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

Reserved on: 12th May, 2021
Pronounced on: 18th May, 2021

\+ ARB. A. (COMM.) 15/2021, I.A. 5094/2021, I.A. 5095/2021 & I.A. 6229/2021

RAGHUVIR BUILDCON PVT. LTD. ..... Petitioner

Through: Ms. Meenakshi Arora, Sr. Adv.
With Mr. Purvish Jitendra Malkan, Ms. Dharita Purvish Malkan & Mr. Shrish Patel, Advs.

versus

IRCON INTERNATIONAL LIMITED ..... Respondent

Through: Ms. Anushka Sharda, Ms. Raveena Rai, Ms. Smriti Nair & Mr. Niranjan Sankar Rao, Advs.

\+ ARB. A. (COMM.) 16/2021, I.A. 5096/2021, I.A. 5097/2021 & I.A. 6227/2021

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Through: Ms. Meenakshi Arora, Sr. Adv.
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IRCON INTERNATIONAL LIMITED ..... Respondent

Through: Ms. Anushka Sharda, Ms. Raveena Rai, Ms. Smriti Nair & Mr. Niranjan Sankar Rao, Advs.

\+ ARB. A. (COMM.) 17/2021, I.A. 5098/2021, I.A. 5099/2021 &

I.A. 6228/2021

RAGHUVIR BUILDCON PVT. LTD. ..... Petitioner

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

J U D G E M E N T

% (Video-Conferencing)

1. By order dated 11th October, 2019 in OMP (I) (Comm) 336/2019, OMP (I) (Comm) 337/2019 and order dated 14th October, 2019 in OMP (I) (Comm) 343/2019, a learned Single Judge of this Court referred the disputes, arising between the appellant and the respondent, to arbitration by an eminent retired Chief Justice of the High Court of Jammu and Kashmir. The appellant is the claimant in the said arbitral proceedings, and the respondent before me is also the respondent therein. These appeals, under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act") impugn the order, dated 5th March, 2021, passed by the learned Arbitrator on applications, preferred before him by the respondent under Section 16 of the 1996 Act.

Factual Conspectus

2. The offer of the appellant, in response to the notice, dated 24th March, 2019, of the respondent, inviting tenders for certain civil works, was accepted by the respondent vide Letter of Acceptance dated 11th May, 2017. As required by the conditions stipulated in the notice inviting tender and the Letter of Acceptance, Performance Bank Guarantees No 17793BG00038, 17793BG00040 and 17793BG00041, dated 17th July, 2017, 31st August, 2017 and 31st August, 2017 respectively (collectively referred to, hereinafter, as "the BGs") and extended subsequently, were furnished by the appellant. Formal contracts, between the appellant and the respondent were executed on 26th September, 2017. Clauses 8.4, 50 and 50.2 of the General Conditions of Contract (GCC) are relevant, and the relevant parts thereof may be reproduced thus:

> "**8.4 Release of Performance Security:**
>
> (a) Performance Security shall be returned to the Contractor, subject to the issue of Completion Certificate by the Engineer in accordance with clause 65 of these conditions. This shall not relieve the Contractor from his obligations and liabilities, to make good any failures, defects, imperfections, shrinkages, or faults that may be detected during the defect liability period specified in the Contract.
>
> (b) *Wherever the contract is rescind(sic), the security deposit shall be forfeited and the Performance Security shall [be encashed]* and the balance work shall be got done independently without risk and cost of the failed contractor. The failed contractor shall be debarred from participating in the tender for executing the balance work.

If the failed contractor is a JV or a partnership firm, then every member/partner of such a firm shall be debarred from participating in the tender for the balance work either in his/her individual capacity or as a partner of any other JV/partnership firm.

(c) The Engineer shall not make a claim under the Performance Guarantee (PG) except for amounts to which Ircon International Limited is entitled under the contract (not withstanding and/or without prejudice to any other provisions in the contract agreement) in the event of :-

1. Failure by the contractor to extend the validity of the PG as described herein above, in which event the Engineer may claim the full amount of the PG.

2. Failure by the contractor to pay Ircon International Limited any amount due, either as agreed by the contractor or determined under any of the Clauses/Conditions of the agreement, within 30 days of the service of notice to this effect by Engineer.

3. *The contract being determined or rescinded under the provision of the GCC the PG shall be forfeited in full and shall be absolutely at the disposal of the Engineer*."

"**50.0 DETERMINATION OF CONTRACT DUE TO CONTRACTOR'S DEFAULT**

50.1 Conditions leading to determination of contract

1.1.1 If the Contractor

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h. fails to adhere to the agreed programme of work or fails to complete the works or parts

of the works within the stipulated or extended period of completion, or is unlikely to complete the whole work or part thereof within time because of poor record of progress; or

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In any such case the Engineer on behalf of the Employer may serve the Contractor with a notice in writing to the effect and if the Contractor does not, within 7 days after delivery to him of such notice, proceed to make good his default in so far as the same is capable of being made good, and carry on the work or comply with such instructions as aforesaid to the entire satisfaction of the Engineer, the Employer shall be entitled after giving 48 hours notice in writing to terminate the contract, as a whole in terms of sub-clause no. 8.4(b) and 8.4(c).

ii. In such a case of termination, the Employer/Engineer may adopt the following courses

a) Take possession of the site and any materials, construction plants, equipment, stores, etc.

b) Measure up the balance work from which the Contractor has been removed, and get it completed by another Contractor. The manner and method, in which such work is to be completed, shall be entirely at the discretion of the Engineer whose decision shall be final and binding.

c) Carry out the balance work from which the Contractor has been removed, by the employment of the required labour, materials, plants and equipment and other resources.

50.2 Entitlement of Employer/Engineer:

In cases described in sub- clause 50.1(ii) above, the Employer/Engineer shall be entitled to forfeit the security deposit and encash the Performance Security amount as a whole in terms of sub-clause no. 8.4."

(Emphasis supplied throughout)

3. In respect of packages SS3-A, SS3-B and SS2-C, of the work allotted to the appellant under the aforesaid contracts, the respondent issued, in the first instance, 7-day notices of default and, in the second, 48 hour notices of default, after which the contract was terminated. The dates of the 7-day notices, 48 hour notices and notices of termination, in respect of these three packages, may be depicted, in a tabular form, thus:

Package No.	**Date of 7-day notice**	**Date of 48-hour notice**	**Date of notice terminating the contract**
SS3-A	5th October, 2019	16th/17th October, 2019	22nd October, 2019
SS3-B	13th September, 2019	30th September, 2019	11th October, 2019
SS2-C	23rd September, 2019	5th October, 2019	11th October, 2019

For ease of reference, I would allude to the communications in Arb A (Comm) 16/2021 – essentially because arguments were addressed with reference to the record of that appeal.

