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

Reserved on: 23rd September, 2020
Pronounced on: 12th October, 2021

\+ ARB.P. 245/2020 & I.A. 7099/2020

AIRONE CHARTERS PVT. LTD. ..... Petitioner
Through: Mr. Manish Sharma, Adv. with Mr. Mohit Jolly and Ms. Smriti Verma, Advs.

versus

JETSETGO AVIATION SERVICES PVT. LTD. ... Respondent
Through: Mr. Amit Sibal, Sr. Adv. with Mr. Gaurav Gupta, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

% 12.10.2021

1. Three Aircraft Charter Agreements (in short, "ACAs") dated 11th August, 2017, were executed between the petitioner and the respondent. Disputes arose. They stand referred, through the intervention of this Court, to an arbitral tribunal comprising Hon'ble Mr. Justice Mukul Mudgal (Retd.), Hon'ble Mr. Justice S.S. Saron (Retd.) and Hon'ble Mr. Justice R.S. Sodhi (Retd.). The respondent is the claimant therein, and the present petitioner, the respondent. The petitioner desired to file counter-claims in the said proceedings. Permission was denied, reserving liberty with the petitioner, however, to avail all such remedies as are available to it in law. The petitioner

issued a notice, invoking arbitration, to the respondent, under Section 21 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). The petitioner suggested that its claims be referred to the arbitral tribunal comprising Hon'ble Mr. Justice Mukul Mudgal (Retd.), Hon'ble Mr. Justice S.S. Saron (Retd.) and Hon'ble Mr. Justice R.S. Sodhi (Retd.), which was already seized of the disputes between the petitioner and the respondent, albeit at the instance of the respondent. The respondent demurred. The petitioner has, therefore, approached this Court under Section 11(6) of the 1996 Act, for referring the claims of the petitioner to the learned arbitral tribunal comprising Hon'ble Mr. Justice Mukul Mudgal (Retd.), Hon'ble Mr. Justice S.S. Saron (Retd.) and Hon'ble Mr. Justice R.S. Sodhi (Retd.).

2. The record has been perused, and learned Counsel heard at length. Mr Manish Sharma appeared for the petitioner, and Mr Amit Sibal, learned Senior Counsel, for the respondent.

Facts

3. The petitioner claims to be an intermediary, which arranges for aircraft charters for its clients, from third parties. The respondent provides charter flights to its customers. Three ACAs, dated 11th August, 2017, were executed between the petitioner and the respondent. The aircraft, to which the ACAs related, were Legacy 650 Tail Number VT-AOK, Legacy 650 Tail Number VT-AOL and Cessna XLS Tail Number VT-AON. Each agreement related to one aircraft. Under each of these agreements, the respondent agreed to

charter the aircraft covered by the agreement, belonging to third parties, through the petitioner, for the period of one year.

4. Clauses 26 of the ACAs, which was identical in all the ACAs, read thus:

> **26. APPLICABLE LAW AND JURISDICTION**
>
> 26.1 This Agreement and the rights and obligations of the parties hereunder shall be construed and interpreted in performed in accordance with Indian Substantive and Procedural law, applicable to Agreements made and to be performed entirely therein.
>
> 26.2 The Parties shall attempt in good faith to resolve any dispute, difference or claim arising out of or in relation it this Agreement through mutual discussion. In case it is not resolved within thirty (30) days from receipt of the written notice (setting out the dispute or claim) the other party, the complaining party may issue a notice of reference, invoking settlement of such disputes through Arbitration.
>
> 26.3 All disputes between parties shall be subject to exclusive jurisdiction of New Delhi, India only.
>
> 26.4 Arbitration: Any and all disputes ("Disputes") arising out of or in relation to or in connection with this Agreement between the Parties or relating to the performance or non-performance of the rights and in New Delhi, India in accordance with the terms of Indian Arbitration and Conciliation Act,1996 (as amended by the Arbitration and Conciliation(Amendment) Act, 2015]. The language used in the arbitral proceedings shall be English. Arbitration shall be conducted by three (3) arbitrators, each Party appointing one Arbitrator and both Parties having to agree on the third Arbitrator to be appointed by the one Arbitrator appointed by each party as per Arbitration and Conciliation Act, 1996 [as amended by the Arbitration and Conciliation (Amendment) Act, 2015] The arbitral award shall be in writing and shall be

> final and binding on each party and shall be enforceable in any court of competent jurisdiction."

5. As already noted, *vide* Section 21 notice dated 13th April, 2018, the respondent sought reference of its claims, *vis-à-vis* the petitioner, to arbitration. The notice was consolidated in nature, and expressly purported to be issued "under Clause 26" of the ACAs. Various infractions, of the ACAs, were alleged against the petitioner. The notice also informed the petitioner that the respondent had appointed Hon'ble Mr. Justice S.S. Saron (retd), as its arbitrator. The respondent, therefore, called upon the petitioner to do likewise, so that the presiding arbitrator could then be nominated by the two arbitrators appointed by the parties.

6. On the petitioner failing to appoint its arbitrator as requested by the respondent, the respondent moved this court under Section 11 of the 1996 Act, *vide* Arb P 540/2018, Arb P 541/2018 and Arb P 542/2018, calling upon this court to appoint the petitioner's arbitrator.

7. Before this Court, the petitioner submitted that it desired Hon'ble Mr Justice R.S. Sodhi (retd) to be its arbitrator. The respondent did not object. Accordingly, *vide* order dated 31st August, 2018, this court disposed of the three arbitration petitions by appointing Hon'ble Mr. Justice R.S. Sodhi (retd) as the petitioner's nominee arbitrator. The two learned arbitrators were requested to proceed to appoint the presiding arbitrator. Saron, J. and Sodhi, J., appointed, between themselves, Hon'ble Mr. Justice Mukul Mudgal (retd) the presiding arbitrator.

8. *Vide* email dated 6th December, 2018, addressed to both parties, the learned Arbitral Tribunal set up the following schedule:

"01.01.2019	Statement of Claim/s to be filed by the Claimant
06.02.2019	Statement of Defence and Counter claim, if any, to be filed by the Respondent
06.03.2019	Rejoinder to the Statement of Defence and reply to counter-claim to be filed by the Claimant
06.04.2019	Rejoinder to the counter claim to be filed by the Respondent.
22.04.2019	Affidavit of Admission/Denial of documents
29.04.2019	**List for Directions at 11 AM**"

9. *Vide* order dated 7th May, 2019, the learned Arbitral Tribunal granted extension of time till 17th May, 2019 to the petitioner to file its Statement of Defence and counter-claim. Corresponding extension of time for responding, thereto, was also granted to the respondent.

10. The petitioner, however, filed its Statement of Defence only on 21st May, 2019, and counter-claims on 6th July, 2019.

11. While condescending to take the Statement of Defence on record, the learned Arbitral Tribunal refused to extend similar latitude to the counter-claims. Observing, first, that there was no application for condonation of delay in filing the counter-claims, the learned Arbitral Tribunal also noted that the time for passing the final award, under the 1996 Act, would expire on 15th March, 2020. Unless the petitioner were to obtain at least six months' extension of the mandate of the learned arbitral tribunal, it was noted that the counter-claims could not possibly be taken on record.

12. *Vide* order dated 24th July, 2019, the learned Arbitral Tribunal directed the parties, "for the sake of convenience", to trifurcate the pleadings in the three claims. In its next meeting held on 9th August, 2019, the learned Arbitral Tribunal directed the respondent to file its Statement of Claims, after trifurcation, on or before 9th September, 2019, with reply and rejoinder to be filed on or before 1st October, 2019 and 9th October, 2019 respectively. Further dates for admission and denial of documents and recording of evidence were also fixed.

13. At this stage, the petitioner filed OMP (Misc) (Comm) 290/2019 before this court under Section 29A(5) of the 1996 Act, for extension of the mandate of the learned Arbitral Tribunal. *Vide* order 26th September, 2019, the petitioner was permitted to withdraw the petition, in the following terms:

> "Learned counsel for the petitioner seeks to withdraw this petition with liberty to pursue the appropriate remedy that may be available to him in law.
>
> The petition is dismissed as withdrawn with the aforesaid liberty."

14. The petitioner, thereafter, moved the learned Arbitral Tribunal, requesting that its counter-claims be taken on record. *Vide* order dated 25th October, 2019, the learned arbitral tribunal disposed of the request, thus:

> "**1.** In view of the Application preferred before the Hon'ble High Court, which was dismissed as withdrawn on 26.09.2019, *the counter claim will not be considered and are accordingly struck of the record of this Tribunal*.

2. *However, as per the said Order of the Hon'ble High Court the Respondent will be at liberty to avail such remedy as available in law.*"

15. *Vide* Section 21 notice dated 6th May, 2020, the petitioner sought reference of its claims (which the learned arbitral tribunal had refused to take on record, as counter-claims to the claims of the respondent) to arbitration. Given the commonality of issues involved, the petitioner suggested that reference of its claims could be made to the learned arbitral tribunal comprising Hon'ble Mudgal, Saron and Sodhi, JJ. The respondent was requested to communicate its assent.

16. The respondent replied on 14th May, 2020, squarely refusing the petitioner's request for reference of the petitioners' claims to arbitration. The following six reasons were adduced:

(i) The petitioner had not complied with the stipulated pre-arbitral consultative procedure as envisaged by Clause 26.2 of the ACAs.

(ii) The counterclaims had not been filed within the time granted by the learned arbitral tribunal.

(iii) The learned arbitral tribunal had, as a result, struck the petitioner's counter-claims off the record.

(iv) OMP (Misc) (Comm) 290/2019, which sought extension of the mandate of the learned arbitral tribunal so as to enable the

petitioner to refer its counter-claims to arbitration, was withdrawn by the petitioner.

(v) The petitioner's claims were time-barred.

(vi) Clause 26.4 of the ACAs required all disputes to be referred to arbitration. It stood invoked by the respondent, while referring its claims against the petitioner to arbitration. The petitioner could not seek to invoke the clause anew, in order to refer its claims to arbitration.

17. The petitioner, in the circumstances, moved this court under Section 11 of the 1996 Act, *vide* Arb P 197/2020. The prayer Clause in the petition read thus:

> "In light of the aforementioned circumstances and in the interest of justice, the Petitioner humbly prays before this Hon'ble Court that it may be graciously please to:
>
> a) Allow the present petition and refer the consolidated claims/disputes with respect to the claims of the Petitioner under the Aircraft Charter Agreements dated 11.08.2017, to the Arbitral Tribunal comprising of HMJ (Retd.) Mukul Mudgal as its presiding arbitrator, HMJ (Retd.) S.S. Saron and HMJ (Retd.) R.S. Sodhi as its members; and
>
> b) Pass any other order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the present case."

