

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF FEBRUARY, 2025

BEFORE

THE HON'BLE MR JUSTICE SACHIN SHANKAR MAGADUM

CIVIL MISC. PETITION NO. 372 OF 2023

BETWEEN:

STARLOG ENTERPRISES LIMITED
(FORMERLY ABG INFRALOGISTICS LIMITED)
501, SUKH SAGAR BUILDING
N.S. PATKAR MARG
MUMBAI-400 007.
REPRESENTED BY ITS
AUTHORIZED REPRESENTATIVE
MS. EDWINA D'SOUZA

...PETITIONER

(BY SRI. PRADEEP NAYAK, ADVOCATE A/W
Ms. SANJANA .M, ADVOCATE A/W
Ms. AKSHITA GOYAL, ADVOCATE)

AND:

BOARD OF TRUSTEES OF
NEW MANGALORE PORT TRUST
PANAMBUR, MANAGALURU-575 010.
REPRESENTED BY CHIEF ENGINEER (CIVIL)

...RESPONDENT

(BY SRI. TEJAS .S.R, ADVOCATE A/W
Ms. FATHIMA NAHA, ADVOCATE FOR
DUA ASSOCIATES FOR RESPONDENT)

THIS CIVIL MISC. PETITION IS FILED UNDER SEC.11(5) OF THE ARBITRATION AND CONCILIATION ACT 1996, PRAYING TO APPOINT A SOLE ARBITRATOR TO ARBITRATE THE DISPUTES RAISED BY THE PETITIONER THAT HAVE ARISED BETWEEN THE PETITIONER AND THE RESPONDENT IN RESPECT OF THE LEASE DEED DATED 31.03.2009 PURSUANT TO CLAUSE 12 UNDER THE SAID LEASE DEED VIDE ANEXURE-A.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 24.02.2025, THIS DAY ORDER WAS PRONOUNCED THEREIN, AS UNDER:

CORAM: HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

CAV ORDER

This Civil Miscellaneous Petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking appointment of sole Arbitrator to resolve the dispute and difference between the parties in terms of clause 12 of the registered lease deed dated 31.03.2009.

2. In response to the notice sent by this Court, respondent/Board has tendered appearance through learned counsel and statement of objections is filed.

3. This petition is filed on the basis of a registered lease deed executed on 31.03.2009. The petitioner contends that the lease agreement was unlawfully terminated by the respondent, compelling the petitioner to invoke the arbitration clause as stipulated under Clause 12 of the lease deed. Subsequently, this Court, in CMP No. 66/2015, allowed the petition and appointed a sole

Arbitrator to adjudicate the dispute. After considering the merits of the case, the learned Arbitrator issued an arbitral award on 08.02.2017 in Arbitration Case No. 61/2016, which partially ruled in favour of the petitioner. The award directed the respondent to refund both the security deposit and the expenses incurred for constructing the perimeter wall, amounting to a total sum of Rs.6,28,49,016/-.

4. Dissatisfied with the arbitral award, the respondent filed an application under Section 34 of the Arbitration and Conciliation Act before the District and Sessions Court, challenging the validity of the award. By its judgment and decree dated 29.06.2018, the District and Sessions Court set aside the award. The Court held that the lease agreement between the parties did not provide for the refund of the deposit amount or the reimbursement of the costs incurred for constructing the perimeter wall, thereby nullifying the relevant portions of the Arbitrator's decision.

5. Aggrieved by the judgment and decree of the District and Sessions Court, the petitioner filed an appeal before this Court in MFA No.7245/2018. Upon hearing the arguments, this Court upheld the judgment passed under Section 34, concurring with the lower court's view that the Arbitrator lacked the jurisdiction to order a refund of the statutory deposit and reimbursement of construction expenses. This decision was further affirmed by the Hon'ble Supreme Court in S.L.P.(Civil) No. 16473/2021, bringing finality to the issue of refund claims.

6. In its statement of objections, the respondent has vigorously opposed the current petition, arguing that the issue of refund, both in terms of the statutory deposit and the expenses for constructing the perimeter wall, has already been comprehensively adjudicated in the earlier proceedings under Section 34. These findings have been upheld by this Court and subsequently by the Hon'ble Supreme Court. The respondent asserts that, given the conclusive determination of these matters, no arbitral dispute remains under consideration. Consequently, the respondent has urged the Court to dismiss the present

petition filed under Section 11(5) of the Arbitration and Conciliation Act, as the issues raised have been conclusively settled and are no longer open for arbitration.