4. The controversy, from which the present litigations emanate, owes its origin, in Arb A (Comm) 16/2021, to the aforementioned two communications, from the respondent to the appellant, dated 13th

September, 2019 and 30th September, 2019, both purportedly issued under Clause 50.1 of the GCC. The letter dated 13th September, 2019 alleged that several critical components of the work allotted to the appellant were still outstanding, and, therefore, granted 7 days' notice to the appellant to complete the outstanding work. *Inter alia,* the letter stated thus:

> "As you have:
>
> (i) Persistently disregarded instructions of IRCON and contravened provisions of the contract,
>
> (ii) Continuously failed to adhere to the agreed programme of work completion plan and
>
> (iii) Abandoned the contract by the de-mobilising all manpower from the site without intimating IRCON,
>
> In terms of clause 50.1 of General Conditions of Contract, you are hereby issued with a notice to proceed to make good your default and comply with the instructions to the entire satisfaction of IRCON within 7 days from the date of issue of this letter.
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> *****
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> You shall note that if we are not observing sufficient progress in making your defaults good during the notice period, further contractual action as per clause 50 of GCC shall be initiated."

5. The appellant replied, to the aforesaid notice dated 13th September, 2019, on 21st September, 2019. The reply did not find favour with the respondent which issued, on 30th September, 2019, the second, 48-hours' notice under Clause 50.1 of the GCC. After setting out the fact that the appellant had, earlier, been given a 7-day notice,

requiring the appellant to comply with the stipulations mentioned therein, the notice dated 30th September, 2019 went on to allege that "no significant improvement has been noticed within the said period" and that, "in spite of (the respondent's) repeated requests, (the appellant's) response remained lukewarm". The notice concluded thus:

> "The above inaction, persistent disregard to IRCON's instructions and overall poor progress of works at site are considered tantamount to violation of the contract conditions.
>
> Due to your persistent failure, you are hereby issued '48 hours' notice under clause 50 of GCC. You are advised immediately to comply the points raised in Seven days' notice with submission of revised program commensurate with augmented resources and mobilise all necessary resources to ensure compliance during this notice period under intimation in writing to this office.
>
> *In case of failing in above actions during the notice period, IRCON will be constrained to initiate action for termination of contract as per clause 50 of GCC.*"
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> (Emphasis supplied)

6. The issuance of the aforesaid 48-hour notices by the respondent, threatening initiation of action for termination of the contract, provoked the appellant to move this Court by way of OMP (I) (Comm) 336/2019, OMP (I) (Comm) 337/2019 and OMP (I) (Comm) 343/2019, under Section 9 of the 1996 Act. The only prayer, in each of these OMPs, was for stay against execution/encashment of the aforesaid three Bank Guarantees furnished by the appellant to the respondent. The averments in the OMPs asserted that there was no default, on the part of the appellant, in complying with the conditions

in the contract and that, therefore, the allegations in the notices dated 13th September, 2019 and 30th September, 2019, were incorrect.

7. During the pendency of the OMPs, the Bank Guarantees provided by the appellant were encashed by the bank, on the request of the respondent, and Demand Drafts, covering the amounts guaranteed, were provided to the respondent.

8. OMP (I) (Comm) 336/2019 and OMP (I) (Comm) 337/2019 were disposed of, by a coordinate Single Bench of this Court, vide order dated 11th October, 2019. As this order is pivotal to resolution of the controversy before me, it is necessary to extract, in full, paras 3 to 8 thereof, thus:

> "3. These are petitions under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') seeking a stay against encashment of Bank Guarantees issued by Karnataka Bank Limited, Vadodara Branch.
>
> 4. OMP (I) (Comm) 336/2019 relates to Bank Guarantee No. 17793BG00038 dated 17.07.2017, extended on 14.12.2018 and further extended on 26.06.2019, furnished by the petitioner to the respondent and OMP (I) (Comm) 337/2019 relates to Bank Guarantee No. 17793BG00041 dated 31.8.2017 extended on 27.11.2018.
>
> 5. The parties had entered into a contract dated 26.09.2017. Disputes have arisen between the parties with respect to the said contract. The respondent had given a seven days' notice dated 13.09.2019 to the petitioner under clause 50.1 of the GCC requiring him to secure the alleged defaults. On 30.09.2019, 48 hours' notice was given asking the petitioner to complete the work in accordance with the contract failing which the respondent was to initiate action towards termination of the contract.

6. After some hearing, the parties have agreed to appoint a Sole Arbitrator to adjudicate upon the disputes arising between the parties. Settlement has also been arrived at with respect to the invocation/encashment of the Bank Guarantees in question till the Arbitrator considers the application under Section 17 of the Act.

7. With the consent of the parties, the petitions are being disposed of as follows:

(i) Hon'ble Mr. Justice Badar Durrez Ahmad, former Chief Justice of Jammu & Kashmir High Court (Retired) is appointed as Sole Arbitrator to adjudicate the disputes between the parties.

(ii) The learned Arbitrator will give disclosure under Section 12 of the Act.

(iii) The fee of the Sole Arbitrator will be as per the Fourth Schedule of the Act.

(iv) Bank Guarantees issued by Karnataka Bank Limited Branch, Vadodra bearing no. 17793BG00038 dated 17.07.2017 and 17793BG00041 dated 31.8.2017, have been encashed and the Demand Drafts are stated to be in possession of the respondent. The said Demand Drafts will not be encashed and will be deposited with the office of the Learned Arbitrator.

(v) Within 15 days of commencement of the arbitration proceedings, the petitioner will move an application under Section 17 of the Act for appropriate interim order. Needless to say that the Arbitrator would be free to continue/modify/vacate the order passed by this Court today.

8. The demand draft lying with the respondent will not be encashed until further orders by the Arbitral Tribunal."

9. On 14th October, 2019, this Court also disposed of OMP (I) (Comm) 343/2019, by referring the dispute in the said case also to the same learned Arbitrator, i.e. Hon'ble Mr. Justice Badar Durrez Ahmad (retired).