18. *Vide* the following order dated 27th May, 2020, this Court disposed of Arb P 197/2020:

"1. The present petition has been taken up for hearing through video conferencing.

2. Vide the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act), the petitioner seeks appointment of an Arbitrator for adjudication of disputes qua three agreements, all dated 11.08.2017 entered into between the petitioner and the respondent for chartering of planes through the petitioner.

3. Learned counsel for the petitioner submits that upon a petition being filed by the respondent, the matter was referred to a three members Tribunal and the claims raised by the petitioner are a matter of consideration before the Tribunal, wherein the petitioner had also sought to raise counter claims qua the same agreements in respect of the dues payable to the petitioner from the respondent. He submits that as there was a delay on the part of the petitioner in raising the counter claims, the learned Tribunal vide its order dated 06.07.2019 declined to accept the same unless the time for completion of the arbitral proceedings was extended by six months by this Court. The petitioner had then approached this Court by way of a petition under Section 29A of the Act seeking extension of time in accordance with the observations of the Tribunal, which petition was permitted to be withdrawn by this Court vide its order dated 26.09.2019 with liberty to the petitioner to avail other remedies as may be available in law. He therefore submits that the petitioner is fully justified in invoking arbitration qua the said counter claims independently for which purpose he relies on a decision dated 06.04.2018 of the Coordinate Bench of this Court in **OMP (Comm) 319/2016 [Union Of India & Ors. v. Arun Kumar Gupta]**. He further submits that even though the Tribunal vide its order dated 25.10.2019 had recorded that the petitioner's counter claims were being struck off the record of the Tribunal, the counter claims had in fact not been filed and only liberty was sought from the Tribunal to file the same belatedly.

4. On the other hand, the learned counsel for the respondent vehemently opposes the petition and submits that once the petitioner's counter claims was struck off from the record by the learned Arbitral Tribunal, which order has attained finality, the petitioner cannot be allowed to invoke

arbitration qua the very same counter claims especially when its petition under Section 29A of the Act already stands rejected by this Court. He further submits that no such liberty to invoke arbitration qua the same counter claims was granted to the petitioner by this Court while permitting the petitioner to withdraw its petition under Section 29A of the Act.

5. In response, learned counsel for the petitioner reiterates that the petitioner has now invoked arbitration in accordance with the liberty granted to it by this Court vide its order dated 26.09.2019. In view of the stand taken by learned counsel for the respondent, learned counsel for the petitioner prays for leave to withdraw the petition with liberty to approach the Court to seek clarification of order dated 26.09.2019 passed by this Court in **OMP (MISC) (COMM) 290/2019**.

6. The petition is dismissed as withdrawn along with the pending application with liberty as prayed for.

7. The order be uploaded on the website forthwith. A copy of the order be also forwarded to the learned counsel through email."

19. Availing the liberty granted in para 5 of the above order, the petitioner moved IA 4320/2020, seeking a clarification of the order dated 26th September, 2019, passed in OMP (Misc) (Comm) 290/2019. The petitioner asserted, *inter alia*, that it could not be rendered remediless to agitate its claims, which were otherwise maintainable and within time.

20. IA 4320/2020 was disposed of by the following order dated 15th July, 2020:

1. Present application has been filed on behalf of the Petitioner with the following prayers:

"A. Clarify its order dated 29.09.2019 that the Applicant's remedy under law is to seek initiation of a fresh arbitration qua its claims arising out of the three

Aircraft Charter Agreements dated 11.08.2017, being valid and alive; and

B. Refer that the claims of the Applicant herein, as a fresh arbitration, before the Arbitral Tribunal comprising of Hon'ble Justice Mukul Mudgal (Retd.), Presiding Arbitrator, Hon'ble Justice R. S. Sodhi (Retd.) and Hon'ble Justice S. S. Saron (Retd.) as the Arbitrators, in the interest of justice; or

C. In the alternative, grant liberty to the Applicant to file a fresh petition under Section 11 of the Arbitration and Conciliation seeking appointment of the arbitral tribunal in furtherance of the notice of arbitration dated 06.05.2020, to adjudicate upon the claims of the Applicant under the three Aircraft Charter Agreements dated 11.08.2017;

D. Pass any other orders this Hon'ble Court may deem fit in the facts and circumstances of the present case."

2. The necessity of filing the present application has arisen on account of the fact that when the Petitioner filed a petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act'), for appointment of an Arbitrator, before a Coordinate Bench of this Court, being Arb. P. 197/2020, learned counsel for the Respondent had opposed the Petition and submitted that once the Petitioner's Counter Claims were struck off from the record by the learned Arbitral Tribunal, which order had attained finality, it is not open to the Petitioner to invoke arbitration qua the very same Counter Claims, especially when its petition under Section 29A of the Act stood rejected by the Court. Learned counsel for the Respondent had also argued that no specific liberty to invoke arbitration qua the said Counter Claims was granted to the Petitioner by the Court while permitting the Petitioner to withdraw the petition under Section 29A of the Act.

3. Petition under Section 11 of the Act was accordingly dismissed by the Coordinate Bench in view of the objection by the Respondent. However, liberty was given to the

Petitioner to approach this Court for seeking a clarification of the Order dated 26.09.2019, passed in the present petition.

4. Although Reply and Rejoinder to the application have been filed, but they are lying under objections and are thus not on record. Learned counsels for the parties, however, submit that they are willing to proceed with the matter without Reply and Rejoinder.

5. I have heard learned counsels for the parties.

6. Vide order dated 26.09.2019, this Court had permitted the Petitioner to withdraw the petition with liberty to pursue appropriate remedies that may be available to it in law.

7. In my view, the order is crystal clear and needs no further clarification. However, with a view to give a quietus to the controversy, it is clarified that Petitioner has liberty to avail all such remedies as are available to it in law and Court has not foreclosed any remedy, so available.

8. Application is disposed of in the above terms."

21. It is in these circumstances that the petitioner has re-approached this Court *vide* the present petition, for referring its claims to arbitration by the learned arbitral tribunal comprising Hon'ble Mudgal, Sodhi and Saron, JJ., which is presently *in seisin* of the respondent's claims. The prayer Clause in the petition reads as under:

"In light of the aforementioned circumstances and in the interest of justice the Petitioner humbly prays before this Hon'ble Court that it may be graciously please to:

a) Allow the present petition and refer the . consolidated claims/disputes with respect to the claims. of the Petitioner under the Aircraft Charter Agreements dated 11.08.2017, to the Arbitral Tribunal comprising of HMJ (Retd.) Mukul Mudgal as its presiding arbitrator, HMJ (Retd.) S.S. Saron and HMJ (Retd.) R.S. Sodhi as .its members; and

b) Pass any other order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the present case."

Pleadings and rival contentions

22. Mr Sharma asserts that the petitioner's claims are not time-barred, as three years, from the date of accrual of cause of action, have yet to expire. Besides, the petitioner relies on the orders passed by the Supreme Court in **Suo Moto Writ Petition (Civil) No. 3/2020**[1], which extends limitation in all cases where the statutory limitation period expired on or after 15th March, 2020. The petitioner has also relied on the judgment of the Supreme Court in **State of Goa v. Praveen Enterprises**[2] as well as of this Court in **UoI v. Arun Kumar Gupta**[3]**.**

23. The rejection, by the learned Arbitral Tribunal, of the petitioner's request to take its counter-claims on record, cannot, submits Mr Sharma, derogate from the petitioner's right to agitate the claims substantively by way of fresh arbitral proceedings. He points out that this right was specifically protected by the learned arbitral tribunal in its order dated 25th October, 2019, and by this court in its order dated 15th July, 2020 in IA 4320/2020 in OMP (Misc) (Comm) 290/2019.

[1] Orders dated 23rd March, 2020, 27th April, 2021
[2] **(2012) 12 SCC 581**
[3] Judgment dated 6th April, 2018 in OMP (Comm) 319/2016

24. Mr. Sharma has contended that the learned Arbitral Tribunal had ample time to take on record, and adjudicate, the counterclaims, as the time for passing the arbitral award was first extended on 1st October, 2021, thereafter, till 1st April, 2021 and, I am informed, has still not expired. He has submitted, further, that the petitioners' claims are well within time and that, in any event, it was for the learned arbitral tribunal to take a call on the issue of limitation. The contention of the respondent that the petitioner was invoking the same arbitration clause twice, he submits, was incorrect, as the petitioner was invoking the arbitration clause for the first time. Mr. Sharma submits that the petitioner could not be placed in a position in which it would become impossible for the petitioner to agitate its claim which is, otherwise, within time. He has also placed reliance on the Judgment of this Court in **A.K.M. Enterprises Pvt. Ltd. v. Ahluwalia Contracts (India) Ltd.**[4], to contend that the petitioner had the option either to file a counterclaim or to preserve its claims as substantive claims referred to arbitration.

25. Qua an argument, advanced by the respondent in its counter-affidavit, that the petitioner ought to have filed three arbitration petitions, Mr. Sharma relies on para 25 of the judgment of the High Court of Bombay in **United Shippers Ltd. v. Tata Power Company Ltd**[5]**.** Mr. Sharma has also reiterated the reliance, placed by the petitioner in its petition, on **Praveen Enterprises**[2] and on **Gammon India Ltd. v. N.H.A.I.**[6]**.** He relies particularly on the second decision to contend that, where the disputes involve similar issues, arising out

[4] **MANU/DE/0958/2019**
[5] **MANU/MH/1467/2010**
[6] **MANU/DE/1284/2020 or AIR 2020 DELHI 132**

of the same contracts, the disputes ought to be referred to one arbitral tribunal.

26. Responding to the submissions of Mr. Sharma, Mr. Amit Sibal contends that there was no genuine justification for the petitioner not filing its counterclaims within the time granted, for the said purpose, by the learned arbitral tribunal. Emphasizing the fact that even as per the petition, the cause of action in the petitioner's favour arose on 11th December, 2017 and 21st March, 2018, he contends that was no reason for the petitioner waiting till 6th May, 2020 to invoke arbitration. Nor, submits Mr Sibal, was there any explanation as to why the petitioner did not invoke arbitration on 6th July, 2019,(when the learned arbitral tribunal declined to take the petitioner's counterclaims on record), or on 26th September, 2019, (when this court refused to grant six months' extension of time as sought by the petitioner and the petitioner unconditionally withdrew its application for extension of time).

