2025:DHC:226

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

Date of decision: 14th JANUARY, 2025

IN THE MATTER OF:

\+ **ARB.P. 1061/2023**

M/S JAIPRAKASH ASSOCIATES LIMITED .....Petitioner

Through: Mr. Lovkesh Sawhney, Senior Advocate with Mr. Rohit Kumar, Advocate.

versus

M/S NHPC LIMITED .....Respondent

Through: Mr. Gauhar Mirza, Ms. Hiral Gupta, Ms. Sukanya Singh, Mr. Rohit Rahar, Mr. Devarshi Mohan, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter '**Act of 1996**') by the Petitioner seeking recommencement of the arbitration and appointment of nominee Arbitrator on behalf of the Respondent to adjudicate upon the disputes which have arisen between the Parties.

2. Shorn of unnecessary details, the facts leading to the present petition are as under:-

i. The Respondent invited bids with regard to execution of Dulhasti Hydro Electric Project on river Chenab at Kishtwar, Jammu and Kashmir. Tenders were invited since the same had been abandoned by a previous awardee namely M/s. Dumaz-Sogea Borie SAE.

The balance work was continued by the Petitioner between 1992 to 1995.

ii. Similarly, the work was done by the joint venture of M/s Jaiprakash Industries Limited and M/s Statkraft Anlegg AS. Subsequently, it was amalgamated with M/s Jaypee Cement Limited which came to be known as M/s Jaiprakash Associates Limited, the Petitioner herein and submitted its bid to the tender floated by the Respondent.

iii. It is stated that in the second phase, the work was divided into two packages, one for Upstream Area Works (Package 1) and the other for Downstream Area Works (Package 2). Both the phases were awarded to the Petitioner.

iv. It is stated that a Contract was entered into between the parties on 09.04.1997. The Contract dated 09.04.1997 stipulated that the work should be completed within 33 months but the work could not be completed within the stipulated term of 33 months. Extension was granted to complete the work. The project which was to be completed in the year 2000, was extended till 2007.

v. It is stated that on 11.05.2007, the certificate of completion was issued by the Respondent. The Petitioner raised bills for the two packages. It is stated that in the Bills of the Petitioner, certain additional costs which were said to have been incurred by the Petitioner on account of overstaying at the site were included.

vi. It is stated that the total claim amount towards these additional costs was Rs. 360.56 crores. It is stated that the claim was rejected by the Respondent herein. Since there was an Arbitration Clause in the Contract dated 09.04.1997, the Arbitration Clause, i.e., Clause 39.2, was invoked and the Arbitral Tribunal consisting of three Arbitrators was constituted.

vii. It is stated that in the majority Award, even though it was found that no evidence has been led by the Petitioner herein to substantiate the claim on the ground of cost incurred due to the delay, yet amount of Rs. 60 crore was awarded on the principle of good conscience and reasonable and proper estimate.

viii. The Award was challenged by both the Petitioner and the Respondent herein by filing O.M.P. (COMM) 505/2020 and O.M.P. (COMM) 482/2020 respectively. It is the case of the Respondent that the Award of Rs. 60 crores was unsustainable whereas, the Petitioner herein made a claim for enhancement of the said amount.

ix. The Learned Single Judge *vide* Judgment dated 26.05.2023 in O.M.P. (COMM) 482/2020, set aside the Majority Award and quashed the finding qua the grant of Rs 60 crores as additional compensation. It is held by the Learned Single Judge that on one hand the Tribunal had held that the Petitioner herein had failed to produce any material to substantiate its claim but on the other hand the Tribunal awarded a sum of Rs.60 crores on the basis of good conscience which is opposed to public policy.

x. The Learned Single Judge was of the opinion that since the parties had not expressly authorized the Tribunal to apply the principle of good conscience and equity, it could not award the said amount as it is contrary to Section 28(2) of the Act of 1996. Since the Award has been set aside by the judgment of even date in O.M.P. (COMM) 505/2020 filed by the Petitioner herein, the Petitioner has approached this Court for appointment of an Arbitral Tribunal to adjudicate the disputes between the parties.

