions referred to above is being considered separately. The Interim Application filed therein is necessary to be considered as it is for stay of the impugned Award. The stay can only be granted if this Court finds merit in the challenge raised in the Arbitration Petition.

8. Mr. Sakhardande, learned Senior Counsel appearing for the Petitioner has submitted that the finding in the impugned Award that the Petitioner's defence of *res judicata* stood waived is perverse and patently illegal. It is also contrary to the fundamental policy of Indian Law. He has submitted that it had been one of the core defences raised by the Petitioner before the Arbitral Tribunal namely that the claims raised by the Respondent in the arbitral proceeding were barred by *res judicata* / principles akin to Order 11 Rule 2 of the Code of Civil Procedure ("CPC"), 1908. The Tribunal had rejected this defence solely on the ground that the Petitioner's defence stood waived.

9. Mr. Sakhardande has submitted that the Petitioner had specifically raised the plea of *res judicata* by way of amendment to its

Statement of Defence. The amendment had been allowed by the Arbitral Tribunal vide Order dated 24th February, 2020. In the said order allowing the amendment, the Arbitral Tribunal did not hold that the amendment would not relate back to the date of filing of the original Statement of Defence. He has submitted that in view thereof, as per settled law, the amendment is deemed to relate back to the original Statement of Defence. In other words, once the amendment to the statement of Defence was allowed, the Petitioner is deemed to have taken a plea of *res judicata* in its statement of defence. He has submitted that in such situation, no question of waiver of the plea of *res judicata* could have arisen. On this ground alone, the impugned Award ought to be set aside.

10. Mr. Sakhardande has submitted that the finding in the impugned Award that failure to raise the defence of *res judicata* at the stage of reference to arbitration and the Statement of Defence as originally filed constitutes waiver is contrary to the provisions of the Arbitration Act. He has submitted that Section 16 of the Arbitration Act casts an obligation on the Respondent in the arbitral proceedings to raise objections to jurisdiction (and not on any other issue) at the time or prior to filing of the Statement of Defence. He has submitted

that in other words, except in so far as issues of jurisdiction are concerned, there is no bar under the Act against raising defences to the claim after the filing of the original Statement of Defence. He has submitted that by the Arbitral Tribunal holding that the defence of *res judicata* ought to have been taken at the stage of reference to arbitration / in the Statement of Defence as originally filed, the Arbitral Tribunal has in effect equated the defence of *res judicata* with a defence of lack of jurisdiction. He has submitted that the findings in impugned Award are contrary to the law laid down in **Indian Farmers Fertilizer Co-operative Limited Vs. Bhadra Products**¹, Paragraph 20, where the Supreme Court defined 'jurisdiction' to mean three aspects- (a) existence of a valid arbitration agreement; (b) constitution of the Tribunal; (c) matters submitted to arbitration must be in accordance with the arbitration agreement. He has submitted that the Supreme Court has made it clear that jurisdiction is to mean the aforementioned three aspects and that *res judicata* is not a facet of 'jurisdiction'. It goes to the aspect of maintainability / admissibility of the claim. He has submitted that in view of finding of the Arbitral Tribunal being contrary to the decision of the Supreme Court, the impugned Award is patently illegal and contrary to the

¹ (2018) 2 SCC 534

fundamental policy of Indian law and ought to be set aside.

11. Mr. Sakhardande has submitted that the Arbitral Tribunal has rejected the Petitioner's plea of *res judicata* on the ground that the Courts have not strictly applied the principles of *res judicata* in case of construction contracts involving works of substantial nature running for several years and involving multifarious issues and disputes. He has submitted that the impugned Award has failed to cite any precedent in support of this finding. He has submitted that the finding is plainly contrary to the decision of the Delhi High Court in **Gammon India Limited Vs. National Highways Authority of India**², Paragraph 35, which categorically holds that "the principles of *res judicata* apply to arbitral proceedings". This observation was rendered in the context of a construction contract.