27. Mr Sibal submits that claims and counter-claims, which were alive at the inception of the arbitral proceedings, were required to be raised then, and could not be permitted to be raised belatedly. The cause of action in respect of the petitioner's counter-claims having arisen prior to the invocation of the arbitral process by the respondent, Mr. Sibal submits that the petitioner is estopped from raising the said claims at this stage. He has relied, for this purpose, on para 33 of the decision in **Gammon India**[6] as well as on the words "any and all disputes", in Clause 26.4 of the ACAs. The claims and counter-claims, submits Mr. Sibal, were required to be decided at one go.

28. Mr Sibal further submits that the present petition is not maintainable, as the petitioner has not exhausted the pre-arbitral protocol of mutual consultation, envisaged by Clause 26.2 of the ACAs. This protocol, according to Mr Sibal, is mandatory and was, in fact, followed by the respondent, before invoking the arbitration clause for reference of its disputes to arbitration.

29. Mr Sibal further contends that, once the learned Arbitral Tribunal had struck the petitioner's counter claims off the record, it was not open to the petitioner to initiate a parallel arbitral proceeding "as per its own whims and fancies". In this context, the counter-affidavit filed by the respondent again relies on **Gammon India**[6]. The submissions made, in this regard, in paras 68 to 72 of the counter affidavit, in my opinion, merit reproduction verbatim:

> "68. The said Petition under Section 11 was taken up for hearing on 27.05.2020 before this Hon'ble Court. *The Petition under Section 11 was also vehemently opposed by the Respondent on the ground that once the Petitioner's Counter-Claim was struck off from the record by the Ld. Arbitral Tribunals, which order has attained finality, the Petitioner cannot be allowed to invoke Arbitration qua the very same Counter-Claim, especially when its petition under Section 29-A of the Act had also been voluntarily withdrawn by it on 26.09.2019 and was dismissed as withdrawn.*
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> 69. *At this point, during the hearing dated 27.05.2020, the Counsel for the Petitioner herein made an incorrect assertion that while dismissing the matter on 26.09.2019, this Hon'ble Court in the Section 29-A proceedings, had given a specific liberty to the Petitioner to file a separate Section 11 proceedings for seeking reference of its Claims to Arbitration. However, the Respondent's Counsel pointed that the said assertion was incorrect and no such specific liberty was granted by this Hon'ble Court, in its Order dated 26.09.2019,*

while permitting the Petitioner to withdraw its Petition under Section 29A of the Act.

70. *In view of the same, this Hon'ble Court was pleased to dismiss the said Petition* filed by the Petitioner under Section 11 of the Act, vide Order dated 27.05.2020. However, the Petitioner sought leave of this Hon'ble Court to seek clarification of the Order dated 26.09.2019 passed in O.M.P. (Misc.) (Comm.) No. 290 of 2019 regarding, whether the Petitioner had been granted a specific liberty in the said Order dated 26.09.2019 to file a separate Petition under Section 11 of the Act for seeking reference of its Claims to Arbitration.

71. After the said Petition under Section 11 of the Act was dismissed, on 06.06.2020, the Petitioner filed an Application under Section 151 of the Code of Civil Procedure, 1908, for allegedly seeking clarification of the Order dated 26.09.2019 passed in O.M.P. (Misc.) (Comm.) 290 of 2019. …

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72. *Even in the said Clarification Application, this Hon'ble Court did not find it appropriate to grant the aforesaid reliefs as prayed for by the Petitioner. The Hon'ble Court was also of the considered view that no clarification can be made to the Order dated 26.09.2019, specifically stating that the Petitioner was at liberty to file a separate Petition under Section 11 of the Act for seeking reference of its Claims to Arbitration.* Thus, the Hon'ble Court, vide its Order dated 15.07.2020, observed that its previous Order dated 26.09.2020 is crystal clear and does not require any clarification and that the Petitioner has liberty to pursue appropriate remedies that may otherwise be available to it in law. The relevant portion of the Order dated 15.07.2020, is being extracted below:

> "7. In my view, the order is crystal clear and needs no further clarification. However, with a view to give a quietus to the controversy, it is clarified that Petitioner has liberty to avail all such remedies as are available to it in law and Court has not foreclosed any remedy, so available.

8. Application is disposed of in the above terms."

(Italics and underscoring supplied)

30. As to why I have emphasized certain assertions in the pleadings of the respondent, would become apparent later in this judgement.

31. Mr Sibal has also objected to the petitioner having filed a consolidated petition, though the ACAs are three in number. This, according to him, is impermissible. He submits that, prior to 6th May, 2020 (the date of issuance of the notice invoking arbitration by the petitioner), the petitioner had never asserted its claims with the respondent. He submits that, had the petitioner's claims been preferred as counter-claims, they would attract Section 23(2A) of the 1996 Act[7]. Mr. Sibal submits that the three ACAs are not interconnected and that, therefore, a single arbitration petition, for reference of disputes relating to all the ACAs, was not maintainable. He relies, for this purpose, on the judgment of the Supreme Court in **Duro Felguera, S.A. v. Gangavaram Port Ltd[8].** and the judgment of the High Court of Madras in **Padam Chand Kothari v. Shriram Transport Finance Co. Ltd[9].** and **Alaska Export USA Inc. v. M/s. Alaska Exports[10]** as well as the judgment of this Court in **ABB India Ltd. v. The Indure Pvt. Ltd[11].** and of the Bombay High Court of Bombay in **United Shippers** *supra.*

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[7] "**23. Statement of claim and defence. –**

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(2A) The respondent, in support of his case, may also submit a counter-claim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counter-claim or set-off falls within the scope of the arbitration agreement."

[8] **(2017) 9 SCC 729**

[9] **2020 SCC OnLine Mad 138**

[10] **2016 SCC OnLine Mad 5961**

[11] **MANU/DE/3875/2018**

32. Mr. Sibal has placed reliance on the judgments of the Supreme Court in **Srei Infrastructure Finance Ltd. v. Tuff Drilling Ltd**[12]**.** and **NHAI v. Bumihiway DDB Ltd**[13]**.** and of this Court in **Haldiram Manufacturing Company Pvt. Ltd. v. DLF Commercial Complexes Ltd**[14], and **NHAI v. PATI-BEL (JV)**[15].

33. Invoking, for the purpose, Section 11(6A) of the 1996 Act, Mr. Sibal submits that the procedure, for invocation of arbitration by the petitioner has, in fact, not even begun.

34. Mr. Sibal has also pointed it out that Clause 26.4 of the agreement required each party to appoint its own arbitrator and, thereafter, for the two arbitrators so appointed to appoint the presiding arbitrator. The request, in the notice invoking arbitration, dated 6th May, 2020, issued by the petitioner to the respondent was not, he submits, in terms of Clause 26.4, as it did not name an arbitrator and call upon the respondent to name its arbitrator, but, rather, sought reference of the dispute to the three-member arbitral tribunal already in existence. Submitting that, even if the petitioner were to appoint Hon'ble Mr. Justice R.S. Sodhi (retd.) as its arbitrator, the respondent may or may not have appointed Hon'ble Mr. Justice S.S.Saron (retd.) and that the two arbitrators would then have to appoint a third, presiding arbitrator, who may also have been different from the presiding arbitrator in the existing arbitral proceedings between the

[12] **(2018) 11 SCC 470**
[13] **(2006) 10 SCC 763**
[14] **2012 SCC OnLine Del 2139**
[15] **2019 SCC OnLine Del 6793**

parties, Mr. Sibal submits that the manner in which the arbitral process, envisaged by Clause 26.4 of the agreement, has been jettisoned by the petitioner, is completely unsustainable in law.

35. **Gammon India[6],** he submits, has no application, as that decision applied to a case where the Section 11 petition, before the court, was competent in the first instance. Mr. Sibal has also placed reliance on paras 12 and 13 of the report in the judgment of the Supreme Court in **Central Organisation for Railway Electrification v. M/S ECI-SPIC-SMO-MCML (JV)[16]**.

36. Mr. Sibal submits, in conclusion, that the observations, in the order dated 25th October, 2016, of the learned Arbitral Tribunal, that the counter-claim of the petitioner "will not be considered and are accordingly struck off the record of this tribunal" was, strictly speaking, not accurate, as the counter claims had never been filed in the first place.

37. Mr. Sibal placed especial reliance on paras 136, 147 and 151 of the counter-affidavit of the respondent, to the present petition, which read as under:

> "136. The contents of Paragraph 4.34 are false and vehemently denied. It is submitted that the Petitioner never raised the said issues during the mutual discussion between the parties in February –March 2018 (a bare perusal of the correspondence pertaining to the said period clearly shows this). Further, the Petitioner has failed to comply with the mandatory procedure before invocation of arbitration as per Clause 26.2 of the Aircraft Charter Agreements. In addition to

[16] **2019 SCC OnLine 1635**

it, the Petitioner is seeking a composite reference of claims to arbitration, which is impermissible in law. Lastly, all the claims raised by the Petitioner are the same as that which had been raised in its Counter-Claim and the same having been struck off the record of the Ld. Arbitral Tribunal vide Order dated 25.10.2019, the Petitioner has been sitting and did nothing until 06.05.2020 and by that time the arbitration proceedings had already come to a near conclusion as the dates for final hearing had already been fixed by the Ld. Arbitral Tribunal, however, the same had to be deferred to start from 29.07.2020 due Covid-19 pandemic.

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147. The contents of Paragraph 7 are incorrect and therefore denied. It is submitted that this Hon'ble Court in the case of ***Gammon India Limited v. National Highways Authority*** (supra) has held that the party choosing to initiate fresh arbitration must show good and special reasons as to why it could not raise the same claims by way of Counter-Claim, if the same had been arisen between the parties when reference to arbitration was made. Moreover, it is an admitted fact that the claims which the Petitioner is seeking to refer to arbitration by way of the present petition already stood arisen between the parties when the claims raised by the Respondent were referred to the Ld. Arbitral Tribunal for adjudication. Therefore, in the absence of any justification for not filing its Counter-Claim, the present petition cannot be allowed. In addition to it, if the present Petition is allowed, then it may also lead to multiplicity of proceedings between the parties and possibly contrary findings, which will be against the fundamental spirit of arbitration.

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151. The contents of Paragraph 11 are false and denied. The contents of Paragraph 139 are reiterated in response."

38. He has also referred me to various paragraphs of the statement of claim and the corresponding paragraphs of statement of defence, as

filed before the existing learned Arbitral Tribunal, to contend that the petitioner's claims were strongly traversed by the respondent.