3. Notice in the instant petition was issued on 14.02.2024. Pleadings are complete.

4. Learned Senior Counsel appearing for the Petitioner contends that the Award does not decide the underlying dispute and has not dealt with the merits of the dispute and therefore, an Arbitral Tribunal has to be appointed to adjudicate the disputes between the parties. He further contends that Section 43(4) of the Act of 1996 provides that where the Court orders an arbitral award to be set aside, then fresh proceedings can be initiated within the timeline prescribed under Section 43(4) of the Act of 1996. He, therefore, states that this Petition is maintainable. The Learned Senior Counsel for the Petitioner places reliance on the judgments of the Apex Court in McDermott International Inc v. Burn Standard Co. Ltd., **(2006) 11 SCC 181**, Dakshin Haryana Bijli Vitran Nigam Ltd v. Navigant Tech. (P) Ltd, **(2021) 7 SCC 657**, NHAI v. M. Hakeen., **(2021) 9 SCC 1** and the judgment passed by this Court in Nussli Switzerland Ltd v. Organizing Committee Commonwealth Games, **2014 SCC Online Del 4834,** to advance the aforesaid contention.

5. Learned Senior Counsel for the Petitioner draws the attention of this Court to paragraph No.52 of the judgment passed by the Apex Court in McDermott International Inc (supra) to contend that when a Court exercises jurisdiction under Section 34 of the Act of 1996, it cannot correct errors of the Arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if so desired. Paragraph No.52 of the McDermott International Inc (supra) reads as under:-

> *"**52**. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the e expediency and finality offered by it."*

6. The Learned Senior Counsel for the Petitioner further draws attention of this Court to the judgment passed by the Apex Court in Dakshin Haryana Bijli Vitran Nigam Ltd (supra) to contend that in law, where the Court sets aside the Award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Paragraph No.44 of the Dakshin Haryana Bijli Vitran Nigam

Ltd (supra) has placed reliance on paragraph No.52 of the McDermott International Inc (supra).

7. Learned Senior Counsel appearing for the Petitioner further places reliance on Indian Oil Corporation Limited v. SPS Engineering Limited, **(2011) 3 SCC 507**; Steel Authority of India Limited v. Indian Council of Arbitration & Anr. being LPA 103/2016 to contend that whether a claim is barred by *res judicata* or not, does not arise for consideration in proceedings under Section 11 of the Act of 1996 and such an issue will have to be examined by the Arbitral Tribunal.

8. *Per contra,* Learned Counsel appearing for the Respondent states that the present petition is filed for adjudication of an already standing decision in the earlier round. It is stated that the question that arises to be raised in this round is also on adjudication for the additional costs incurred on account of overstaying at the site of work which has already been adjudicated on merits by the Arbitral Tribunal. The Arbitral Tribunal has already held that there was no material on which the claim could be granted but still granted Rs.60 crores only on the basis of good conscience which Award is now set aside by the learned Single Judge in O.M.P. (COMM) 482/2020. It is stated that there is nothing left to be decided once again.

9. The learned Counsel for the Respondent contends that the present petition is absolutely *mala fide*. It is contended that a referral Court does have the jurisdiction to *prima facie* scrutinize as to whether the claim is a dead claim or not rather than to relegate the parties to Arbitration which is a time consuming and expensive affair.

10. Heard the learned Counsel for the parties and perused the material on record.

11. It is well-settled that referral Court under Section 11 of the Act of 1996 does not dwell into detail on the question as to whether there is an arbitral dispute or not. A referral Court primarily looks into the question as to whether there is an arbitration agreement and that the disputes have arisen between the parties and if there is an arbitration agreement and disputes have arisen between the parties then a referral Court, exercising jurisdiction under Section 11 of the Act of 1996, refers the matter to the Arbitration. It is equally well-settled that the principle that is followed by Courts while exercising jurisdiction under Section 11 of the Act of 1996 is, when in doubt, refer.