10. The contracts were rescinded, by the respondent, on 11th October, 2019 and 22nd October, 2019, as already stated in para 3 *supra.*

11. Joint proceedings are being conducted by the learned Arbitrator, in all these three matters.

12. The appellant filed applications, before the learned Arbitrator, under Section 17 of the 1996 Act, as permitted by this Court in its orders dated 11th October, 2019 and 14th October, 2019 *supra*. These applications were disposed of, on 28th November, 2019, by the learned Arbitrator, by consent, directing that the demand drafts be returned by the respondent to the appellant, in exchange for Bank Guarantees, for equivalent amounts, to be furnished by the appellant in favour of the respondent, which were to be kept alive during the arbitral proceedings, with a restraint on the respondent from encashing the Bank Guarantees.

13. In the meanwhile, the appellant filed its Statements of Claims, in the three arbitral proceedings before the learned Arbitrator. For the purposes of the present appeal, I am not concerned with the

contentions, on merits, contained in the Statement of Claim, or the grounds on which the appellant sought to deny the allegation, of the respondent, that it was in breach of the contract. I deem it appropriate, however, to reproduce paras 93 to 95 of the Statements of Claim, thus:

> "93. The Claimant submits that, the Respondent immediately after 48 hours notice without terminating the contract under the terms of the contract approached the Claimant's Branch Manager of Karnataka Bank, Vadodara Branch for the encashment of the above said performance guarantee on 04/10/2019. Thus, the contract in question has been put to an end by the Respondent is illegal and bad in law.
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> 94. The claimant submits that, Clause-8 of General Conditions of contract of which the relevant provisions of clause 8.4 (b) and (c) are reproduced as under:
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> > 8.4 (b) where the contract is rescind, the security deposit shall be forfeited and the Performance Security shall (be encashed) and the balance work shall be got done independently without risk and cost of the failed contractor. The failed contractor shall be debarred from participating in the tender for executing the balance work.
> >
> > 8.4 (c) The Engineer shall not make a claim under the Performance Guarantee (PG) except for amounts to which IRCON International Limited is entitled under the contract (notwithstanding and/or without prejudice to any other provisions in the contract agreement) in the event of :-
> >
> > > 1. Failure by the contractor to extend the validity of the PG as described hereinabove, in which event the Engineer may claim the full amount of the PG.

> 2. Failure by the contract to pay Ircon International Limited any amount due, either as agreed by the contractor or determined under any of the Clauses/Conditions of the agreement, within 30 days of the service of notice to this effect by Engineer.
>
> 3. The contract being determined or rescinded under provision of the GCC the PG shall be forfeited in full and shall be absolutely at the disposal of the Engineer."
>
> 95. The claimant submits that, Clause 8.4 (b) provides for encashment of the performance Security only after the contract is rescinded, whereas in the present case the Respondent initiated action for invocation/encashment of the Bank Guarantee prior to termination/rescission of the contract. The contract was terminated/rescinded by the Respondent vide letter No. IRCON/3018/DFCCIL-CTP-12/SS3-SC/1086/1272 dtd. 11/10/2019."

The invocation and encashment, by the respondent, of the Bank Guarantees furnished by the appellant was, therefore, assailed on the ground that the contractual provisions permitted such encashment/invocation only consequent on termination/rescission of the contract, and not prior thereto. This, as the discussion hereinafter would reveal, is an important circumstance. Thereafter, the Statements of Claim filed by the appellant also went on to assail the termination, by the respondent, of the contract, on various grounds.

14. The respondent filed applications, before the learned Arbitrator, under Section 16 of the 1996 Act, essentially objecting to the inclusion, by the appellant, of the challenge to the termination, by the respondent, of the contract, in its Statements of Claim. The prayer

clause in the applications, therefore, prayed that the learned Arbitral Tribunal "be pleased to hold that it has jurisdiction to only adjudicate the disputes pertaining to the invocation of the BG and does not have jurisdiction to adjudicate any other disputes or claims raised by the Claimant in the present proceedings". A supplementary application was also preferred, by the respondent, before the learned Arbitrator, under Section 16 of the 1996 Act, praying that the learned Arbitral Tribunal acknowledge that it did not have the jurisdiction to arbitrate on claims, issues and disputes within the ambit of 'excepted matters' under Clause 73 of the GCC. Clause 73.0 of the GCC read thus:

> "**73.0 SETTLEMENT OF DISPUTES**
>
> All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be settled as under, provided that matters for which provision has been made in clauses 20.3, 36.5, 40.1, 40.2, 49.7, 50.0, 51.0, 59.0, 61.2 and 72.2 of General Conditions of Contract or in any clause of the Special Conditions of Contract shall be deemed as 'excepted matters' (matters not arbitrable) and decision of the Employer there are, shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of this clause."

15. The appellant filed replies before the learned Arbitrator, opposing the aforesaid applications under Section 16, preferred by the respondent.

16. The applications of the respondent, under Section 16, were disposed of, by the learned Arbitrator, vide a common Order dated 5th March, 2021, which forms the subject matter of challenge in these appeals. Essentially, the learned Arbitrator reasoned/held thus:

(i) It was true that the prayer, in the OMPs filed under Section 9, by the appellant, was for stay of encashment of the Bank Guarantees provided by it. However, it was also true that the prayer was predicated on the circumstances leading to the issue of the 48 hour notices by the respondent and the impending termination of the contract.

(ii) The use of the words "disputes have arisen between the parties with respect to the said contract", as contained in para 5 of the order dated 11th October, 2019 *supra*, passed by this Court in the OMPs obviously referred "to all the disputes which (had) been pointed out and brought to the notice of the court through the said section 9 petition", and could not "be limited to only the question of invocation of the PBG". In fact, the issuance of the 7 day and 48 hour notices by the respondent was because disputes had arisen between the appellant and the respondent, pertaining to the contract. The mere fact that limited interim measures had been sought by the appellant, in its Section 9 petitions, did not "circumscribe the arena of disputes between the parties".

(iii) The words "after some hearing, the parties have agreed to appoint a Sole Arbitrator to adjudicate upon the disputes arising between the parties" and "settlement has also been arrived at with respect to the invocation/encashment of the Bank Guarantees in question till the Arbitrator considers the application under Section 17 of the Act", as employed in para 6 of the order of this Court, plainly read, indicated "that there (had) been agreement/settlement on two aspects: (1) to appoint a Sole arbitrator to adjudicate upon the disputes arising between the parties; and (2) with regard to the invocation/encashment of the PBG which (had) been further elaborated in para 7(iv), 7(v) and 8 of the said order".