39. In fine, Mr. Sibal submits that the petition deserves to be dismissed as not maintainable as well as on merits.

40. Responding to the submissions of Mr. Sibal, by way of rejoinder, Mr. Manish Sharma, at the outset, draws attention to para 6 of the termination notice dated 21st March, 2018, issued by the petitioner to the respondent, which clearly stated thus:

> "6. That email dated 26th Feb'18 with the subject "notice for initiating mutual discussion" was received by AirOne. Hence, a dialogue had been initiated to resolve the day to day business dealing with one another."

41. He has also relied on the following passages, from the statement of defence of the respondent before the learned Arbitral Tribunal:

> "20. That the contents of the paragraph 19 are false and misleading. The Claimant has chosen to appraise the tribunal with partial facts. In consistency with the agreement and in order to avoid gross financial exposure, the Respondent had written to the claimant on 22·Feb. 18 intimating the Claimant of the outstanding amounts of Rs.1,26,80,150/-. It is clearly stated in a following email on the same day that all invoices were to be cleared immediately as no further flights will be undertaken till all the outstanding are paid. The same e-mail was a mere invocation of clause no. 8 c), and there was no mention of the termination clause of the agreement. Further it is pertinent to note that at the time of this outstanding payment demand, the Claimant wanted the Respondent to take a further exposure of Rs. 34,00,000/- (rupees 34 lakhs), which is clearly not in spirit with clause 8a) which clearly states that both parties understand that the aircraft provider will not take any financial exposure on account of this agreement and all the planned utilization needs to be paid in advance by the charterer. It is pertinent to note that the Respondent

subsequent to this attempt of the frustration of the agreement by the Claimant sent a whatsapp to the Claimant stating the availability of the aircraft, upon payment of the outstanding.

21. That the contents of paragraph no. 20 a) are false, malicious and in clear contradiction of the agreement. It is pertinent to take note of clause 8 e) which states that at no time, security deposit will be considered as advance for a charter request. Hence, claimant's request to utilize security deposit amount lying in excess for the purpose of charter agreements was in contradiction to the covenants of the charter agreement. Further, the contents of paragraph no.20 b) are false and misleading. The exclusion monies were paid on the basis of a mutually agreed exclusion sheet. The Respondent has annexed all bills of exclusions in order to demonstrate the authenticity of the exclusion amounts. It is therefore, incorrect on the part of the Claimant to wrongly claim that the Respondent was wrongfully in possession of funds to the tune of Rs. 77,61,397/-. The contents of paragraph 20 c) are false and misleading and contrary to the payment terms of the charter agreement. It is clearly stated under clause 8g) that guaranteed block hours and excess flying of each month is to be paid each month.

22. That the contents of paragraph no. 21 are false and misleading. It is vehemently denied that the Claimant suffered any financial or other losses or was forced to abandon any prearranged commercial charter. From the aforementioned paragraphs and the payment terms clause, it is abundantly clear that the aircraft provider is not to take any financial exposure on account of this agreement. All the planned utilization needs to be paid in advance by the charterer. Furthermore, the Respondent had cautioned and requested the Claimant a day prior on 22nd Feb '18 vide an e-mail to clear the running default as otherwise clause 8c) suspending/ ceasing services would have to be invoked. Hence, with prior notice it was an absolute responsibility to clear the outstanding amounts for continued charter services. As such, the alleged loss to the Claimant charterer if any, knowing that there is default In their part under the Agreement and then confirming a charter is clearly a bad decision attributed to the Claimant and the respondent cannot be held liable for the same.

> 23. That the contents of the paragraph no. 22 are false and misleading. The Claimant misconstrued an articulate clause of the agreement to suit their convenience. Termination if any, has to be in accordance with the terms of the contract and not in accordance with the Claimant's whims. Non availability of aircraft on 23rd Feb' 19 was a consequence of outstanding payments to the tune of Rs.1.25 crores. As a result of this outstanding, there was suspension/cessation of charter services. Nowhere does the invocation of clause 8 c) suggest termination of the agreement in its entirety. In fact it exhibits the malafide intent of the Claimant to frustrate the contract as the Claimant was unable to meet their ambitions of chartering three aircrafts. It is pertinent to note that the Respondent subsequent to this attempt of the frustration of the agreement by the Claimant sent a whatsapp to the Claimant stating the availability of the aircraft, upon payment of the outstanding."

42. Mr. Sharma further submits that the petitioner's counter claims were raised, with the respondent, not once, but on several occasions, including in Claims A, B, D, E and G of the notice invoking arbitration dated 6th May, 2020, as well as before the learned Arbitral Tribunal and also in OMP (Misc) (Comm) 290/2019, preferred by the petitioner under Section 29(A)(5) of the 1996 Act, which read thus:

> "A. Claim of Rs. 33,86,865/- towards the pending dues payable under the Agreement dated 11.08.2017, in respect of aircraft Legacy 650 having Tail No. VT-AOK:
>
> B. Claim of Rs. 1,54,95,760/- towards the amount payable in respect of the notice period of 30 days for premature release of the aircraft Legacy 650 having Tail No. VT- AOK under the Agreement dated 11.08.2017:
>
> *****
>
> D. Claim of Rs. 1,49,35,441/- towards pending dues payable under the Agreement dated 11.08.2017, in respect of aircraft Legacy 650 having Tail No. VT-AOL;

> E. Claim of Rs. 1,58,67,667- towards the dues payable in respect of the notice period of 30 days in respect of aircraft Legacy 650 having Tail No. VT-AOL under the Agreement dated 11.08.2017, on account of its premature termination on 21.03.2018;
>
> *****
>
> G. Claim of Rs. 51,33,157/- towards the dues payable under the Agreement dated 11.08.2017, in respect of aircraft Cessna Citation XLS having Tail No. VT-AON:"

43. Mr. Sharma has seriously disputed the submission of Mr. Sibal that no counter claim was filed before the learned Arbitral Tribunal. He has placed the counter claim on record as one of an index set of additional documents and has referred me to the prayer clause in the said counter claim, in para 16 thereof, which reads thus:

> "16. In view of the facts and circumstances and in the interest of justice, it is most humbly prayed that this Hon'ble Tribunal may be pleased to:
>
> a. Direct the Claimant to pay Rs. 1,36,12,7721- (Rupees one crore thirty six lakhs twelve thousand seven hundred and seventy two only) on account of the outstanding payment as on 22nd Feb 2018
>
> b. Direct the claimant to pay Rs. 11,85,321/- (Rupees eleven lakhs eighty five thousand three hundred and twenty one only) on account of the interest accrued on delayed payments till 22nd Feb 2018
>
> c. Direct the claimant to pay Rs. 1,50,33,200/- (Rupees one crore fifty thousand thirty three thousand two hundred only) on account of the payable notice period post termination of legacy 1(VT-AOK) agreement.
>
> d. Direct the claimant to pay Rs. 137,51,977/- (Rupees one crore thirty seven lakhs fifty one thousand nine hundred and seventy seven only) on account of

the pro rata minimum guaranteed hours for the VT AOL agreement;

e. Direct the claimant to pay Rs.1,58,67,667/- (Rupees one crore fifty eight lakhs sixty seven thousand six hundred and sixty seven only) on account of the payable notice period post termination of legacy 2 (VT-AOL) agreement;

f. Direct the respondent to pay interest @ 2 % per month on the total aforementioned outstanding amount till date, amounting to Rs. 190,24,300/- (Rupees one crore ninety lakhs twenty four thousand three hundred only) (till Feb 2019)

g. Pass any other order(s) as may be deemed fit in the interest of justice."

44. Apropos Mr. Sibal's reliance on Clause 26.2 of the ACAs, Mr. Sharma submits that, had the learned Arbitral Tribunal allowed the counter-claim to be taken on record, no benefit of the said clause could have been reaped by the respondent. If the petitioner's claims are otherwise maintainable and within limitation, therefore, he submits, the respondent cannot seek to oppose the reference of the claims to arbitration by insisting on the petitioner exhausting any pre-arbitral procedure under Clause 26.2. He has relied, for this purpose, on paras 4 and 5 of the report in **Demerara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.**[17], and paras 15 and 16 of **Swiss Timing Limited v. Organizing Committee, Commonwealth Games**[18], as well as paras 5 to 7 and 8 to 11 of the judgment of this Court in **Ravindra Kumar Verma v. BPTP Ltd**[19]., and the decisions in

[17] **(2015) 13 SCC 610**
[18] **(2014) 6 SCC 677**
[19] **2015 (147) DRJ 175**

Siemens Ltd. v. Jindal India Thermal Power Ltd.[20] and **Union of India v. Baga Brothers**[21] and **JK Technosoft Ltd. v. Ramesh Sambamoorthy**[22].

45. Distinguishing the decision in **Srei Infrastructure**[12], Mr. Sharma submits that, in that case, no statement of claim had been filed at all, so that there could be no question of any counter claim being filed.

46. Apropos the submission that the notice invoking arbitration, dated 6th May, 2020, of the petitioner was not in accordance with Clause 26.4 of the ACAs, Mr. Sharma refers to Clause 31 of the said notice, which suggested reference of the claims of the petitioner to the existing learned Arbitral Tribunal comprising of Hon'ble Mr. Justice Mukul Mudgal (Retd.), Hon'ble Mr. Justice S.S. Saron (Retd.) and Hon'ble Mr. Justice R.S. Sodhi (Retd.), pointing out that the suggestion was only in the nature of a "proposal". It was not, therefore, as though the petitioner had appointed, or nominated, the said learned Arbitral Tribunal to adjudicate on the petitioner's claim. Mr. Sharma submits that, instead of taking a hyper-technical view of the matter, the petitioner could be treated as having appointed, by the said notice, Hon'ble Mr. Justice R.S. Sodhi (retd.) as its arbitrator, and the respondent could be called upon to appoint its arbitrator, so that the quorum of the arbitral tribunal could be completed and the claims proceed to arbitration.

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[20] **MANU/DE/0627/2018**
[21] **MANU/DE/1880/2017**
[22] **MANU/DE/3047/2017**

47. To substantiate this proposal, Mr. Sharma has relied on paras 13 to 15 of the judgment of the High Court of Bombay in **Rajiv Vyas v. Johnwin Manavalan**[23]. He submits that the respondent had, in its reply to the notice invoking arbitration of the petitioner, dated 6th May, 2020, completely refused the proposal to refer the petitioner's claim to arbitration, under the existing arbitral tribunal or under any other arbitral tribunal. As such, he submits, the respondent cannot, at this stage, seek to capitalize on the procedure stipulated in Clause 26.4 of the ACAs.