12. The Apex Court in Vidya Drolia v. Durga Trading Corporation, **(2021) 2 SCC 1**, underlines the scope of Section 11 of the Act of 1996 and has concluded as under:-

> *"**153**. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.*

154. *Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:*

154.1. *Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the an scope of application unde review by 8 or 11 of the Arbitration Act, post the am Seements by Act 3 of 2016 (with retrospective effecundme 23-10-2015) and even post the amendments vllect from 23 2019 (with effect from 9-8- 2019), is no longer applicable.*

154.2. *Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.*

154.3. *The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i) (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to

> ***arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."***
>
> (emphasis supplied)

13. A perusal of the said judgment would show that the scope of judicial review under Section 11 of the Act of 1996 is extremely limited and restricted and that the Arbitral Tribunal is the first-preferred authority to determine and decide all questions of non-arbitrability. However, paragraph No.154.4 does indicate that the restricted and limited examination is to check and protect parties from being forced to arbitrate when the matter is demonstrably non-arbitrable and to cut-off dead wood.

14. The said judgment has been quoted with approval by the Apex Court in SBI General Insurance Co. Ltd v. Krish Spinning, **(2024) SCC OnLine SC 1754**. In the said judgment also, the Apex Court has held that though the Arbitral Tribunal is the first-preferred authority to determine the question pertaining to non-arbitrability, yet the referral Court may exercise its limited jurisdiction to refer arbitration cases which are ex facie frivolous and where it is certain that the disputes are non-arbitrable. A detailed scrutiny of facts and evidence is not permissible under Section 11 of the Act of 1996.

Paragraphs No.85 and 86 of the SBI General Insurance Co. Ltd v. Krish Spinning, **(2024) SCC OnLine SC 1754,** reads as under:-

> *" **85.** As is clear from the aforesaid extract, Vidya Drolia (supra) held that although the arbitral tribunal is the preferred first authority to determine the questions pertaining to non-arbitrability, yet the referral court may exercise its limited jurisdiction to refuse reference to arbitration in cases which are ex-facie frivolous and where it is certain that the disputes are non-arbitrable.*
>
> ***86**. The decision of this Court in Vidya Drolia (suprof was subsequently relied upon by a this Ltd. v. Rajapura two-Judge Bench Homes (P) Ltd. reported in (2021) 16 SCC 743 wherein it was heldehat the prima facie review as laid down in Vidya Drolia (supra), in exceptional cases warrants interference by the court to protect the wastage of public money.*
>
> *"21. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does no denude this Court of its judicial function to loo beyond the bare existence of an arbitration clause t cut the deadwood. A three-Judge Bench in Vidy Drolia [Vidya Drolia v. Durga Trading Corpn., (2021 2 SCC 1, paras 236, 237, 244.3, 244.4, 244.5, 244.5. 244.5.3: (2021) 1 SCC (Civ) 549], has eloquent clarified that this Court, with a view to preve wastage of public and private resources, may condu "prima facie review" at the stage of reference to we out any frivolous or vexatious claims."*

15. The conclusion of the Apex Court in SBI General Insurance (supra) is given in paragraph no. 92 which reads as under:-

> *"**92**. The position that emerges from the aforesaid discussion of law on the subject as undertaken by us can be summarised as follows:-*
>
> *i. There were two conflicting views which occupied the field under the Arbitration Act, 1940. While the decisions in Damodar Valley (supra) and Amar Nath (supra) took the view that the disputes pertaining to "accord and satisfaction" should be left to the arbitrator to decide, the view taken in P.K. Ramaiah (supra) and Nathani Steels (supra) was that once a "full and final settlement" is entered into between the parties, no arbitrable disputes subsist and therefore reference to arbitration must not be allowed.*
>
> *ii. Under the Act, 1996, the power under Section 11 was characterised as an administrative one as acknowledged in the decision in Konkan Railway (supra) and this continued till the decision of a seven- Judge Bench in SBP & Co. (supra) overruled it and significantly expanded the scope of judicial interference under Sections 8 and 11 respectively of the Act, 1996. The decision in Jayesh Engineering (supra) adopted this approach in the context of "accord and satisfaction" cases and held that the issue whether the contract had been fully worked out and whether payments had been made in full and final settlement of the claims are issues which should be left for the arbitrator to adjudicate upon.*
>
> *iii. The decision in SBP & Co. (supra) was applied in Boghara Polyfab (supra) and it was held by this Cour that the Chief Justice or his designate, in*