7. Learned counsel appearing for the petitioner has exhaustively advanced his arguments and has placed reliance on the following judgments:

1) *Payu Payments Private Limited vs. The New India Assurance Co. Ltd.* - 2024 SCC Online Del 6777;

2) *Vidya Drolia vs. Durga Trading Corporation* - (021) 2 SCC 1;

3) *Kunhayammed & Others vs. State of Kerala and Another* - 2000 (6) SCC 359;

4) *Vardhaman Builders vs. Narendra Balasaheb Ghatge and Others* - 2024:BHC-OS:7195;

5) *Shakeel Pasha and Others vs. City Max Hotels (India) Pvt. Ltd.,* - 023 (6) KarLJ 202;

6) *SBI General Insurance vs. Krish Spinning* - 2024 SCC Online SC 1754;

7) *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act, 1899* - 2023 INSC 1066;

8) *NTPC Ltd. vs. SPML Infra Ltd.* (03) 9 SCC 385;

9) *Asmal Ismail Khan Deshmukh vs. ASAP Fluids Pvt. Ltd. and Another* - 2024 SCC Online SC 3191;

10) *Wadhwa Group Holdings Private Limited vs. Homi Pheroze Ghandy and Others* - Manu/MH/1670/2022;

11) *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.* - (2006) 11 SCC 181;

12) *Steel Authority of India Limited vs. Indian Council of Arbitration and Others* - 225 (2015) DLT 348;

13) *Associated Constructions vs. Mormugoa Port Trust* - 2010 (3) ARBLR 472 (Bom);

14) *Indian Oil Corporation vs. SPS Engineering* - Civil Appeal No.1282 of 2011.

8. Per contra, learned counsel appearing for the respondent has placed reliance on the following judgment:

1) *M/s. Jaiprakash Associates Limited vs. M/s. NHPC Limited* - ARB.P.No.1061/2023

9. This is a second round of litigation where petitioner has invoked the arbitration clause seeking appointment of sole Arbitrator. However, the parties to this petition were relegated to get their disputes resolved through sole Arbitrator. This Court on an earlier occasion at the instance of petitioner in CMP.No.66/2015 proceeded to appoint a sole Arbitrator. Petitioner and respondent lead their respective oral and documentary evidence. Learned Arbitrator formulated the following issues which are relevant and therefore are extracted which reads as under:

1) *Whether the claimant proves that the termination of contract by the respondent by its letter dated 2nd April 2014 is illegal? If so whether the claimant is entitled to seek the continuation of the contract?*

2) *If the termination of the contract by the respondent is justified in alternative whether the claimant is entitled to return of Rs.7 crores invested by it from the respondent?*

3) *Whether the claimant is entitled to the reliefs sought for in the rejoinder and in the objections to the counter claim of the respondent?*

4) *Whether the reasons given by the claimant for non-performance of the contract within time line prescribed by the terms of the contract and the reasons for delayed execution of the contract are justified in law?*

5) *Whether the claimant proves that the termination of the lease by the respondent is contrary to the provisions of Transfer of Property Act?*

6) *Whether the findings recorded by the Addl. District Judge, Mangalore in Arbitration Case No.10/2014 that the claimant was not at fault and did not breach the terms of the contract is binding on the Arbitral Tribunal?*

7) *Whether the respondent is entitled to damages of Rs.27 crores towards loss of business and loss of revenue and Rs.20 crores towards*

interest on the said sum on account of the breach of the terms of the contract by the claimant?

8) Whether the respondent is entitled compensation of Rs.1,21,05,975/- for not vacating the lease land after termination of lease which is in addition to the damages claimed which is covered by issue No.7?

10. The learned Arbitrator, while addressing Issue No.1, found that the petitioner had failed to demonstrate due diligence in fulfilling its obligations under the contract. The Arbitrator concluded that there was clear negligence on the part of the petitioner in failing to perform its contractual duties as stipulated under the lease agreement. Consequently, the Arbitrator upheld the respondent's termination of the contract, deeming it legally justified. Despite upholding the respondent's right to terminate the agreement, the Arbitrator proceeded to partially award relief in favour of the petitioner by directing the refund of the deposit amount along with reimbursement for the expenses incurred in constructing the perimeter wall.