48. Mr. Sibal, who was permitted to advance short submissions in surrejoinder, seeks to distinguish the decision of the High Court of Bombay in **Rajiv Vyas**[23]. There, submits Mr Sibal, the party had abandoned the arbitration clause. In the present case, however, the respondent had never defaulted in appointing its arbitrator, which was a pre-condition for invoking Section 11(6). The present petition, he submits, therefore, is pre-mature. He draws the attention of this Court to the prayer clause in the petition, which specifically prays for referring the disputes to the existing arbitral tribunal of Hon'ble Mudgal, Sodhi and Saron, JJ., which, according to him, is completely impermissible. This suggestion is, in any case, he submits, not acceptable to his client.

49. Mr. Sibal further submits that the judgments, on which Mr. Sharma relies, did not require a written notice to be issued by the respondent to the petitioner, by one party to the other, initiating a 30 day discussion, before invoking the arbitral process. That such a

[23] **MANU/MH/1125/2010**

requirement was contained in the ACAs, he points out, is not disputed by the petitioner.

50. Demerara Distilleries[17], submits Mr. Sibal, was distinguishable as there was no discussion, in the said decision, regarding the respondent's counter-claim.

51. Mr. Sibal further points out that while, in its earlier communication to the respondent, the petitioner claim was of ₹ 1,76,80,150/-, in its notice invoking arbitration dated 6th May, 2020, the petitioner had inflated its claim to ₹ 13.92 crores. He submits that his client has never been put to notice regarding the said inflated claims.

52. Ravindra Kumar Verma[19]**,** on which Mr. Sharma had relied, stands distinguished, points out Mr. Sibal, in **NHAI v. PATI-BEL (JV)**[15] which chose, in preference to the decision in **Ravindra Kumar Verma**[19]**,** to follow **Haldiram Manufacturing Company**[14]**.**

53. Mr. Sibal finally reiterates his contention that the counter claim had never been filed by the petitioner before the learned Arbitral Tribunal. He submits that the petitioner had only annexed, to its Section 29(A) petition (OMP (Misc) (Comm) 290/2019) a draft counter claim. Besides, he submits, the said petition was also withdrawn.

Analysis

A prefatory note

54. Before proceeding to examine the rival contentions, one aspect needs to be noted. I have reproduced in para 29 *supra*, paras 68 to 72 of the counter affidavit filed by the respondent in the present case. Certain averments contained in the said paragraphs have been italicized and underscored by me. These averments, in my view, are, *ex facie*, legally objectionable.

55. While referring to the order dated 27th May, 2020, passed by this Court in Arb P 197/2020, para 70 of the counter affidavit seeks to convey an impression that, in view of the averments of learned counsel, to which paras 68 and 69 allude, Arb P 197/2020 was dismissed. No such indication is to be found, however, in the order dated 27th May, 2020. In paras 2 to 4 of the said order, this Court has only set out the contentions advanced by the learned counsel before it. Thereafter, para 5 only records the petitioner's contention that it had invoked arbitration, and its request for being permitted to withdraw the petition so as to seek a clarification of the order dated 26th September, 2019 passed in OMP (Misc) (Comm) 290/2019. There is nothing to indicate that the order of this Court was passed, "in view of" the contentions advanced by the learned counsel before it, as recorded in paras 3 and 4 of the order.

56. Similarly, while alluding to the order dated 15th July, 2020, the respondent has averred that "this Hon'ble Court did not find it

appropriate to grant the … reliefs as prayed by the petitioner". No such indication is to be found in the order dated 15th July, 2020. In fact, even while holding that the order dated 26th September, 2019, earlier passed, by it, was clear, this Court did go on, nonetheless, to clarify that the petitioner was at liberty to avail all remedies available to it in law, and that no such remedy stood foreclosed. This clarification, in my view, definitely enures in the petitioner's favour.

57. It would be advisable that, while referring to judicial orders in pleadings, parties are circumspect in ensuring that no words, not contained in the order, are read into it, and no impression, of the order having been passed on grounds, which do not find place in the order itself, is sought to be conveyed. Else, it would amount to a clear attempt to mislead the Court.

58. I say no more on this aspect, and proceed to examine the merits of the petition.

Ubi jus, ibi remedium

59. *Ubi jus, ibi remedium*[24] is a doctrine which stands fossilized in legal lore. Invoking this principle, a Division Bench of this Court in **NTPC v. Deconar Services Pvt Ltd**[25], speaking through Vikramajit Sen, J. (as he then was), held that the right to legal redress cannot be obliterated altogether. To the same effect, para 29 of the report of the

[24] Where there is a right, there is a remedy.
[25] **2010 (2) Arb LR 172 (Del)**

judgment of the Constitution Bench in **Anita Kushwaha v. Pushap Sudan**[26]**,** holds thus:

> "29. To sum up: access to justice is and has been recognized as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. The Magna Carta, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, 1966, the ancient Roman Jurisprudential maxim *ubi jus ibi remedium*, the development of fundamental principles of common law by judicial pronouncements of the courts over centuries past have all contributed to the acceptance of access to justice as a basic and inalienable human right which all civilized societies and systems recognize and enforce."

60. Right to legal redress is a fundamental right. It cannot be compromised. When parties entered into a contract, agreeing to submit disputes, which arise, to arbitration, arbitrable disputes, which come within the four corners of the clause, cannot be refused arbitration.

61. There are well-recognized exceptions to the principle that the right to legal redress carries, with it, a remedy. Considerations such as limitation, constructive *res judicata* and the like can render the remedy unavailable, though the right subsists. These, however, are considerations, which the Court (or arbitrator) would take into account, once it is *in seisin* of the dispute. They do not foreclose the claimant, or petitioner, from placing its dispute before the Court, or arbitrator. Moreover, these are considerations which are essentially

[26] **2016 (8) SCC 509**

intended to balance equities, and prevent prosecution of claims which, owing to passage of time or other circumstances, would render grant of relief to the claimant entirely inequitable to the opposite party. Balancing of equities is, therefore, the *raison d' etre* behind these conceptual exceptions to the *ubi jus ibi remedium* principle.

62. What the respondent seeks, in the present case, is wholesale rejection of the request, by the petitioner, to refer its claims to arbitration. In other words, the respondent seeks that the arbitral doors should be closed to the petitioner.

63. Allowing this request would, in effect, render the petitioner remediless to agitate its claims, even in the face of an existing arbitration clause and the *prima facie* arbitrable nature of the claims themselves. Such a consequence must, at all costs, be avoided if possible, as it impinges on the right to legal redress, otherwise available to the petitioner.

Re. contention that the claims are time barred

64. Mr. Sibal sought to contend that the petitioner's claims were time barred. No real basis, for this contention, is, however, forthcoming. The claims have admittedly been preferred within three years from 11th December, 2017 and 21st March, 2018, when, according to the petitioner, the cause of action arose. The respondent does not dispute the petitioner's averment that the cause of action

arose on the said dates. If that be so, the claims cannot, *prima facie*, be treated as time barred.

65. No doubt, the petitioner had initially sought to agitate the present claims as counterclaims before the learned Arbitral Tribunal and on the petitioner's failing to do so within the time granted by the learned Arbitral Tribunal, the counterclaims were struck off the record. That cannot, however, be a ground to deny the petitioner the right to arbitration, treating them as substantive claims. In fact, the intent of the clarification, contained in para 7 of the order dated 15th July, 2020, passed by this Court in IA 4320/2020 appears to be precisely this. In para 2 of the said order, this Court has noted the contention, of the respondent, that once the petitioner's counterclaims were struck off the record by the learned Arbitral Tribunal, the petitioner could not seek to invoke arbitration qua the very same counterclaims, especially after rejection of its Section 29-A petition. This submission has, at the very least, not been accepted by this Court in the order dated 15th July, 2020. Rather, this Court has clarified that the petitioner had liberty to avail all such remedies as were available to it in law and that no such remedy stood foreclosed. All that is required to be seen, therefore, is whether the reference of the petitioner's claims to arbitration, was a "remedy available to it in law". If it was, the petitioner is entitled to avail the said remedy in view of para 7 of the order dated 15th July, 2020 which has attained finality, never having been challenged.

66. The judgments of the Supreme Court in **Praveen Enterprises**[2] and **A.K.M. Enterprises**[4], on which Mr. Sharma places reliance, in my view, are relevant in this context. Para 26 of **Praveen Enterprises**[2] read thus:

> "26. A counter claim by a Respondent pre-supposes the pendency of proceedings relating to the disputes raised by the claimant. *The Respondent could no doubt raise a dispute (in respect of the subject matter of the counter claim) by issuing a notice seeking reference to arbitration and follow it by an application under Section 11 of the Act for appointment of Arbitrator, instead of raising a counter claim in the pending arbitration proceedings. The object of providing for counter claims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a Respondent in an arbitration proceedings being similar to that of a Defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceedings or raise the dispute by way of a counter claim, in the pending arbitration proceedings."*
>
> (Emphasis supplied)

67. **A.K.M. Enterprises**[4], rendered by a Coordinate Bench of this Court, relies on **Praveen Enterprises**[2] and holds thus:

> "11. Be that as it may, in **State of Goa (supra)**, the Supreme Court has clarified that the object of providing for counter claims is to avoid multiplicity of proceedings and to avoid divergent findings. *Keeping this object in view, the respondent in an arbitration proceeding has a choice of raising the dispute (counter claim) by issuing a notice to the claimant calling upon him to agree for reference of this dispute (counter-claim) to arbitration and then resort to an independent arbitration proceedings or raise the dispute by way of a counter claim in the pending arbitration proceedings. The only effect of such counter claim would be on the issue of limitation.*"
>
> (Emphasis supplied)

68. The striking off, from the record, of the counter-claims of the petitioner does not, in my view invite, in its wake, rejection of the request of the petitioner to refer the claims to arbitration under Section 11 of the 1996 Act. The counterclaims were filed by the petitioner on 6th July, 2019. (Though Mr. Sibal disputed this fact, the learned Arbitral Tribunal has, by "striking the counterclaims off the record" recognized that the counterclaims were on record at the time they were struck off.) The learned Arbitral Tribunal refused to take the counterclaims on record unless six months' extension of its mandate was obtained from this Court. The petitioner, accordingly, filed OMP (Misc) (Comm) 290/2019, seeking extension of the mandate of the learned Arbitral Tribunal by six months. For reasons unknown, the petitioner withdrew the said petition on 26th September, 2019. Even so, this Court reserved liberty to the petitioner "to pursue the appropriate remedy that may be available to him in law". In view of the withdrawal, by the petitioner, of OMP (Misc) (Comm) 290/2019, the learned Arbitral Tribunal struck the petitioner's counterclaims off the record. Even while doing so, the learned Arbitral Tribunal reserved liberty, with the petitioner, to avail such remedy as was available to it in law.