(iv) Para-7 (i) of the order clearly indicated that the "disputes between the parties" were to be adjudicated by the learned Arbitrator.

(v) Evidently, therefore, "the disputes between the parties, not limited to the issue of invocation of the PBG were, by consent of the parties, referred to (the) Tribunal for adjudication". As such, "the contention of the Respondent that the consent for arbitration given by the parties before the Hon'ble High Court of Delhi was only limited to the issue of legality of invocation of the PBG (was) untenable and (was) not borne out of the said order passed by the Hon'ble High Court".

(vi) At the same time it was also evident that only those disputes which existed at the time of the passing of the order dated 11th October, 2019 by this Court were referred to the Arbitrator for adjudication.

(vii) Consequently, disputes pertaining strictly to the termination, which happened subsequently, and claims arising solely out of the termination, were not, as they could not have been, referred to the learned Arbitrator for adjudication.

(viii) The respondent contended, before the Arbitrator, that he had no jurisdiction to arbitrate on the disputes as the conditions to arbitration, as set out in Clause 73 of the GCC had not been complied with. Relying, for the purpose, on Section 4 of the 1996 Act[1] in this context, the respondent sought to contend that, as consent to arbitration had been given, by it, before this Court, limited to the legality of invocation of the Bank Guarantee, the respondent had not waived its right to object to any other dispute, within the meaning of Section 4. This contention was not tenable, as the consent to arbitration was given, before this Court, not limited to the issue of invocation of the Bank Guarantees, "but covered all disputes which had reference in the claimant's petition under Section 9". As such,

[1] "**4. Waiver of right to object. –**
A party who knows that –
(a) any provision of this Part from which the parties may derogate, or
(b) any requirement under the arbitration agreement,
has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

qua all such disputes, the respondents right to object to the jurisdiction of the learned Arbitrator, on the ground of non-fulfilment of preconditions for arbitration as contained in the GCC, stood waived.

(ix) Specifically on the contention of the respondent that disputes and claims arising out of the termination of the contract could not be subject matter of arbitration in the proceedings before the learned Arbitrator, following on the order dated 11th October, 2019 of this Court, as they were not in existence when the order was passed, the learned Arbitrator held thus, in para 15 of the impugned order:

> "The fourth contention of the learned counsel for the respondent was that disputes and claims arising out of termination of the contract were not in existence when the Hon'ble High Court of Delhi passed its order dated 11.10.2019 and as such they cannot be the subject matter of arbitration in the present proceedings. *As already pointed out above, there is substance in this contention.* However, a detailed examination of the claims raised by the Claimant would have to be undergone so as to separate those claims or part of those claims which arises solely out of the termination of the contract. The exercise, in my view, would have to be done at the final stage after evidence has been laid. *The principle is clear that those claims which solely arise out of termination are not covered under the present reference by the Hon'ble High Court by virtue of its order dated 11.10.2019.* The actual separation and severance of such claims can only be done at a later stage as mentioned above."
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> (Emphasis supplied)

(x) The contention, of the respondent, that "excepted matters" were outside the scope of arbitration, was unexceptionable, in view of Clause 73.0 of the GCC. This contention was accepted on principle, with the observation that the extent to which the claims of the appellant were "excepted matters", if at all, could be assessed only after detailed scrutiny, once evidence in the case was complete. A specific issue to this effect had been framed.

17. The impugned order, therefore, ends with the following conclusions:

> "20.1 The contention of the respondent that the consent for arbitration given by the parties before the Hon'ble High Court of Delhi was only limited to the issue of legality of invocation of the PBG is untenable. At the same time, it is also evident that only those disputes which existed at the time of passing of the order dated 11.10.2019 by the Hon'ble High Court of Delhi were referred to this Tribunal for adjudication. Consequently, disputes pertaining strictly to the termination, which happened subsequently, and claims arising solely out of the termination, in my view, were not, as they could not have been, referred to this Tribunal for adjudication in the present proceedings.
>
> 20.2 The principle is clear that those claims which solely arise out of termination are not covered under the present reference by the Hon'ble High Court by virtue of its order dated 11.10.2019. However, the actual separation and severance of such claims can only be done as a later stage as mentioned above.
>
> 20.3 The waiver with regard to the pre-arbitration procedure specified in clause 73 of the GCC was not limited to the issue of invocation of the PBG but it also covered all the disputes which were opened before the Hon'ble High Court.

> 20.4 The reference to arbitration was by consent of the parties. This is specifically recorded in the said order dated 11.10.2019 passed by the Hon'ble High Court of Delhi. Therefore, the Respondent cannot contend that the pre-arbitration conditions spelt out in clause 73 of the GCC ought to have been complied with in respect of the disputes which were placed before the Hon'ble High Court.
>
> 20.5 It is correct that excepted matters are not arbitrable. The principle for deciding which matters can be regarded as "excepted matters" has also been explained above. However, to what extent the claims raised by the Claimant fall within the "excepted matters", if at all, could not be decided without a detailed scrutiny which would be possible only after considering all the documents and evidence on record. This enquiry has to be postponed till the stage and will be decided under issue no. 2.
>
> 20.6 The section 16 application as also the supplementary application under section 16 filed by the Respondent are disposed of in the aforesaid terms. This order shall govern not only these applications but also the parallel and virtually identical application in the matters arising out of OMP Nos. 337/2019 and 343/2019."

18. The appellant is essentially aggrieved by the finding, reflected in paras 20.1 and 20.2 of the impugned order, that disputes pertaining strictly to termination of the contract between the appellant and respondent, and claims arising solely out of such termination, were not amenable to adjudication in the arbitral proceedings before the learned Arbitrator. Additionally, Ms Meenakshi Arora, learned Senior Counsel for the appellant also assails the finding, in para 18 of the impugned Order, that claims prohibited by any clause in the SCC would, *ipso facto*, stand excluded from the ambit of the arbitration, as they would be "excepted matters". This finding, she submits, is in the

teeth of the law laid down by the Supreme Court in ***B.S.N.L. v Motorola India Pvt Ltd***[2].