12. Mr. Sakhardande has thereafter raised contention that all four Arbitration Petitions are arising out of the same Contract and ought to be decided in one go. He has placed reliance upon the decision of the Delhi High Court in ***Gammon India Limited (supra)*** at Paragraph 35 (vi) & 45 (ii), where the Delhi High Court has held that to avoid the possibility of any conflicting findings in the four

² 2020 SCC Online Del 659

Petitions, the Petitions ought to be disposed of comprehensively in one go. He has submitted that the present Petition ought to be admitted and disposed of along with the other three Petitions pending before this Court.

13. Mr. Sakhardande has also made submission on the merits of the impugned Award namely that the awarded monetary sums to the Respondent is without any oral evidence. He has submitted that the Petitioner is entitled to take this plea even if it is assumed (though denied) no such ground was taken by the Petitioner in the Section 34 Petition. He has submitted that this being a legal submission it can be taken at any stage. He has placed reliance upon the decision of the Supreme Court in *Lion Engineering Vs. State of Madhya Pradesh*³, in which it is held that a defence of lack of jurisdiction of the Arbitral Tribunal can be taken up for the first time in a Petition under Section 34 of the Arbitration Act.

14. Mr. Sakhardande has submitted that the issues raised in the present Arbitration Petition also form the subject matter of the 2019 Petition. Therefore, the present Petition ought to be heard with the 2019 Petition.

³ (2018) 16 SCC 758

15. Mr. Sakhardande has also made submissions with regard to the Respondent not being entitled to any interest on the amount that may be deposited by the Petitioner pursuant to the orders of this Court and for which, he has placed reliance upon the decisions of the Supreme Court in *Nepa Limited Vs. Manoj Kumar Agarwal*⁴, Paragraph 14 and *DLF Limited Vs. Koncar Generators and Motors Ltd.*⁵, Paragraphs 14 & 15.

16. Mr. Zal Andhyarujina, learned Senior Counsel appearing for the Respondent has submitted that the Petitioner in the present Arbitration Petition has not made out any valid grounds of challenge under Section 34 of the Arbitration Act. He has submitted that the grounds raised in the Arbitration Petition are not within the permissible scope of challenges to an Arbitral Award under Section 34 of the Arbitration Act as amended from time to time. The present Arbitration Petition has been filed by the Petitioner merely as an attempt to delay and / or avoid paying the amount due under the Arbitral Award to the Respondent. He has in the context of scope of Section 34 i.e. permissible grounds which can be raised in a challenge to an award, placed reliance upon decision of the Supreme Court in

⁴ 2022 SCC OnLine SC 1736

⁵ 2024 SCC OnLine SC 1907

Associate Builders Vs. Delhi Development Authority⁶ at Paragraph 27, 28, 31, 32, 40 to 45. He has submitted that the Supreme Court has made it clear that fundamental policy of Indian Law includes disregarding order of superior Courts; an arbitrary or whimsical decision; a decision suffering from non-application of mind; a perverse or irrational decision i.e. a decision based on no evidence or one which ignores vital evidence; a decision that defies logic as to suffers from irrationality; and a decision that results in miscarriage of justice. He has submitted that an award is said to be patently illegal if it contravenes a substantive law of India, provided that the illegality goes “to the root of the matter”, the Arbitration Act, or the rules applicable to the dispute.

17. Mr. Andhyarujina has submitted that the Judgment of the Supreme Court **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India**⁷ has observed that the amended Section 34 brought about fundamental change in the law and the expansion of ground of “the public policy of India”, and has done away with the law laid down in **ONGC Limited Vs. Saw Pipes Limited**⁸ and **ONGC Limited Vs. Western Geco**

⁶ (2015) 3 SCC 49

⁷ (2019) 15 SCC 131

⁸ (2003) 5 SC 705

International Limited⁹ and a new ground of “patent illegality” with in-built exceptions has been introduced. This decision has considered “public policy of India” as “fundamental policy of Indian Law” which would be relegated to the Supreme Court Judgment in **Renusagar**.