69. Thereafter, the petitioner issued, to the respondent, a Section 21 notice on 6th May, 2020, seeking reference of its claims to arbitration. On the respondent refusing to accede, the petitioner moved Arb P 197/2020 before this Court under Section 11. A reading of the order dated 27th May, 2020, disposing of the said arbitration petition, discloses that the arbitrability of the petitioner's claims was seriously

contested by the respondent. (Incidentally, the contentions advanced by the respondent before this Court on 27th May, 2020 substantially overlap with the contentions advanced by Mr. Sibal before me.) This Court noted the contention of the petitioner that, in accordance with the liberty granted by its earlier order dated 26th September, 2019, the petitioner had invoked arbitration. Having noted this contention, the Court permitted the petitioner to withdraw the petition to seek clarification of the order dated 26th September, 2019 passed in OMP (Misc) (Comm) 290/2019.

70. IA 4320/2020 was, accordingly, moved by the petitioner, seeking such clarification. Again, during arguments on IA 4320/2020 on 15th July, 2020, the respondent seriously contested the right of the petitioner to have its claims referred to arbitration, especially after the very same claims had earlier been preferred as counter-claims and struck off the arbitral record. This Court clarified that the petitioner was at liberty to avail all such remedies as were available to it in law and no such remedies should stand foreclosed.

71. Having failed to convince this Court regarding the entitlement of the petitioner to have its claims referred to arbitration on two occasions, first on 27th May, 2020 and, thereafter, on 15th July, 2020, the respondent seeks to urge the very same contention, yet again, in the present proceedings before it – effectively, a third bite at the cherry.

72. It is not, therefore, as if the learned Arbitral Tribunal had held the petitioner not to be entitled to prefer its claims. The counterclaims,

which were earlier on record, were struck off the record only because of the time constraint within which the learned Arbitral Tribunal would have to render its award and the withdrawal, by the petitioner, of OMP (Misc) (Comm) 290/2019. That impediment does not apply, where the petitioner desires to agitate the claims substantively in arbitral proceedings. The independent right of the petitioner, to do so, stands recognized by the Supreme Court in **Praveen Enterprises**[2] and by this Court in **A.K.M. Enterprises**[4].

73. I cannot, therefore, accept the submission of Mr. Sibal that, the petitioner was barred from seeking reference of its claims to arbitration under Section 11 of the 1996 Act, owing to its counterclaims having been struck off the record by the learned Arbitral Tribunal.

74. As an ancillary submission, Mr. Sibal contended that, in the absence of any explanation as to why the petitioner did not move for referring its claims to arbitration immediately after 6th July, 2019, when the learned Arbitral Tribunal declined to take the petitioner's counterclaims on record, or after 26th September, 2019, when the petitioner withdrew its application for extension of time, the petitioner ought not to be allowed to seek reference of its claims to arbitration at this belated stage. He has also relied, in this context, on the words "all disputes", contained in Clause 26.4 of the ACAs. The use of the expression "all disputes", contends Mr. Sibal, indicates that all disputes existing on the date when the respondent referred its claims to arbitration, were required to be so referred and decided at one go.

This would include, according to Mr. Sibal, the counterclaims of the petitioner. In other words, Mr. Sibal's contention is that, when the respondent referred its claims to arbitration, the petitioner ought also to have sought reference to its counterclaims to arbitration. Having not do so, the petitioner cannot now seek reference of its counterclaims to arbitration. The expression "all disputes" in Clause 26.4, according to Mr. Sibal, forecloses the petitioner's right to do so. Piecemeal adjudication of claims of the parties is impermissible. He relies on the judgment of the Supreme Court in **Dolphin Drilling v. O.N.G.C.**[27] and on the judgment of a Coordinate Single Bench of this Court in **Gammon India**[6], which followed **Dolphin Drilling**[27]. I am unable to accept the submission.

75. **Dolphin Drilling**[27] is, in my view, clearly distinguishable. The arbitration clause, in **Dolphin Drilling**[27], read thus:

> "**28. Settlement Of Disputes**
>
> 28.1 Except as otherwise provided elsewhere in the Agreement, if any dispute, difference, question or disagreement or matter whatsoever shall, before or after completion or abandonment of work or during extended period, hereafter arises between the parties hereto or respective representative or assignees concerning with the construction, meaning, operation or effect of the Agreement or out of or relating to the Agreement or breach thereof shall be referred to arbitration.
>
> 28.2 The reference to arbitration shall be to an arbitral tribunal consisting of three arbitrators. Each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the presiding arbitrator.

[27] **2010 (3) SCC 267**

> 28.3 The party desiring the settlement of dispute shall give notice of its intention to go in for arbitration clearly stating all disputes to be decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days. If the other party fails to appoint its arbitrator within stipulated period or the two arbitrators fail to appoint the third arbitrator, Chief Justice of High Court of competent jurisdiction or Chief Justice of India as the case may be or any person or institution designated by them shall appoint the Second Arbitrator and/or the Presiding arbitrator as the case may be."

76. Dolphin Drilling Ltd ("DDL", hereafter) filed an application under Section 11(6) of the 1996 Act before the Supreme Court, for reference of the disputes between DDL and ONGC to arbitration. Notice invoking arbitration, under Section 21, was addressed by DDL to ONGC on 29th January, 2008. DDL had appointed a former Chief Justice of India as its arbitrator. ONGC did not respond to the notice. DDL moved the Supreme Court.

77. While acknowledging the arbitrability of the disputes raised by DDL, ONGC contended that DDL had, in connection with different disputes, arising under the same agreement, already invoked the arbitration clause. ONGC contended, therefore, that DDL could not invoke the arbitration clause anew, as the remedy of arbitration under the agreement was a one-time measure.

78. Reliance was placed, for the purpose, on the words "all disputes", as contained in Clause 28.3.

79. The Supreme Court rejected the contention. Paras 8 to 10 of the report read thus:

> "8. The plea of the respondent is based on the words *"all disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form clause 28 of the agreement cannot be said to be a onetime measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future*.
>
> 9. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. *In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non-arbitrable*.
>
> 10. For the reasons aforesaid I am unable to sustain the objection raised on behalf of the respondent. In the result, the application is allowed. The applicant has nominated Justice S.P. Bharucha, a former Chief Justice of India, as its arbitrator. Justice Mrs. Sujata V. Manohar, a former judge of this court, is appointed arbitrator on behalf of the respondent, subject to her consent and on such terms as she may deem fit and proper."
>
> (Emphasis supplied)

80. Clause 28.3 of the contract between ONGC and DDL *required the notice invoking arbitration to clearly state all disputes to be decided by the learned Arbitral Tribunal* and to appoint an arbitrator. The Supreme Court interpreted this covenant as requiring all disputes, in existence on the date of notice invoking arbitration to be included in such notice. Disputes, which arose thereafter could not, however, be excluded from the arbitral process.

81. Unlike the clause in **Dolphin Drilling**[27], Clause 26.4 of the ACAs merely required all disputes arising out of or in connection with the ACAs to be referred for arbitration. There was no requirement of all such disputes having to be referred in the notice invoking arbitration issued at the first instance. The principle that all disputes in existence on the date of issuance of the notice invoking arbitration had to be referred to arbitration at that stage, cannot, therefore, apply in the present case, where no such requirement of inclusion of all existing disputes in the notice invoking arbitration is contained in the ACAs.

82. **Dolphin Drilling**[27] cannot, therefore, help the respondent.

83. The decision of the Coordinate Bench of this Court in **Gammon India**[6] supports the case of the petitioner rather than that of the respondent. In paras 24 and 25 of the decision, this Court has held thus:

> "24. A perusal of the provisions of the Arbitration and Conciliation Act, 1996 shows that the statute envisages that

disputes can be raised at different stages and there can be multiple arbitrations in respect of a single contract. …… All these provisions show that there can be multiple claims and multiple references at multiple stages.

25. Filing of different claims at different stages of a contract or a project is thus permissible in law, inasmuch as the contract can be of a long duration and the parties may wish to seek adjudication of certain disputes, as and when they arise. Despite this permissibility, multiplicity ought to be avoided as discussed hereinafter."

84. This Court proceeded, thereafter, to advise against multiple arbitrations in respect of disputes arising under the same contract/agreement, to avoid confusion and delay. Thereafter, the Court proceeded to rely on **Dolphin Drilling**[27] and went on to hold, in para 33 thus:

"33. A perusal of the above finding of the Supreme Court clearly shows that the Court has expressed its displeasure about the arbitration process becoming a highly expensive and time-consuming means for resolution of disputes. Owing to the wording of the clause, in the said case, the Supreme Court referred the parties to arbitration for the second time. The underlying ratio of **Dolphin (supra)**, on a careful reading, is that all disputes that are in existence when the arbitration clause is invoked, ought to be raised and referred at one go. Though there is no doubt that multiple arbitrations are permissible, it would be completely contrary to public policy to permit parties to raise claims as per their own convenience. While provisions of the CPC do not strictly apply to arbitral proceedings, the observations of the Supreme Court in **Dolphin (supra)** show that when an arbitration clause is invoked, all disputes which exist at the time of invocation ought to be referred and adjudicated together. It is possible that subsequent disputes may arise which may require a second reference, however, if a party does not raise claims which exist on the date of invocation, it ought not to be given another chance to raise it subsequently unless there are legally sustainable grounds. This is necessary in order to ensure that there is certainty in arbitral proceedings and the remedy of

arbitration is not misused by parties. The constitution of separate arbitral tribunals is a mischief which ought to be avoided, as the intent of parties may also not be *bona fide*."