Submissions of the appellant

19. I have heard Ms Meenakshi Arora, learned Senior Counsel for the appellant at length.

20. Ms Arora assailed the decision of the learned Arbitrator to exclude, from the scope of the arbitral proceedings, the termination of the contract between the appellant and the respondent and all claims solely arising from such termination. She contended that a holistic reading of the order, dated 11th October, 2019, of this Court, revealed that all "disputes", between the appellant and the respondent stood referred to arbitration, by consent of the parties. The fact that the respondent had issued, to the appellant, notices, proposing to terminate the contract, was also noticed in the said order. The order, therefore, encompassed, within the scope of the "disputes" referred to arbitration, the termination proposed by the 7-day and, thereafter, the 48-hour notices issued by the respondent to the appellant, even if no formal order of termination had been passed by then. Ms Arora pointed out that, having acted on the basis of the decision to terminate the appellant's contract by invoking the Bank Guarantees furnished by the appellant, issuance of a separate order of termination was a mere formality, and the respondent could not justifiably seek to exclude,

[2] **(2009) 2 SCC 337**

from the ambit of the arbitral proceedings, the legality of the termination of the appellant's contract. She also contended that, in fact, the act of invocation of the Bank Guarantees, by the respondent, *ipso facto* resulted in termination of the contract between the appellant and the respondent. For this purpose, she sought to read, in conjunction, Clauses 50 and Clause 8.4(c)(3) of the GCC. These clauses, pointed out Ms Arora, permitted invocation of the Bank Guarantee only in the event of rescinding or termination of the contract between the appellant and the respondent. By invoking the Bank Guarantees, therefore, she submits, the respondent had exercised its authority under Clause 8.4(c)(3), which was available only in the event of termination. To that extent, submits Ms Arora, the contracts stood terminated by the invocation of the Bank Guarantees. At any rate, she submits, the letter dated 30th September, 2019 concluded with the recital that the respondent would "be constrained to initiate action for termination of contract as per Clause 50 of GCC". Issuance of a formal termination order was, therefore, she submits, a mere formality, which was inevitable in the circumstances. She invited my attention to the specific ground, urged before the learned Arbitrator and recorded in para 7 of the impugned Order, to the effect that "the PBG could only be invoked post termination and since it had been invoked there was deemed termination prior to the passing of the order dated 11.10.2019 and therefore all disputes including the issue of termination was within the jurisdiction of this Tribunal".

21. I posed, to Ms Arora, a hypothetical query. If, I suggested, no formal order of termination would have been issued by the respondent, after invoking the Bank Guarantees, would that not have constituted an independent ground for the appellant's to challenge the invocation as being violative of Clause 50 read with Clause 8.4(c)(3) of the GCC, which contemplated invocation, or forfeiture, of the security furnished by the appellant in the form of the Bank Guarantees only *consequent upon* determination/rescinding of the contract? Ms Arora, even while acknowledging that, in such a circumstance, the invocation of the Bank Guarantees could be assailed on the said ground, submits that the issue for consideration was different, *viz.* the scope and nature of the disputes which were referred, by this Court, to arbitration on 11th October, 2019.

22. Ms Arora also relied on sub-sections (2A), (3) and (4) of Section 23[3] of the 1996 Act. She submits that the very intent of inserting, in Section 23, sub- sections (2A) and (4) [the former by Section 11 of the Arbitration and Conciliation (Amendment) Act, 2016 and the latter by Section 5 of the Arbitration and Conciliation (Amendment) Act, 2019] was to avoid multiplicity of litigation.

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[3] "**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.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral Tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

(4) The statement of claim and defence under the section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of the appointment."

Section 23(3) permitted rejection, of the prayer to amend the statement of claim, only on the ground of delay. Ms Arora also referred me to Section 2(9)[4] .

23. Ms. Arora further emphasised the comprehensive wording of the arbitration agreement between the appellant and the respondent, which covered "all disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract". The termination of the contract was also, therefore, she submitted, a dispute referable to arbitration. Ms Arora exhorts this Court to interpret the order, dated 11th October, 2019, referring the parties to arbitration, as encompassing the legality of the termination of the contract, which was a foregone conclusion, as well. She points out that this Court did not limit or circumscribe the issues, or disputes, while referring the parties to arbitration.

24. Ms Arora further submits that, if the legality of the termination, by the respondent, of the contract with the appellant, was not to be decided in the present arbitral proceedings, it would result in an incongruous situation, for various reasons. She submits that many of the claims of the appellant were predicated on the legality of the termination, and the appellant would stand foreclosed from having all

[4] "**2. Definitions. –**

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(9) Where this Part, other than clause (a) of section 25 or clause (a) of sub- section (2) of section 32, refers to a claim, it shall also apply to a counter-claim, and where it refers to a defence, it shall also apply to a defence to that counter-claim."

such claims arbitrated. Similarly, she submits, a piquant situation would arise, in which the legality of the invocation of the Bank Guarantees would be decided by one arbitral tribunal, and the legality of the termination, which is a contractual precondition for invoking the Bank Guarantees, would be decided by another. This would result in overlap of issues and multiplicity of proceedings which is required, at all costs, to be avoided. Ms Arora presses into service the judgement of the Supreme Court in ***State of Goa v. Praveen Enterprises***[5], which was also cited before the learned Arbitrator.

25. Ms Arora also invoked Section 4 of the 1996 Act, to contend that, having failed to question the jurisdiction of the learned Arbitrator to entertain the challenge, of the appellant in its Statement of Claim, to the legality of the termination of the contract, the respondent was statutorily estopped from challenging said jurisdiction at a later stage. She points out that the first traversal, to the jurisdiction of the learned Arbitrator to entertain the challenge, of the appellant, to the termination of the agreement, was in the application under Section 16, filed as late as on 6th May, 2020. This, she submits, indicates that the plea was by way of an afterthought, squarely barred by Section 4. She points out that this contention was specifically raised before the learned Arbitrator. Reliance has been placed, in this context, on para 39 of the judgement of the Supreme Court in ***B.S.N.L.***[2]. Ms Arora has also placed reliance on the judgement of a coordinate bench of this Court in ***A.K.M. Enterprises Pvt Ltd v. Ahluwalia Contract (India)***

[5] **(2012) 12 SCC 581**

Ltd[6] and invited my specific attention to para 2, 3, 5, 6, 10, 12 and 13 of the said decision.

26. Insofar as the findings of the learned Arbitrator regarding the "excepted matters" were concerned, Ms Arora is aggrieved by the finding that, where the claim is prohibited by any clause of the SCC, it would *ipso facto* fall within the definition of "excepted matters". This, she submits, is contrary to the law laid down in ***B.S.N.L.***[2] Ms Arora submits, however, that she would be satisfied if this finding, of the learned Arbitrator, is treated as *prima facie* in nature, reserving liberty to the appellant to establish, before the learned Arbitrator that, despite the said finding, any particular claim was amenable to arbitration.