18. Mr. Andhyarujina has also referred to the decision of the Supreme Court in **Delhi Airport Metro Express Pvt. Ltd., Vs. Delhi Metro Rail Corporation Limited**¹⁰, which has also relied upon the decision of the Supreme Court in ***Ssangyong Engineering and Construction Company Limited (Supra)*** and has held that every error of law would not fall within the expression of “patent illegality” and similarly neither can erroneous application of law be categorized as patent illegality. The Supreme Court has also held that the Courts are refrained from re-appreciation of evidence whilst exercising jurisdiction under Section 34 of the Arbitration Act. Further, Courts are mandated to strictly act within the confines of Section 34 of Arbitration Act.

19. Mr. Andhyarujina has submitted that in view of the aforementioned Judgments of the Supreme Court, there are only

⁹ (2014) 9 SCC 263

¹⁰ (2022) 1 SCC 131

limited grounds under which an Award can be challenged under Section 34 of the Arbitration Act and the present Arbitration Petition has failed to raise any valid ground under Section 34 of the Arbitration Act.

20. Mr. Andhyarujina has submitted that the Arbitral Tribunal's finding that the Petitioner had waived the plea of *res judicata* and raised the same belatedly and as an afterthought is a plausible view and cannot be challenged under Section 34. He has referred to the Response to the Amendment Application filed in the arbitral proceedings wherein the Respondent herein has raised the issue of waiver of the plea on *res judicata*. Further, this has also been raised in the Amendment to Rejoinder. This is apart from raising the plea that *res judicata* is a mixed question of law and fact and is required to be raised in pleading and properly proved.

21. Mr. Andhyarujina has submitted that there is no ground raised in the present Arbitration Petition that the finding of the Arbitral Tribunal on waiver of *res judicata* is perverse. Further, no attempt was made by Counsel on behalf of the Petitioner in the course of arguments to argue on perversity.

22. Mr. Andhyarujina has submitted that the findings of the Arbitral Tribunal on *res judicata* calls for no interference.

23. Mr. Andhyarujina has submitted that it is settled law that the Arbitral Tribunal's jurisdiction only extends upto the reference by both parties, and an Arbitral Tribunal is only a competent Court as to the issues submitted in the reference. A plain reading of both references of the arbitral proceedings culminating in the 2019 Award and the arbitral proceedings culminating in the impugned Award reveal that the claims referred to arbitration were distinct.

24. Mr. Andhyarujina has referred to Section 7(1) of the Arbitration Act which contemplates the possibility of invocation of arbitration for certain disputes as opposed to all disputes. He has in this context placed reliance upon *Gammon India Limited (supra)*. He has submitted that in view of the arbitration agreement between the parties and there being no concept of only one invocation for all disputes, the contention on behalf of the Petitioners that the invocation of all disputes should have been a one time measure is misconceived.

25. Mr. Andhyarujina has submitted that the dismissal of the

present Arbitration Petition will have no bearing on the other Arbitration Petitions. He has submitted that the present Arbitration Petition is concerned with the variation of works and additional costs incurred due to the variation of works and this has been provided separately in the General Conditions of Contract i.e. “variation” in Clause 1.1.6.9 read with Clause 13. He has submitted that under the General Conditions of Contract, “variation” of works resulting from breach of contract does not make the contractor / Respondent herein liable. This is by virtue of an absence of a Clause that makes the Contractor liable for variation of works resulting from a breach of contract. Thus, the Contractor is entitled to be compensated for variation of works, whether in breach or not in breach and in every circumstances as soon as there is a variation work. He has accordingly submitted that the present Arbitration Petition is not dependent upon the other Arbitration Petitions and is in no way concerned with the extension of time granted in the 2019 Award.