85. Thereafter, this Court proceeded to express the following opinion:

> "i. In respect of a particular contract or a series of contracts that bind the parties in a legal relationship, the endeavour always ought to be to make one reference to one Arbitral Tribunal. The solution proposed by the Supreme Court (Aftab Alam, J.,) in paragraph 9 of **Dolphin (supra)** i.e., to draft arbitration clauses in a manner so as to ensure that claims are referred at one go and none of the claims are barred by limitation, may be borne in mind. The said observation in **Dolphin (supra)** reads:
>
> > "9. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that **the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/ cancellation of the agreement** and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non-arbitrable."
>
> ii. If under a contract, disputes have arisen and the arbitration clause is to be invoked, at different stages, the party invoking arbitration ought to raise all the claims that have already arisen on the date of invocation for reference to arbitration. It would not be permissible for the party to refer only some disputes that have arisen and not all. If a dispute and a claim thereunder has arisen as on the date of invocation and is not mentioned, either in the invocation letter or in the terms of reference, such claim ought to be held as being barred/waived, unless permitted to be raised by the Arbitral Tribunal for any legally justifiable/sustainable reasons.

iii. If an Arbitral Tribunal is constituted for adjudicating some disputes under a particular contract or a series thereof, any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same Tribunal. The Arbitral Tribunal may pronounce separate awards in respect of the multiple references, however, since the Tribunal would be the same, the possibility of contradictory and irreconcilable findings would be avoided.

iv. In cases belonging to Category (iii) involving different parties and the same organisation, where common/overlapping issues arise, an endeavor could be made as in the ***IRCTC cases (supra)*** to constitute the same Tribunal. If that is however not found feasible, at least challenges to the Awards rendered could be heard together, if they are pending in the same Court.

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vi. If there are multiple challenges pending in respect of awards arising out of the same contract, parties ought to bring the same to the notice of the Court adjudicating a particular challenge so that all the challenges can be adjudicated comprehensively at one go. This would ensure avoiding a situation as has arisen in the present case where Award Nos.1 and 3 have attained finality and the challenge to Award No.2 continued to remain pending."

86. I have no difficulty in agreeing with the principles enunciated in para 33 of the **Gammon India**[6], subject, however, to the clear understanding that these principles, as derived from the judgment of the Supreme Court in **Dolphin Drilling**[27], would apply where, as in **Dolphin Drilling**[27], invocation of the arbitration at the first instance is required, per contract, to embrace all existing claims. It may not, however, be possible to postulate this as an inflexible rule in a case where the arbitration clause in the agreement between the parties *does not expressly require reference of all existing disputes to arbitration*

at the initial stage. Where, however, the arbitration clause *requires the notice invoking arbitration to include "all disputes"*, the expression "all disputes" must necessarily embrace all disputes in existence on the date when the notice invoking arbitration is issued. In other words, if such an express stipulation is contained in the arbitration clause, the party invoking arbitration cannot seek piecemeal reference of disputes which were in existence on the date when arbitration was initially invoked, and refer them to arbitration at different stages. It is required to include, in the notice invoking arbitration, all existing disputes. Disputes, which arise thereafter can, however, of course be referred to arbitration as and when they arise, as **Dolphin Drilling**[27] itself clarifies.

87. This principle, however, would have no applicability in a situation in which the two sets of claims being sought to be referred to arbitration are by different parties to the contract. Neither **Dolphin Drilling**[27] nor **Gammon India**[6] can, in my view, be understood to me that, if there are two parties to a contract, one party is necessarily required to refer its counterclaims to arbitration at the time of reference to arbitration, by the other party, of its claims, so that the claims and counterclaims could be adjudicated together "at one go". Such a proposition would, in my view, be fundamentally erroneous in law.

88. A party invoking arbitration cannot bifurcate its claims, choosing to refer some claims at one stage and others at another, if the contract requires arbitration to be invoked in respect of "all disputes"

at the initial stage. Even in such a situation, however, the invocation of arbitration by one party to a contract and the consequent reference of the claims of that party to arbitration would not require, of necessity, the opposite party to also simultaneously refer its counter claims to arbitration. Such a requirement would create chaos in the arbitral process. One may easily visualize a situation in which, for example, the claims of one party (let us say, party A) may involve several contested facts and issues, whereas the claim of the other party (say, party B) may be, for example, a simple claim for interest. Can it be said that party A would be bound to refer, to arbitration, all its claims along with the reference to arbitration of the claims of party B? Even if the arbitration clause between party A and party B requires all disputes to be referred to the Arbitral Tribunal at one go, that, in my view, can only mean that all disputes *raised by any one party* would have to be referred simultaneously to arbitration. The reference, by one party to the contract, of its disputes to arbitration, cannot bind the other party to simultaneously, or even proximately, also refer its disputes to arbitration, whether as claims or counter-claims.

89. Of course, in the present case, as I have already noted, the contract between the parties did not require all disputes to be included in the notice invoking arbitration, unlike the situation which existed in **Dolphin Drilling**[27]. There was no embargo, therefore, on the petitioner referring its claims to arbitration at a later stage – or even at a much later stage – provided the claims were within time.

90. The submission, of Mr. Sibal, that the petitioner ought to have referred its claims to arbitration simultaneously with the reference of the claims of the respondents is, therefore, rejected.

91. Even otherwise, in the peculiar facts of the present case, where the counter claims were raised by the petitioner before the learned Arbitral Tribunal, struck off the record and, thereafter, liberty was reserved with the petitioner to seek all remedies available in law, I do not think the petitioner can be non-suited on the ground that it did not initiate the arbitral process, in respect of its claims, prior to the notice dated 6th May, 2020.

Re. Contention that the petitioner was disentitled from seeking reference of its claims to arbitration, as the petitioner's counter claims had been struck off the record by the learned Arbitral Tribunal

92. To support this contention, Mr. Sibal has sought to place reliance on the judgment of the Supreme Court in **Srei Infrastructure Finance Ltd. v. Tuff Drilling Ltd.**[12]

93. The facts before the Supreme Court, in the said case, were as follows. Tuff Drilling Ltd. ("Tuff", in short) filed an application under Section 11 of the 1996 Act, for referring disputes, relatable to the contract between Srei Infrastructure Finance Ltd ("Srei") and Tuff to arbitration. As an arbitrator was appointed, the Section 11 petition was dismissed as not pressed. The arbitrator directed Tuff to file its statement of claim. On failure of Tuff to do so, the arbitrator terminated Tuff's claim under Section 25(a) of the 1996 Act.

94. Tuff filed an application seeking recall of the said order, also explaining the delay in filing statement of claim. Srei objected to the maintainability of the application on the ground that, once the proceedings stood terminated under Section 25(a), the Arbitral Tribunal had become *functus officio*. This objection was upheld by the learned Arbitral Tribunal, and, consequently, the application of Tuff was rejected on 26th April, 2012.

95. Tuff filed a revision application before the High Court of Calcutta. The High Court allowed the revision application, holding that the Arbitral Tribunal enjoyed the power to recall its order. The matter was, therefore, remanded to the Arbitral Tribunal to decide the application of Tuff, for recall of the order dated 12th December, 2011, terminating the arbitral proceedings. Aggrieved by this decision, Srei appealed to the Supreme Court.

96. The Supreme Court delineated the issues which arose for consideration thus:

> "**12.1.** (*i*) Whether the Arbitral Tribunal which has terminated the proceeding under Section 25(*a*) due to non-filing of claim by the claimant has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant?
>
> **12.2.** (*ii*) Whether the order passed by the Arbitral Tribunal under Section 25(*a*) terminating the proceeding is amenable to jurisdiction of the High Court under Article 227 of the Constitution of India?
>
> **12.3.** (*iii*) Whether the order passed under Section 25(*a*) terminating the proceeding is an award under the 1996 Act so

as to be amenable to the remedy under Section 34 of the Act?"

97. The Supreme Court held, on a conjoint reading of Section 23(1) and Section 25 that, even after terminating the proceedings, on the party adversely affected showing sufficient cause, the Arbitral Tribunal was empowered to accept the statement of claim and recall the order terminating the proceedings. In view thereof, the Supreme Court held that other issues did not survive for consideration.

98. Clearly, the issues before the Supreme Court in **Srei Infrastructure**[12] have no similarity whatsoever, with the issue arising in the present case. I am unable to understand how the said decision is being cited for the proposition that, once the learned Arbitral Tribunal has struck the petitioner's counter claim off the record, the petitioner could not file the said counter claims substantively as fresh claims referable to arbitration.

99. To my mind, in the absence of any inhibiting factor which finds specific place in the 1996 Act, or in any judicial authority, the request for reference of the claims of the petitioner to arbitration cannot be denied. In its judgment in **Vidya Drolia v Durga Trading Corporation**[28], the Supreme Court has examined all contours of this issue in great and exhaustive detail. The said decision – which I have also had an occasion to examine in some detail in **Mahindra Susten v. NHPC Ltd.**[29] – holistically read, requires advocates reference, to arbitration, of nearly every dispute that could be raised, except where

[28] **(2021) 2 SCC 1**
[29] **2021 SCC OnLine Del 3273** (paras 30 to 37)

the subject matter of the dispute is inherently non-arbitrable in nature, such as cases relating to sovereign rights, national security or intellectual property rights *in rem*. While holding that issues relating to maintainability and arbitrability of the dispute may be examined by the Section 11 Court, the Supreme Court has held that these issues, too, ought appropriately to be left for decision to the Arbitral Tribunal.

Re. Objection regarding non-compliance with Section 26.4

100. Mr. Sibal has also opposed the maintainability of the present petition on the ground that the petitioner has not exhausted the pre-arbitration protocol as envisaged by Clause 26.4 of the ACAs. This Clause contemplates mutual discussion between the parties, within 30 days of receipt of written notice from one party to the other, setting out the particulars of the dispute or claim. The issuance of the notice of reference, invoking the arbitral process, is envisaged only where resolution of the dispute through mutual discussion does not take place within 30 days of issuance of such notice.

101. Clause 26.4 does *not* require issuance of a notice, by one party to the other, calling on the other party *to engage in mutual discussion*. All it states that an attempt at resolving the dispute by mutual discussion should be made within 30 days from receipt of the notice setting out the dispute. The petitioner had served a Section 21 notice on the respondent on 6th May, 2020, setting out its claims. In its reply, dated 14th May, 2020, the respondent questioned the very maintainability of the petitioner's claims and the referability of the

claims to arbitration. That apart, Mr. Sharma has correctly pointed out that the claims of the petitioner were set out, prior to the notice dated 6th May, 2020, even in OMP (Misc) (Comm) 290/2019. The respondent had, in no uncertain terms, questioned the claims of the petitioner, even on merits, at every stage. In such circumstances, relegating the parties to any mutual discussion, at this stage, would undoubtedly be an empty formality as Mr. Sharma correctly submits.