27. Finally, Ms Arora emphasises the distinction between appeals under Section 37(2), *vis-à-vis* challenges under Section 34 to final awards. She submits that the constraints on the Court, while exercising jurisdiction under Section 34, would not necessarily apply under Section 37. Impliedly, therefore, Ms Arora seeks to contend that the jurisdiction of the Court under Section 37 is wider than that under Section 34. However, she has not drawn my attention to any judicial authority, supporting the submission.

Analysis

28. Scope of Section 37(2)[7]

[6] **2019 SCC OnLine Del 7614**

28.1 I may first address the last submission of Ms Arora that the jurisdiction of the Court under Section 37(2)(a) is wider than that under Section 34.

28.2 Unquestionably, Section 37 purports to confer appellate power. Sub-section (1) thereof provides for appeals against orders passed by the Court under Section 34; in other words, it is in the nature of a second rung of challenge. As against this, Section 37(2) is in the nature of a first appeal, and is provided against orders passed by the arbitral tribunal under Section 16(2) or 16(3), or under Section 17.

28.3 It is obvious that the legislature does not contemplate any difference in the extent of jurisdiction of the Court exercising appellate power under the two clauses of Section 37(2). In other words, the extent of appellate jurisdiction under Section 37(2)(a) and Section 37(2)(b) has to be regarded as equal, there being no statutory indication to the contrary.

28.4 Whether under clause (a) or (b), the order of the Arbitral Tribunal, which is amenable to challenge before the Court, is indisputably interlocutory in nature. Indeed, if the order is not interlocutory, and finally decides any issue, the present appeal would

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[7] "**37. Appealable orders. –**

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(2) An appeal shall also like to a court from an order of the arbitral Tribunal –

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17."

not be maintainable under Section 37(2), and the appellant would necessarily had to invoke the jurisdiction of the Court under Section 34, in view of the position of law enunciated in ***Indian Farmers Fertiliser Cooperative Ltd v. Bhadra Products***[8]**.**

28.5 If the submission of Ms Arora were to be accepted, it would imply that the jurisdiction of the Court to interfere, against an interlocutory order of the Arbitrator, would be more expansive than the jurisdiction available against the final award. To my mind, such an interpretation, of Section 37(2), would be incongruous and anomalous in equal measure. The scope of interference against interlocutory orders, classically, is far more circumscribed than the scope of interference against the final decision of the authority below. Section 37(2) cannot, in my view, be so read – in the absence of any statutory indication to that effect – as to turn this principle on its head.

28.6 Besides, Section 37 falls, like Section 34, in Part I of the 1996 Act and is, therefore, subject to the discipline of Section 5, which proscribes judicial intervention, in matters covered by Part I, except where also provided. The Supreme Court clearly held, in ***Bharat Sewa Sansthan v. Uttar Pradesh Electronics Corporation Ltd***[9], that "main objective of the Act is to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration *and to minimise the supervisory role of courts in the arbitral process* and to permit an arbitral Tribunal to use

[8] **(2018) 2 SCC 534**
[9] **AIR 2007 SC 2961**

mediation, conciliation or other procedures during the arbitral proceedings in settlement of disputes, etc.". Minimising of the supervisory role of courts in the arbitral process is, therefore, one of the sanctified aspirations of the Legislature, while enacting the 1996 Act.

28.7 In my considered opinion, this objective has to drive the approach of the Court, while exercising jurisdiction *under any of the provisions contained in Part I of the 1996 Act.* It must be borne in mind that the 1996 Act is an Act to foster and provide impetus to the arbitral process, and the sanctity thereof, and not an Act to clothe civil courts with jurisdiction. Exercise of jurisdiction by civil courts, under the 1996 Act has, therefore, necessarily to be extremely circumspect, keeping this guiding principle in mind.

28.8 This Court has, in its recent decision in ***Dinesh Gupta v Anand Gupta***[10] , held, on this aspect, as under (albeit in the context of Section 37(2)(b)):

> "40. Oftentimes, the question arises as to whether the jurisdiction of the High Court, under Section 37, is subject to the same circumscriptions as formed by its jurisdiction under Section 34. Mr. Nayar had submitted, before me, that it would be folly to restrict the jurisdiction of the High Court, under Section 37, by the principles which apply to Section 34. He had sought to emphasise that the jurisdiction vested in the Court by Section 37 was appellate, unlike Section 34. Appellate jurisdiction, by its very nature, Mr. Nayar had sought to submit, is wider than the jurisdiction which applies to consideration of objections against an arbitral award. Appellate jurisdiction encompasses, within its fold, the power

[10] **MANU/DE/1727/2020**

to review findings of fact and, in fact, the appellate court is, jurisprudentially, an extension of the original court, the appeal being a continuation of the original proceedings. As such, Mr. Nayar had sought to submit, the High Court, exercising appellate jurisdiction under Section 37, should not feel restricted by the constraints which govern its jurisdiction under Section 34.

41. Empirically viewed, Mr. Nayar's submissions appear attractive. There is, undoubtedly, qualitatively, a distinction between appellate jurisdiction and "judicial review jurisdiction". Appellate jurisdiction, equally, is classically regarded as an extension of original jurisdiction, the appellate proceedings being an extension of the original proceedings. The appellate court is, therefore, ordinarily, empowered to re-appreciate findings of fact entered by the original court. That the jurisdiction of the appellate court is much wider than the jurisdiction of a Court exercising judicial review, of any other kind, is also, classically, well settled.

42. Legal principles are, however, in every instance, required to be applied to the factual scenario, in which their application is invited. While, therefore, appreciating the jurisdiction of the High Court, under Section 37 of the 1996 Act, we are required to be aware of the fact that the order, interference with which is being invited, was passed by an arbitrator, or arbitral tribunal. The sanctity attached to arbitral awards, especially in the context of the 1996 Act-which is based on the UNCITRAL model-has, therefore, necessarily to be borne in mind, while exercising jurisdiction over the decision of the arbitrator, whether in the form of a final award, or an interim award under Section 17.