exercise e the powers available to them under Section 11 of th Act, 1996, can either look into the question of "acco and satisfaction" or leave it for the decision of t arbitrator. However, it also specified that in ca where the Chief Justice was satisfied that there indeed "accord and satisfaction", he could reject the application for that the party seeking arbitration would have to prima facie standard of scrutiny was facie establish that there was fraud or coercion involved appointment The prima of arbitrator. also expounded, stating in the signing of the discharge certificate. The adopted in a number of subsequent decisions, wherein position elaborated in it was held that a mere bald plea of fraud or coercion was not sufficient for a party to seek reference to Boghara Polyfab (supra) was arbitration and prima facie evidence for the same was required to be provided, even at the stage of the Section 11 petition.

iv. The view taken by SBP & Co. (supra) and Boghara Polyfab (supra) en by sen by the legislature as causing delays in the dispas seor Section 11 petitions, and with a view to overcome the same, Section 11(6-A) was introduced in theme the 1996 to limit the scope of enquiry under Section 11 only to the extent of determining the "existence" of an arbitration agreement. This intention was acknowledged and given effect to by this Court in the decision in Duro Felguera (supra) wherein it was held that the enquiry under Section 11 only entailed an examination whether an arbitration agreement existed between the parties or not and "nothing more or nothing less".

> *v. Despite the introduction of Section 11(6-A) and the decision in Duro Felguera (supra), there have been diverging views of this Court on whether the scope of referral court under Section 11 of the Act, 1996 includes the power to go into the question of "accord and satisfaction". In Antique Art (supra) it was held that unless some prima facie proof of duress or coercion is adduced by the claimant, there could not be a referral of the disputes to arbitration. This view, however, was overruled in Mayavati Trading (supra) which reiterated the view taken in Duro Felguera (supra) and held that post the 2015 amendment to the Act, 1996, it was no more open to the Court while exercising its power under Section 11 of the Act, 1996 to go into the question of whether accord 1996 satisfaction" had taken place.*
>
> *vi. The decision in Vidya Drolia (supra) although adopted the view taken in Mayawati Trading (supra) yet it provided that in exceptional cases, where it was manifest that the claims were exfacie time barred and deadwood, the Court could interfere and refuse reference to arbitration. Recently, this view in the context of "accord and satisfaction" was adopted in NTPC v. SPML (supra) wherein the "eye of the needle" test was elaborated It permits the referral court to reject arbitration in such exceptional cases where the plea of fraud or coercion appears to be ex- facie frivolous and devoid of merit. "*

16. This Court, therefore, proceeds to apply the said law to the facts of the instant case. In the facts of the instant case, the relief sought for by the Petitioner herein is for directing the Respondent to appoint its nominee Arbitrator as per procedure laid down in Article 39 of GCC of the Contract

Agreement and to appoint an Arbitrator on behalf of the Respondent in terms of the provisions of Clause 11(5) of the Act of 1996.

17. In the majority Award, the Arbitrators have held that the process of ascertainment of the additional costs is not possible since the amount was not claimed during the currency of the Contract and was therefore not estimated simultaneously with other expenses incurred from time to time. The Arbitrators were of the opinion that, had the Petitioner claimed the said amount during the implementation of the Contract, the additional cost could have been ascertained with some level of accuracy. The Arbitrators were also of the opinion that the Claimant had based its claim on the estimates prepared or approved by the Auditors and the certificates said to have been issued by the Auditors, on the basis of accounts of the Claimant for the years 2001-2007 which have not been proved in accordance with law. The Arbitrators were of the opinion that there is no material to decide whether the time related cost as claimed by the Petitioner is or is not a part of overheads. The Arbitrators were also of the opinion that in the light of imperfect evidence led by the Petitioner herein, it is not possible for the Tribunal to indicate the amount payable to the Claimant separately under each head and as to whether under how many heads the claim is made. After coming to this conclusion, yet, the Arbitrators based on pleadings, oral and documentary evidence adduced by the parties and merits and demerits of each party's case, awarded a sum of Rs.60 crores. The relevant portion of the Award which has been quoted by the learned Single Judge while deciding the application under Section 34 of the Act of 1996 is once again extracted and the same reads as under:-