11. Aggrieved by the portion of the arbitral award that ordered the refund of the deposit and reimbursement for construction expenses, the respondent initiated proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the legality of the award. The respondent contended that the lease agreement contained no provisions for the refund of the statutory deposit or reimbursement of the amount spent on construction. The District and Sessions Court upheld this argument and set aside the portion of the award directing the refund. This judgment, delivered in Arbitration Case No.61/2016, was subsequently affirmed by this Court in MFA No.7245/2018 through an order dated 12.05.2021. The petitioner, dissatisfied with this outcome, approached the Hon'ble Supreme Court by filing SLP (Civil) No.16473/2021. However, the Hon'ble Apex Court dismissed the petition, thereby affirming the findings of both the lower courts. The courts consistently held that the agreement contained no clause permitting a refund of the upfront payment, whether the lease

concluded upon the expiration of the 30-year term or due to premature termination.

12. In light of the above developments, the present petition raises the question of whether the petitioner is entitled to seek the appointment of a sole Arbitrator under Section 11(5) of the Arbitration and Conciliation Act. The issue assumes significance given that the arbitral award in Arbitration Case No.61/2016 has been conclusively set aside by the District and Sessions Court, upheld by this Court, and confirmed by the Hon'ble Supreme Court. This Court, therefore, must examine whether the petitioner can maintain the present petition by relying on the arbitration clause within the lease agreement, notwithstanding the previous judicial findings.

13. The learned counsel for the petitioner has cited a series of precedents to argue that this Court, while acting as a Referral Court under Section 11 of the Arbitration and Conciliation Act, cannot exceed its jurisdiction by examining the merits of the dispute. The petitioner has placed reliance on the judgment of the

Hon'ble Supreme Court in **SBI General Insurance Co. Ltd. v. Krish Spinning Mills Pvt. Ltd.** (supra) to assert that the Referral Court's role is confined to ascertaining the existence of an arbitration agreement. Emphasizing the presence of a valid arbitration clause in the lease agreement, the counsel argues that the parties are entitled to decide the procedure for appointing Arbitrators. The petitioner contends that, even though the arbitral award has been set aside under Section 34, the underlying cause of action persists, allowing the petitioner to invoke the arbitration clause once again by issuing a notice under Section 21 of the Act.

14. Conversely, the learned counsel for the respondent has placed reliance on a judgment rendered by the Delhi High Court in **M/s. Jaiprakash Associates Limited v. M/s. NHPC Limited** (supra). Drawing from this decision, the counsel argues that even a Referral Court has limited authority to assess whether the dispute is arbitrable, particularly in cases where prior arbitral proceedings have conclusively settled the issues raised. It

is submitted that, since the petitioner's claims have already been adjudicated through properly constituted arbitral proceedings and subsequent judicial scrutiny, the petitioner cannot seek to invoke arbitration anew. The respondent maintains that initiating fresh arbitral proceedings under these circumstances would be untenable, given that the arbitral award has been fully set aside under Section 34 and confirmed by higher judicial authorities.

15. In response, the petitioner's counsel has countered the arguments of the respondent, asserting that the Delhi High Court's judgment in ***M/s. Jaiprakash Associates Limited*** (supra) is *per incuriam* as it allegedly contradicts the principles established by the Hon'ble Supreme Court in ***Krish Spinning Mills*** case. The petitioner urges this Court not to rely on the Delhi High Court's decision and instead focus on the precedents set by the Hon'ble Apex Court regarding the limited role of the Referral Court under Section 11.

16. This Court has carefully considered the submissions made by both counsels and examined the relevant judgments. Additionally, this Court has scrutinized the findings recorded by the sole Arbitrator, particularly the affirmation of the respondent's termination of the contract. The Court has also analyzed the legal basis for setting aside the arbitral award under Section 34 and the subsequent confirmation of that decision by this Court and the Hon'ble Supreme Court.

17. The central issue that arises for consideration is whether the setting aside of the arbitral award under Section 34, which has been upheld by higher judicial forums grants the petitioner the right to initiate fresh arbitral proceedings based on the same arbitration clause invoked earlier.

Findings:

18. The learned Arbitrator, while answering Issue No.1 in the affirmative, concluded that the termination of the lease agreement by the respondent through its letter

dated 02.04.2014 was legally valid. Consequently, the Arbitrator held that the petitioner was not entitled to seek the continuation of the contract. Despite this finding, the Arbitrator awarded partial relief to the petitioner by directing the refund of the deposit and reimbursement of expenses related to the perimeter wall construction. The respondent challenged this relief by arguing that the lease agreement did not provide for such refunds, either upon the natural expiration of the 30-year lease period or in cases of premature termination. The District and Sessions Court, acting under Section 34, accepted this argument and set aside the refund-related portions of the award in its judgment dated 08.02.2017.