43. In the opinion of this Court, another important, and peculiar, feature of the 1996 Act, which must necessarily inform the approach of the High Court, is that the 1996 Act provides for an appeal against interlocutory orders, whereas the final award is not amenable to any appeal, but only to objections under Section 34. If the submission of Mr. Nayar, as advanced, were to be accepted, it would imply that the jurisdiction of the Court, over the interlocutory decision of the arbitrator, would be much wider than the jurisdiction

against the final award. Though, jurisprudentially, perhaps, such a position may not be objectionable, it does appear incongruous, and opposed to the well settled principle that the scope of interference with interim orders, is, ordinarily, much more restricted than the scope of interference with the final judgment.

44. Here, yet another peculiar dispensation, in the 1996 Act, apropos the scope of interference with the decision of the arbitrator, manifests itself. The proviso to Section 36 (3) ordains that the Court, while considering an application for grant of stay of a final arbitral award for payment of money, shall "have due regard to the provisions for grant of stay of a decree under the provisions of the Code of Civil Procedure, 1908". By reference, therefore, Order 41 Rule 5 of the CPC, which deals with stay, by the appellate court, of original decrees, stands incorporated into Section 36(3) of the 1996 Act. Though, therefore, the final arbitral award is not made amenable to appeal, by the 1996 Act, any prayer for stay of the arbitral award, that accompanies objections under Section 34, is required to be examined in the light of the provisions, in the CPC, governing stay of original decrees, in exercise of appellate jurisdiction. Though, for the purposes of this judgment, it is not necessary to psychoanalyse the legislative intent in providing for such a peculiar dispensation, the fact that applications for stay of final arbitral awards, are required to be considered on the basis of the principles governing stay, by appellate courts, under Order 41 Rule 5 of the CPC, indicate, to an extent, that the principles of Order 41 are also required to be borne in mind, while exercising appellate jurisdiction, under Section 37.

45. The 1996 Act is, preambularly, a fallout of the United Nation's Commission on International Trade Law (UNCITRAL), adopted in 1995 as the Model Law on International Commercial Arbitration. The Statement of Objects and Reasons, preceding the 1996 Act, stipulates, in paras 2 to 5 thereof, as under, in this respect:

> "2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial

Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practise. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of the disputes by recourse to conciliation. An important feature of the UNCITRAL Model Law and Rules is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contains provisions which are designed for universal applications.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with International Commercial Arbitration and Conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under:-

a. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

b. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

c. to provide that the arbitral tribunal gives reasons for its arbitral award;

d. to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

e. *to minimize the supervisory role of the courts in the arbitral process;*

f. to permit an arbitral tribunal to use mediation, conciliation or other procedure during the arbitral proceedings to encourage settlement of disputes;

g. to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

h. to provide a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

i. to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign awards.

5. *The Bill seeks to achieve the above objects."*

46. The Supreme Court has, in ***Chloro Controls (I) Ltd. v. Severn Trent Water Purification Inc.***[11], held that the legislative intent and essence of the 1996 Act "is to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and Geneva Convention". The afore-extracted passages, from the Statements of Object and Reasons of the 1996 Act has, necessarily, to guide the Court, while interpreting the provisions thereof. While on the point,

[11] **(2013) 1 SCC 641**

it may be noted that, in ***Bharat Sewa Sansthan v. U.P. Electronics Corporation Ltd.***[9], the Supreme Court has clearly held the "main objective of the (1996) Act" as being "to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimise the supervisory role of courts in the arbitral process and to permit an arbitral Tribunal to use mediation, the conciliation or other procedures during the arbitral proceedings in settlement of disputes, etc."

47. *There can be no gainsaying the proposition, therefore, that, while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the Court is required to maintain an extremely circumspect approach. It is always required to be borne, in mind, that arbitration is intended to be an avenue for "alternative dispute resolution", and not a means to multiply, or foster, further disputes.* Where, therefore, the arbitrator resolves the dispute, that resolution is entitled to due respect and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily, immune from judicial interference.

48. Interestingly, while examining, in ***Snehadeep Structures (P) Ltd. v. Maharashtra Small Scale Industries Development Corporation Ltd.***[12], the scope of the expression "appeal" as employed in Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993, the Supreme Court held that, "if the meaning of "appeal" is ambiguous, the interpretation that advances the object and purpose of the legislation, shall be accepted." Purposive interpretation, as has been noticed in ***Shailesh Dhairyawan v. Mohan Balkrishna Lulla***[13] and ***Richa Mishra v. State of Chhattisgarh***[14], has, over time, replaced the principle of "plain reading" as the golden rule, for interpreting statutory instruments.

49. In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as

[12] (2010) 3 SCC 34
[13] (2016) 3 SCC 619
[14] (2016) 4 SCC 1799

the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of security, by one of the parties to the dispute. The power, of the learned Sole Arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (b) of Section 17 (1) (ii) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. Whether, in exercising such jurisdiction, the arbitrator has acted in accordance with law, or not, can, of course, always be questioned. While examining such a challenge, however, the Court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken at the discretionary level, and at an interlocutory stage.

50. One may also refer, in this context, to Section 5 of the 1996 Act, which reads as under:

> "5. Extent of judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part, no judicial authority shall intervene except where so provided in this Part."

It is, no doubt, possible to argue that the intent, of Section 5, is to restrict judicial intervention, with arbitral proceedings, and orders passed therein, to the avenues for such interference, as provided by Part I of the 1996 Act, and not to restrict the scope of the Sections and the provisions contained in Part I. Perhaps. Section 5 remains, however, a clear pointer to the legislative intent, permeating the 1996 Act, that judicial interference, with arbitral proceedings, is to be kept at a minimum. Significantly, in ***Venture Global Engineering v. Satyam Computer Services Ltd.***[15], it was opined that the scheme of the 1996 Act was "such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act". In ***State of Kerala v. Somdatt Builders Ltd.***[16], a Division Bench of the Kerala High Court held that the jurisdiction of the Court, under Section 37 of the 1996

[15] **(2008) 4 SCC 190**
[16] **2012 (3) Arb LR 151 (Ker) (DB)**

Act, was also required to be interpreted in the light of the legislative policy contained in Section 5. I entirely agree.