"It must be appreciated that what we are concerned with is an estimate of the Additional cost that must have been incurred by the Claimant on account of overstaying for more than 80 months at the site, along with his machinery, equipment, labour and all other incidental items. Precise ascertainment is not possible since the said amount was not claimed during the currency of the contract and was therefore not estimated simultaneously with other expenses incurred from time to time which expenses were audited by the statutory auditor. Had the Claimant so claimed during the implementation of the contract, the amount of additional cost could probably have been ascertained with some level of accuracy. Now, more than two years after the work has been completed, an estimate is sought to be made. For this purpose, while the Claimant basis its claim on the estimates prepared or approved by the Auditors and the certificates said to have been issued by the Auditors, on the basis of accounts of the Claimant for the years 2001 to 2007 (which have not been proved according to law, as pointed put hereinbefore, the Respondent seeks to arrive at the estimate applying the guidelines which too have not been properly proved explained by the Respondent's witness (RW 1). The difference between the two figures one by the Claimant and the other by the Respondent is too vast. There is also no material before us to decide whether the Time related cost claimed by the Claimant is part of Overheads, as asserted by the Respondent or not. According to CWC guidelines extracted in the Defence Statement, overhead charges do include "office expenses". Probably "Head office expenses" are included within the ambit of office expenses". It is equally relevant to notice that time extensions were granted mainly for HRT work and not for other works. How was the ratio of expenditure between HRT and other works set out in the Rejoinder filed by the Claimant - was determined is

also a relevant aspect, which has remained unexplained. Then, there is the issue of depreciation. The Respondent stated that the machinery/equipment made over to the Claimant, by the Respondent at the Inception of the contract, had already earned depreciation for several (six) years and that the Claimant can claim depredation only for one year, whereas the Claimant says that this machinery/ equipment was "refurbished" by the Claimant and hence he is entitled to claim depreciation. No material has been placed before us in support of 'refurbishing' except oral assertions. Undoubtedly, the Claimant had claimed. depreciation on all relevant machinery/ equipment during the years 2001 to 2007 in the respective years and had availed. Now, the claim in is for additional depreciation for overstaying on a retrospective basis. Not only depreciation, the effect Claimant Claimant has claimed "escalation" on depredation the basis of which is not clear. The Respondent further says rightly that the claim for depreciation too, if any, has to: be restricted to HRT work only since the extension of time was mainly with regard to HRT only. In short, case put-forward by the Claimant cannot be said to have been properly explained and/or established by it. Even so, in the light of the undeniable fact that the Claimant had to overstay at the site, together with his equipment etc. wherever it may be for a period of more than 80 months must necessarily have caused additional cost expense to it, which has to als recompensated, even though the Respondent was also not responsible for the said overstay as discussed hereinbefore. Thble formant has claimed Additional costs under three heads as mentioned above, the Respondent has, however, disputed the said categorization into three heads and says that there are only two heads of expenses. In the light of the imperfect evidence led by the Claimant, it is not possible for the Tribunal to indicate the amounts

> *payable to the Claimant separately under each head - whether there are three heads or two heads, as the case may be. Be that as it may, having regard to all the aforementioned circumstances including the pleadings, oral and documentary evidence adduced by the parties and merits and demerits of each party's case, we are of the opinion that an amount of Rs. 60.00 Crores (Rupees sixty crores only), (as the additional cost incurred by the Claimant on account of overstay at the site) would be a reasonable and proper estimate."*

18. After quoting the aforesaid paragraphs, the learned Single Judge set aside the Award holding that while the Arbitrators noted that the Petitioner herein has not produced any material on the basis of which the claim could be awarded, which was originally more than Rs.300 crores, yet decided to award Rs.60 crores for which there is no basis or reasoning given. Paragraphs No.47 and 49 of the judgment of the learned Single Judge passed in O.M.P. (COMM) 482/2020 reads as under:-

> ***"47. A perusal of the relevant portion of the Award shows that the Majority Tribunal clearly noted that the respondent failed to produce any material basis which the quantum of the award could be arrived at. In the absence of any material substantiating the claim of the respondent, which was originally of more than 300 crores, was decided to be fixed at 60 crores. This amount of compensation has been fixed despite there being a clear contradictory finding that the case put forward by the respondent herein was not established. At this juncture, this Court refers to the judgment passed by the Calcutta High Court in State of West Bengal vs. Tapas Kumar Hazara, AP 1036/2011 dated 25th August 2022, wherein it was found the arbitral tribunal had given award in contradiction to its findings and hence it was set aside for the same reason.***