26. Having considered the submissions, the issue that arises in the arbitral proceeding which has culminated in the impugned Award and which is the subject matter of challenge in the present Arbitration Petition is with regard to the whether claims raised by the

Claimant / Respondent herein was barred by the plea of *res judicata*. The plea of *res judicata* had been raised by amending the Statement of Defence after the arbitral proceedings had commenced and were being proceeded with. The Arbitral Tribunal has held that the plea of *res judicata* had been waived in view of the Petitioner having been a party to the reference of dispute to the Arbitral Tribunal and taking active part in the arbitral proceedings before the Arbitral Tribunal and not raising the plea of *res judicata* at the outset.

27. I am of the view that the Petitioner by amending the Statement of Defence and raising the plea of *res judicata*, though not having raised the plea earlier, had certainly not given up the plea of *res judicata*. I prima facie find that the amendment to the Statement of Defence would relate back to the date of the original Statement of Defence and that would include the plea of *res judicata* and hence, the Arbitral Tribunal's finding that the plea of *res judicata* has been waived by the Petitioner herein, in my prima facie view, is perverse and deserves consideration.

28. Further, the finding in the impugned Award that Courts have not strictly applied principles of *res judicata* in case of

construction contracts which involves works of substantial nature running for several years and involving multifarious issues and disputes, is prima facie contrary to the decision of the Delhi High Court in ***Gammon India Limited (supra)*** which expressly holds that the principles of *res judicata* applies to arbitral proceedings and this observation was in the context of a construction contract.

29. The contention of the Respondent that the finding of the Arbitral Tribunal on the plea of *res judicata* having been waived is a plausible view taken by the Arbitral Tribunal which calls for no inference under Section 34 of the Arbitration Act is misconceived. The learned Arbitrator has in my prima facie view overlooked the material fact of the Petitioner by amending the Statement of Defence had taken the plea of *res judicata* and which plea relates back to the Statement of Defence. Thus, in my prima facie view this finding of the Arbitral Tribunal on the plea of *res judicata* having been waived cannot be considered to be a plausible view.

30. Thus, I find that the present Arbitration Petition requires consideration. This apart from the fact that the present Arbitration Petition was part of a group of four Arbitration Petitions, three of

which have been admitted by this Court and the impugned Awards therein are stayed. The dispute in the present Arbitration Petition is also from the same contract and relating to the works as aforementioned and thus, there is undoubtedly some overlap in the issues involved in the Arbitration Petitions.

31. The contention on behalf of the Respondent with regard to the Petition not containing any permissible ground of challenge under Section 34 of the Arbitration Act, in my view, does not find merit. In any event, the rights and contentions of the Respondent are expressly kept open to be urged at the hearing of the Arbitration Petition.

32. Hence, the following order is passed:

(i) The Commercial Arbitration Petition (L) No.5951 of 2022 is admitted and shall be placed alongwith the three Arbitration Petitions viz. Commercial Arbitration Petition No.1594 of 2019; Commercial Arbitration Petition No.658 of 2021 and Commercial Arbitration Petition (L) No.18306 of 2023 for hearing.

(ii) The impugned award being Arbitral Award dated 13th September, 2021 and Correction Award dated 15th November, 2021 is stayed, subject to the Petitioner depositing 100% of the awarded amount, within a period of six weeks from the date of this order.

(iii) The Respondent is at liberty to file an Application for withdrawal of the deposited amount which shall be considered on its own merits.

(iv) The issue of interest, as to whether it runs once there is a deposit and stay of the impugned Award shall be considered at the hearing of the Arbitration Petition.

(v) The Interim Application (L) No.7509 of 2022 is accordingly disposed of.

(vi) The Commercial Arbitration Petitions referred to above including the present Commercial Arbitration Petition shall be placed for directions on 7th January, 2025.

[R.I. CHAGLA, J.]