19. This Court, in its judgment rendered in MFA No. 7245/2018, upheld the findings of the lower court. The affirmation of these findings is evident from Paragraph 43 of this Court's decision, which states:

"43. Indisputedly, there is no clause in the agreement for the refund of upfront payment after the lapse of 30 years period of the lease deed or when the lease agreement is terminated before the

efflux of time or to claim compensation for the alleged expenses incurred towards the construction of compound wall. The award passed by the learned arbitrator against the terms of the agreement is opposed to the principles of law as rightly held by the Trial Court. Besides, the direction issued by the learned arbitrator to refund the upfront payment of Rs.5,81,08,700/- with the compensation/damages, towards expenses incurred towards the alleged construction of the compound wall at Rs.47,40,316/- with interest at 12% per annum from the date of the award till its payment is unreasonable and patently illegal being contrary to the terms of the contract and certainly comes within the ambit of Section 34(2)(b)(ii) of the Act."

20. The petitioner, aggrieved by the order passed by this Court, approached the Hon'ble Apex Court seeking redressal. However, the Hon'ble Apex Court declined to grant any indulgence, effectively upholding the orders passed by the lower courts. This decision by the Apex Court solidifies the findings rendered by the courts under Section 34 proceedings.

21. In light of the findings recorded by the Court under Section 34 proceedings and subsequently affirmed

by the Hon'ble Apex Court, the pivotal issue that arises for determination before this Court is whether the setting aside of the arbitral award by judgment and award dated 08.02.2017 permits the petitioner to invoke the arbitration clause as per the agreement dated 31.03.2009. This Court emphatically holds that the answer to this question is 'No'.

22. The primary relief sought by the petitioner, which involved challenging the termination of the contract, was decisively negated by the Arbitrator while answering Issue No.1. This adverse finding against the petitioner was not contested by initiating proceedings under Section 34 of the Arbitration and Conciliation Act. Consequently, the Section 34 proceedings were confined solely to the issue of refund of the statutory deposit and the amount expended on the construction of the perimeter wall. These limited reliefs were also set aside by the Court under Section 34 proceedings and affirmed by the Hon'ble Apex Court, leaving no scope for further arbitration on these matters.

23. Two significant conclusions emerge from the preceding legal trajectory. Firstly, the termination of the

contract has been legally validated and stands final. Secondly, the petitioner chose not to challenge the Arbitrator's decision on this issue. Furthermore, the relief concerning the refund of the statutory deposit and construction expenditure was set aside by the Court and confirmed by the Hon'ble Apex Court. Thus, both of these issues have attained finality.

24. The petitioner's argument, asserting that their right to seek compensation under Section 65 of the Indian Contract Act remains intact, and therefore the arbitration clause can be invoked, is fundamentally flawed. The judgments cited by the petitioner, which pertain to the limited inquiry permissible under Section 11 of the Arbitration Act, do not apply to the current scenario. This case involves post-award developments under Section 34 proceedings, where the award has been conclusively set aside.

25. It is a well-established legal principle that once an award is set aside, the parties may ordinarily invoke the arbitration clause anew by resorting to Section 21 of

the Arbitration and Conciliation Act. However, this principle is inapplicable here because the issues raised by the petitioner were already adjudicated upon by the Arbitrator and subsequently addressed in Section 34 proceedings, with the findings being affirmed by the Hon'ble Apex Court.

26. The contention of the petitioner that since the entire award was set aside, their right to invoke arbitration under Section 21 still subsists is misconceived. The findings under Section 34 proceedings have a direct bearing on the maintainability of the present civil miscellaneous petition. The Court, while adjudicating Section 34 proceedings, unequivocally addressed the pertinent issues, and these findings remain binding upon both parties.

"17. The defendant No.1 has not preferred any cross appeal about the findings of the learned arbitrator on issue No.1, 3, 4 and 5. Hence the findings of the learned arbitrator regarding the termination of the contract are binding upon the parties and it has assumed the nature of finality. The plaintiff came up with this suit U/s 34 of A & C

Act challenging the findings of the learned arbitrator on issue No.2. The plaintiff sought for damages to the tune of Rs.27-00 crore towards loss of business and loss of revenue and Rs.20-00 crore towards interest on the said sum on account of breach of terms of the contract and compensation of Rs.1,21,05,975/- for having failed to vacate and handover the leased premises, even after termination of the lease deed, in addition to the damages claimed by them. The learned arbitrator has not awarded any damages of compensation to the plaintiff/NMPT. The plaintiff has not filed this suit challenging the findings of the learned arbitrator on issue No.7 and 8 in A.C.No.61/2016 dated 8.2.2017. The plaintiff/NMPT claims that even though they have sought for damages and compensation, the learned arbitrator has not considered their claim and even no reasons are assigned for rejecting their claim and merely observed that the plaintiff is holding the deposited amount of Rs.5,81,08,700/- without any liability to pay interest on the said amount and also held that the defendant No.1 is not entitled to claim any interest from the date of termination of contract to till the date of award. Since the plaintiff/NMPT has not challenged the findings of the learned arbitrator on issue No.7, 8, they do not survive for consideration."