> ***49***. *Certainly, there is nothing in the language of the Award which shows that any reasonable considerations to the claim have been given to the say that the respondent was entitled to a sum of Rs.60 crores. As per the mandate of law, by the plain reading of the Section 31 (3) of the Act and by the reference to judicial pronouncement reproduced above, it is evident that the case of the petitioner falls under the principle of no-evidence. The Arbitral Tribunal has failed to delineate and specify any reason for fixing the amount of Rs.60 crores as additional cost in favour of the respondent and against the petitioner."*
>
> (emphasis supplied)

19. The learned Single Judge thereafter concluded that in the absence of an express agreement by the parties, the Tribunal could not have awarded any amount on the basis of equity and good conscience as it is specifically prohibited under Section 28(2) of the Act of 1996. The question therefore, that is posed before this Court is as to whether after such findings having been arrived at by the Tribunal that there is no evidence at all on the basis of which the claim can be granted, whether this Court should once again send the parties back for fresh adjudication or not.

20. A perusal of the Award which was set aside by the Learned Single Judge under Section 34 of the Act of 1996 is stated on the ground that the basis for granting of the claim is without any reason. Since, the Tribunal has carefully scrutinized the contentions and has come to the conclusion that there is no evidence or material for grant of such claim after having done that exercise once, this Court is of the opinion that referring the same issue

back to the same Tribunal or to a new Tribunal would be re-agitating the same issue. The only reason why the claim of Rs.60 crores is rejected by the Learned Single Judge was that there was a positive discord between the two portions of the same award where at one side, the Tribunal held that there was no material/evidence to award the compensation but on the other hand, a sum of Rs. 60 crores were granted, which did not find favour with the Learned Single Judge.

21. The contention of the learned Senior Counsel appearing for the Petitioner placing reliance on certain paragraphs of the judgment passed by this Court under Section 34 of the Act of 1996 that the award has been set aside un-reasoned, is not a correct reading of the judgment of the learned Single Judge.

22. The learned Single Judge held that there are contradictory findings in the award wherein the Tribunal on one hand has held that there is no material to award the amount but on the other hand has granted Rs.60 crores. The learned Single Judge further held that there is no reasoning as to why the amount of Rs.60 crores has been granted by the arbitral tribunal. The learned Single Judge has not set aside the finding of the Tribunal which has held that there is no evidence to substantiate the claim. There is no quarrel with the legal proposition expounded that there will be no impediment in law for the parties to an arbitration agreement in initiating fresh proceedings in the event of the court setting aside an arbitral award on any issue which has not been concluded, however, in the present case, all issues stand concluded between the Parties. The Arbitral Tribunal has after examining the pleadings and evidence led before it returned a finding that the claim of

additional costs made by the Petitioner has no legs to stand on and lacks any material basis and thus, to this extent, the issue stands concluded between the Parties. This finding remains undisturbed. Further, admittedly, no appeal under Section 37 has been filed by the Petitioner. As such, therefore, there remains no live dispute between the Parties. It also cannot be lost sight of the fact that the Petitioner had challenged the Award and sought enhancement of the claim amount, however, the Learned Single Judge has set aside the award of Rs. 60 crores for lack of basis for the same. By this petition, the petitioner now wants to send the matter back to the Tribunal to once again see as to whether there is any basis to grant Rs.60 crores, an exercise which has already been undertaken by the Tribunal once, which cannot be allowed by this Court.

23. While this Court is conscious of the fact that the general rule favours referring disputes to arbitration, it is equally settled that 'manifest injustice' remains a key exception to this rule. This Court is of the view that to realise the true and correct meaning to this Court's role of exercising its supervisory role under the Act of 1996, Referral Courts especially at the post award stage must step in to prevent the arbitration process from being misused to perpetuate injustice. The concept of manifest injustice extends to scenarios where the dispute is so evidently flawed that it is clear that relegating the parties to arbitration would serve no purpose. The present matter is one such matter. Allowing such claims to go forward would be a waste of resources and an improper use of the arbitration process, which is meant to resolve only those disputes that are legally viable. The present matter falls in the category where 'legitimate interference' is necessitated and to prevent

wastage of public and private resources. Applying the 'eye of the needle' test, this Court has no hesitation is observing that the *prima facie* scrutiny of the facts of the present case, leads to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable.