102. This issue is no longer *res integra*. A similar objection was rejected by the Supreme Court in paras 4 and 5 of the report in **Demerara Distilleries**[17] thus:

> "**4.** *The respondent Company further contends that invocation of the arbitration clause, even if the same is held to be applicable, is premature as under Clause 3 of the Agreement, differences are required to be resolved first by mutual discussions, followed by mediation, and, only on failure of mediation recourse to arbitration is contemplated*. It is also contended that the disputes raised are not arbitrable inasmuch as what the petitioners really want is the winding up of the Company. It is further submitted that the respondent Company had initiated a proceeding alleging oppression and mismanagement in the administration of the joint venture company, which is presently pending before the Company Law Board. It is stated that, in the said proceedings, the petitioners have appeared and sought reference to arbitration under Section 8 of the Act. All the aforesaid facts have not been stated in the application/petition under Section 11(6) of the Act. It is on the aforesaid broad basis that the assertions and the claims made in the present petition have been sought to be resisted by the respondent.
>
> **5.** *Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not merit any serious consideration. The*

> *elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality*. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application. Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration."
>
> (emphasis supplied)

103. In **Swiss Timing Limited**[18], the Supreme Court held that, where the dispute between the parties could not be settled despite exhaustive correspondence between them, the invocation of arbitration could not be treated as premature.

104. **NHAI v. PATI-BEL (JV)**[15] and **NHAI v. Bumihiway**[13], on which Mr. Sibal relied, deal with arbitration agreements which envisaged multi-tiered consultative discussions, envisaged as pre-cursors to initiation of the arbitral process. Where, as in the present case, the agreement merely refers to mutual discussions, preceding invocation of arbitration, these decisions would have no applicability.

105. Haldiram Manufacturing Company[14], however, was undoubtedly a decision in which the arbitration clause merely envisaged "mutual discussions" with no specified procedure. **Haldiram Manufacturing Company**[14] cannot, however, be followed in the light of the subsequent enunciation of the law in **Demerara Distilleries**[17] with which **Haldiram Manufacturing Company**[14] is clearly in conflict. Besides after noticing **Haldiram Manufacturing Company**[14]**,** a Coordinate Bench of this Court in **Ravindra Kumar Verma**[19] expressed its opinion thus:

> "11. Whereas the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration and which is necessary for preserving rights as envisaged by Section 77 of the Act, however, since in many contracts there is an effective need of conciliation etc. in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc."

106. Ravindra Kumar Verma[19] has subsequently been followed by this Court in **Siemens**[20], **Baga Brothers**[21] and **JK Technosoft**[22] and by me in **Kunwar Narayan v. Ozone Overseas Pvt.Ltd.**[30]

[30] **MANU/DE/0227/2021**

107. The petitioner's request to refer its claims to arbitration cannot, therefore, be rejected for want of compliance with the pre-arbitratral protocol envisaged by Clause 26.4 of the ACAs.

Re. Objection to notice of invocation of arbitration not being in accordance with Clause 26.4

108. Mr. Sibal contends that Clause 26.4 of the ACAs envisages one of the parties issuing a notice to the other, invoking the arbitral process and nominating its arbitrator, the second party responding with its arbitrator within 30 days of such notice and, thereafter, the two arbitrators appointing a presiding arbitrator. The notice dated 6th May, 2020, from the petitioner to the respondent is not, therefore, in terms of Clause 26.4 as the petitioner has not appointed its arbitrator, but has instead sought reference of the dispute to the existing Arbitral Tribunal comprising Hon'ble Mudgal, Sodhi and Saron JJ. Such a request, submits Mr. Sibal, is not in accordance with Clause 26.4. It is not, therefore, a valid notice invoking arbitration within the meaning of Section 21 of the 1996 Act.

109. The contention appears, to me, to be no more than hairsplitting. Mr. Sharma has correctly pointed out that the reference of the petitioner's claims to the existing Arbitral Tribunal was merely in the nature of a "proposal". The submission is clearly borne out by para 31 of the notice, which expressly states that it was "*proposed* on behalf of our client that the reference be made to the same learned Arbitral Tribunal in order to avoid multiplicity of proceedings……" It cannot, therefore, be said that the petitioner had *appointed* the existing

Arbitral Tribunal as the Arbitral Tribunal to adjudicate the petitioner's claims. In fact, by suggesting reference of the petitioner's claims to the learned Arbitral Tribunal comprising Hon'ble Mudgal, Sodhi and Saron JJ, the petitioner evinced its intention to appoint Hon'ble Sodhi J as its arbitrator. Even if, therefore, the notice dated 6th May, 2020 may be regarded as not adhering strictly to the letter of Clause 26.4 of the ACAs, I am inclined to accept the submission, of Mr. Sharma, that the notice should be treated as one appointing Sodhi, J. as the petitioner's arbitrator.

110. I agree, however, with Mr. Sibal that there can be no automatic reference of the petitioner's claims to the existing Arbitral Tribunal comprising Hon'ble Mudgal, Sodhi and Saron, JJ. Party autonomy entitles parties to choose their arbitrators. On either party defaulting to the agreement in this regard, the other party can, in a Section 11 petition, only request the Court to appoint an arbitrator for the defaulting party. It cannot insist that the arbitration must be conducted by a pre-existing Arbitral Tribunal, unless the opposite party consents to that arrangement.

111. As worded, therefore, the prayer in the present petition, for referring the petitioner's claims to the existing Arbitral Tribunal comprising Hon'ble Mudgal, Sodhi and Saron, JJ, cannot be granted.

112. As the notice, dated 6th May, 2020, invoking arbitration also contained a similar proposal, and in view of my decision to accept the petitioner's submission that the notice should be treated as one by the

petitioner appointing Hon'ble Sodhi, J as its arbitrator, I am inclined to grant the respondent 30 days time [in line with Section 11(4)(a)[31] of the 1996 Act, though the provision may not strictly apply] to appoint its arbitrator, whereafter the two learned Arbitrators would appoint a presiding arbitrator.

113. At this point, it becomes necessary to revert to **Duro Felguera[8]**. **Duro Felguera[8]** also emanated from a Section 11 petition. In that case, the Supreme Court referred the disputes relating to all packages of the contract between the parties to the same Arbitral Tribunal. Mr. Sharma sought to rely on this decision to justify his request for reference of his client's claim to the existing Arbitral Tribunal comprising Hon'ble Mudgal, Sodhi and Saron, JJ. There is, however, a fundamental distinction between **Duro Felguera[8]** and the present case, to which Mr. Sibal has rightly drawn attention. **Duro Felguera[8]** was a case in which Duro Felguera, S.A. appointed its arbitrator, in accordance with the protocol contained in the agreement between the parties, and called upon Gangavaram Port Ltd. to do likewise. Gangavaram Port Ltd. defaulted. Duro Felguera, S.A, therefore, approached the Court. In such a situation, the right of Gangavaram

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[31] **Section 11: Appointment of arbitrators**:

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(4)If the appointment procedure in sub-section (3) applies and

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;

Port Ltd. to choose its arbitrator stood extinguished by virtue of Section 11(6) of the 1996 Act, as the choice of the arbitrator was then with the Court. The second party could not object to the arbitrator chosen by the Court. In the present case, however, the petitioner, in the notice dated 6th May, 2020, *did not* nominate its arbitrator. No occasion, therefore, arose for the respondent to do likewise. The petitioner sought reference of its claims *to the existing Arbitral Tribunal comprising Hon'ble Mudgal, Sodhi and Saron, JJ.* The respondent objected to the proposal. It is only by the present order that the said proposal is being treated as a proposal by the petitioner nominating Sodhi, J as its arbitrator. The right of the respondent to do likewise cannot, therefore, be denied. It is not open for this Court to thrust on the respondent any arbitrator, including Saron, J, despite the respondent having elected for Saron, J, as its arbitrator in the existing arbitration. That choice, must, in the first instance, rest with the respondent. I cannot, therefore, follow the course of action which was followed by the Supreme Court **Duro Felguera**[8] and refer the petitioner's claims for arbitration to the existing Arbitral Tribunal comprising Mudgal, Sodhi and Saron, JJ.

114. Save and except to this limited extent, the objection of Mr. Sibal regarding the prayer for referring the petitioner's claims to the existing three member Arbitral Tribunal, presided over by Mudgal, J is rejected.

Re. objection to filing of a single Section 11 petition

115. The sole surviving objection of Mr. Sibal is regarding the maintainability of a single arbitration petition, for reference of the disputes relatable to three ACAs, to arbitration. Interestingly, though the respondent had filed three Section 11 petitions before this Court, the statement of claim filed by the respondent before the learned Arbitral Tribunal was a single consolidated claim. The claim was trifurcated consequent on directions issued by the learned Arbitral Tribunal. Having said that, the decision in **Duro Felguera**[8] clearly requires independent arbitrations for each of the ACAs. At the same time, the mere fact that the petitioner has filed a consolidated Section 11 petition, instead of filing three separate petitions under Section11, cannot, in my view, be a ground to reject the petition altogether. I am fortified by the view expressed by the High Court of Bombay, speaking through Vazifdar, J (as he then was) in **United Shippers**[5], which reads thus:

> "**25.** Technically, there are three contracts between the parties viz. the contracts dated 25th March, 2003, 27th February, 2004 and the MOU dated 6th April, 2005. The agreements, however, are between the same parties, are identical in nature and the arbitration clause in the second agreement was incorporated in the MOU. In these circumstances, it would be far too technical to dismiss the application on the ground that three applications ought to have been filed. No prejudice whatsoever has been caused to the Respondent as a result of a composite petition. More important is the fact that the Applicant justifiably presumed that the Respondent was willing to have the disputes and differences under the three agreements referred to the same sole arbitrator and that the only point of disagreement was as to the name of the arbitrator. This is evident from the letter

dated 24th February, 2006, the relevant portion whereof I have extracted earlier."

Conclusion

116. For all the aforesaid reasons, the present petition stands disposed of in the following terms:

(i) The letter dated 6th May, 2020, from the petitioner to the respondent, shall be treated as a notice of arbitration, appointing Sodhi, J, as the petitioner's arbitrator, to arbitrate on the claims of the petitioner.

(ii) The respondent is directed to appoint its nominee arbitrator within 30 days of receipt, by the respondent, of an electronic copy of this judgment.

(iii) The two learned Arbitrators would, thereafter, proceed to appoint the presiding arbitrator.

117. Needless to say, should the parties be agreeable to the petitioner's claims being decided by the existing Arbitral Tribunal comprising Hon'ble Mudgal, Sodhi and Saron, JJ, that would be an eminently advisable course to pursue. It would also aid in expeditious disposal of the arbitral proceedings. This order would not inhibit the parties from doing so.

118. The present petition stands allowed in the aforesaid terms and to the aforesaid extent with no orders as to costs.

C. HARI SHANKAR, J.

OCTOBER 12, 2021
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