27. A careful examination of the Section 34 proceedings reveals that the subject matter was restricted to the refund of the upfront payment of Rs.5,81,08,700/- and Rs.47,40,316/- towards the cost of constructing the perimeter wall. Thus, the petitioner's assertion that the setting aside of the entire award revives their right to seek fresh arbitration is legally untenable. The operative portion of the Section 34 judgment clearly reflects the Court's intent. The operative portion reads as under:

"The Arbitration suit filed by the plaintiff/NMPT against the defendants under Sec.34 of the Arbitration and Conciliation Act, 1996 is hereby decreed.

The award passed by the learned Arbitrator/defendant No.2 is Arbitration Case No.61/2016 dated 8.2.2017 is hereby set aside with liberty to the parties to approach proper forum for necessary relief.

Draw decree accordingly."

28. The unambiguous language in the second paragraph of the operative portion underscores that while liberty was granted to approach the appropriate forum, such a forum does not encompass arbitration under the

provisions of the Arbitration and Conciliation Act. Consequently, the petitioner's claim under Section 65 of the Indian Contract Act falls outside the ambit of the arbitration clause and cannot be adjudicated by an arbitrator.

Conclusion:

29. The Arbitrator's decision, which upheld the validity of the termination of the contract, stands as final and binding since the petitioner chose not to challenge this specific finding under Section 34 of the Arbitration and Conciliation Act.

30. Furthermore, the relief granted by the Arbitrator regarding the refund of the statutory deposit and the reimbursement for construction costs incurred by the petitioner was specifically set aside by the Court under Section 34 proceedings. This decision, which was subsequently upheld by the Hon'ble Apex Court, firmly establishes that the petitioner has no legal entitlement to seek a refund of either the upfront payment or the expenses related to the construction of the perimeter wall

through arbitration. The issue of refund has thus been conclusively settled in favour of the respondent.

31. Given that both critical issues, the legality of the contract's termination and the refund of amounts claimed have attained finality through due legal process, the petitioner cannot invoke the arbitration clause again on the same grounds. The petitioner's attempt to initiate fresh arbitration proceedings under Section 21 of the Arbitration and Conciliation Act is therefore fundamentally misconceived and legally impermissible.

32. The only potential recourse available to the petitioner, if any, would be through a competent civil court, as the liberty granted in the Section 34 judgment pertains solely to seeking relief in an appropriate legal forum outside of arbitration. The arbitration clause embedded in the agreement dated 31.03.2009 cannot be invoked for matters that have already been adjudicated upon and concluded by both the Arbitral Tribunal and the judiciary, including the Hon'ble Apex Court.

33. The judgments cited by the petitioner, including ***Payu Payments Private Limited vs. The New India Assurance Co. Ltd., Vidya Drolia vs. Durga Trading Corporation,*** and ***Kunhayammed & Others vs. State of Kerala and Another,*** primarily address issues related to the interpretation of arbitration agreements, the scope of judicial interference under Section 34, and the finality of judicial decisions. However, these precedents are not applicable to the present case, as the core issues of contract termination and refund have already attained finality through decisions affirmed by the Hon'ble Apex Court. Unlike the cases cited, where arbitration proceedings or statutory interpretations were central to the dispute, the present matter concerns the enforceability of an arbitration clause after the underlying disputes, termination and refund have been conclusively resolved by judicial proceedings. The petitioner's reliance on these judgments is thus misplaced, as they do not address circumstances where an arbitral award has been set aside and affirmed through subsequent court rulings, leaving no

scope for re-invoking arbitration under the same agreement.

34. In conclusion, the petitioner's claim under Section 65 of the Indian Contract Act or any related legal principle cannot be entertained within the domain of arbitration. All relevant issues have been conclusively resolved through the arbitration proceedings and subsequent judicial reviews, leaving no scope for further arbitration under the existing agreement.

35. For the foregoing reasons, this Court proceeds to pass the following:

ORDER

The civil miscellaneous petition is devoid of merits and accordingly, stands dismissed.

**SD/-
(SACHIN SHANKAR MAGADUM)
JUDGE**

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