24. This Court is of the view that it is the duty of the Referral Court especially at the post award stage to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. This is more so also from the perspective that one of the primary rationale behind the enactment of the Act of 1996 was speedy justice and bringing a finality to an ongoing dispute i.e. there be an end to litigation even though a party may remain dissatisfied with the verdict. The Statement of Objects and Reasons reveal that the legislative intent of enacting the Act of 1996 was to provide parties with an efficient alternative dispute resolution system which gives litigants an expedited resolution of disputes while reducing the burden on the courts. If this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court.

25. This Court cannot be expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of an arbitrator, else in a situation such as the present one where an award has been set aside and the aggrieved party wants to initiate another round of arbitration only to take a second bite at the cherry, the process of the Court would be susceptible to abuse by parties to litigate endlessly which completely goes against the aim and objective of the Act of 1996. If this practice is encouraged, the finality to an Award would always be in a limbo.

26. This Court also notes that the Petitioner did not take leave of the Section 34 Court to get directions seeking fresh adjudication or at which stage the de novo arbitration would begin or whether the matter shall be sent back to the same Tribunal or a fresh Tribunal is to be constituted and instead chose to the file the present petition. Be that as it may, in the given set of facts and circumstances of this case, even if the parties are relegated to fresh arbitration, the new Tribunal would not be able to allow fresh evidence to be taken on record, unless consented to by both the Parties as also get beyond the finding of the earlier Tribunal that there exists imperfect evidence in support of Petitioner's claim which has not been interfered with by the Section 34 Court.

27. This Court is also conscious of the fact that it is not deciding this issue of constitution of an Arbitral Tribunal at the first referral stage but in fact in the post award stage. While at the first referral stage, a court getting into the question of jurisdiction could hinder, stray and delay many arbitration proceedings, at the post award stage, the referral court has to take into consideration many other factors including the fact that such proceedings are not misused by the parties.

28. While it is settled that a decision on *res judicata* generally requires consideration of pleadings as also claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the claims/issues/points and the award in the second round of arbitration and therefore it is an arbitral tribunal which would be the correct forum to examine this issue, that is not the point in contention here. In the present

case, it is an admitted position that the Petitioner wants to initiate fresh adjudication of the same claim already dealt with by the Tribunal.

29. In view of the above, this Court is of the opinion that the present petition therefore would squarely fall within the definition of a dead wood and in fact forcing the Respondent to participate in a time-consuming costly arbitration process. In this Court's considered view, the present case is demonstrably 'non arbitrable' and fails to meet the conditions as specified in Para 154.4 of the Vidya Drolia (supra) to make out a case for referral. This Court is mindful that it is a referral court but at the post award stage and is performing a judicial function to affirm and uphold the integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

30. This Court is of the opinion that referring the parties once again to the Tribunal which normally is the norm would in fact be against public policy.

31. It is now well-settled by the Apex Court in SBI General Insurance Co. Ltd (supra) and in the reasoned judgment of the Apex Court in Goqii Technologies Private Limited v. Sokrati Technologies Private Limited, **2024 SCC OnLine SC 3189** that Section 11 of the Act of 1996 should not be misused by the parties in order to force other party to the Arbitration Agreement to participate in a time-consuming and costly arbitration process. The issues which have been analyzed by the Tribunal need not be referred back to the Tribunal once again.

32. The principle that a party cannot be permitted to re-adjudicate the same issue is based on public policy. The Courts of competent jurisdiction

have to ensure that no one should be made to face the same kind of litigation twice over as such a process is contrary to fair play and justice.

33. In view of the above, though ordinary rule is to refer any dispute to arbitration, but this Court is of the opinion that the instant case falls under the exception.

34. With these observations, the petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

JANUARY 14, 2025
RJ