51. The principle of least intervention by courts was held, in ***Enercon (India) Ltd. v. Enercon Gmbh***[17], to be well-recognised in arbitration jurisprudence, in almost all jurisdictions. In a similar vein, earlier in point of time, the Supreme Court held, in ***P. Anand Gajapathi Raju v. P. V. G. Raju***[18], that Section 5 "brings out clearly the object of the new Act, namely, that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the court's intervention should be minimal." Likewise, albeit in the context of Section 34, it was held, in ***McDermott International Inc. v. Burn Standard Co. Ltd.***[19], thus:

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

Though the above exposition of the law is in the context of Section 34, the principles enunciated therein embody the general philosophy underlying the 1996 Act. The italicised words, towards the conclusion of the paragraph, especially, would apply, with equal force, to challenges to interlocutory orders of arbitral tribunals, under Section 37, as they would, to challenges to the final award, under Section 34.

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[17] (2014) 5 SCC 1
[18] (2000) 4 SCC 539
[19] (2006) 11 SCC 181

> 52. Section 37 is, in a sense, a somewhat peculiar provision as, against the decision of the arbitrator, it provides for a first appeal, as well as a second appeal, to the High Court. Sub-section (1) provides for an appeal, to the High Court, from the decision of the Section 34 Court, before which the final award has, in the first instance, been tested. Sub-section (2), on the other hand, provides for a first appeal, against interlocutory orders of the arbitral tribunal under Section 16 or Section 17. There is, necessarily, a qualitative difference between these two challenges, though both would lie to the High Court. The challenge under Section 37(1), which is directed against a final award of the arbitrator/arbitral tribunal, is akin to a second appeal, as was observed by this Court in ***M.T.N.L. v. Fujitshu India Pvt. Ltd.***[20]. The challenge under Section 37(2), on the other hand, is directed against the decision of the arbitral tribunal and has therefore, in my opinion, necessarily to conform to the discipline enforced by Section 5. It would, therefore, be improper for a Court to treat an appeal, under Section 37 (2) of the 1996 Act, as akin to an appeal under the CPC, or as understood in ordinary-or extraordinary-civil law. An appeal against an order by an arbitrator, or by an arbitral tribunal, is an appeal sui generis, and interference, by the Court, in such appeals, has to be necessarily cautious and circumspect."

28.9 Ms Arora has not cited any authority which would contradistinguish the principles to be applied while exercising jurisdiction under Section 37(2), with those applicable to exercise of jurisdiction under Section 34. Given the overarching objectives of the 1996 Act, I am of the opinion that there is really no substantial difference between the two.

28.10 Consequently, this Court, while exercising jurisdiction under Section 37(2)(a) over the impugned order of the letter Arbitrator,

[20] **2015 (2) Arb LR 332 (Delhi)**

would only examine whether the order suffers from any patent illegality or perversity, or is otherwise unconscionable in law on facts. The Court does not, therefore, "re-arbitrate" the application decided by the learned Arbitrator. If the interpretation of the learned Arbitrator is plausible, I would be extremely loath to interfere therewith, especially at an interlocutory stage of the arbitral proceedings.

29. Pared down to its essentials, I do not really see that the impugned Order, or the view expressed by the learned Arbitrator therein, merits interference by the Court. The learned Arbitrator has held that the order of termination of the contract, as well as claims depended solely on the said order, could not constitute part of the arbitral proceedings, as the contract was terminated after the passing of the order, dated 11th October, 2019, by this Court. I am unable to understand how this interpretation could be said to be patently illegal, perverse, or would otherwise merit interference at the hands of the Court.

30. The jurisdiction of the learned Arbitrator would, unquestionably, be governed by the terms of the order dated 11th October, 2019, of this Court. Para 7 of the order, constituting the operative portion thereof, appointed the learned Arbitrator "to adjudicate the disputes between the parties". The expression "the disputes", etymologically, would have to refer to the disputes to which the earlier paras of the order allude. Para 5 of the order states thus:

> "Disputes *have arisen* between the parties with respect to the said contract".

The phrase "have arisen" is in the present perfect tense. It refers, therefore, to disputes which existed, *in praesenti*, on the date when the order was passed. In ***Dolphin Drilling v O.N.G.C.***[21], the Supreme Court held that the word "all disputes", as employed in the arbitration agreement in that case, "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". The notices terminating the contract, in the present appeals, were all issued *after* the passing of the concerned referral orders by this Court and were not, therefore, in existence on the date when the disputes were referred to arbitration. On those dates, the contract between the parties was, as yet, not terminated qua the concerned packages.

31. Apparently cognizant of this factual position, Ms Arora made a valiant effort to submit that, by invocation of the Bank Guarantees, the contract, *ipso facto*, stood terminated, even if no "formal" order of termination had yet been issued. The contention, quite obviously, has been merely to be stated to be rejected. As advanced, the contention is contrary both to Clause 50 as well as Clause 8.4 (b) and 8.4 (c)(3) of the GCC. A bare reading of these clauses makes it apparent that invocation of the Bank Guarantee is a consequence of termination. Clause 8.4 (b) states that "whenever the contract is rescind (*sic* rescinded?), the security deposit shall be forfeited and the

[21] **(2010) 3 SCC 267**

Performance Security shall be encashed. Parallelly, Clause 8.4(c)(3) permits the Engineer to make a claim under the Bank Guarantees "in the event of the contract being determined or rescinded under the provisions of the GCC", in which case "the PG shall be forfeited in full and shall be absolutely at the disposal of the Engineer". Invocation of the Bank Guarantees could not, therefore, in any event, terminate, *proprio vigore*, the contract between the appellant and the respondent. The submission of Ms Arora, if accepted, would amount to placing the cart before the horse.

32. As I have already noted hereinbefore, a pointed query was put, to Ms Arora, as to whether, if no order of termination had been issued after the Bank Guarantees were encashed, that, by itself, would not constitute a ground to challenge the encashment of the Bank Guarantees. Ms Arora answered in the affirmative. Significantly, even in the Statement of Claim filed before the learned Arbitrator, the appellant has challenged the invocation of the Bank Guarantees on the ground that, prior to termination of the contract, such invocation was not permissible. Having thus taken a stand, both in its pleadings before the learned Arbitrator as well as in response to the query posed by the Court, that the respondents were not entitled to invoke the Bank Guarantees before the contract was terminated, the appellant cannot, quite obviously, be urged to contend that, by invocation of the Bank Guarantees, the contract stood terminated. That would amount to canvassing a stand directly contrary to the pleadings before the learned Arbitrator which, quite obviously, is not permissible. While it

is open to a party to take alternative, contrary, pleas, a party cannot advance a contention before a court which is directly opposed to the stand taken in the pleadings. In any event, Clause 8.4(b) and 8.4(c)(3) of the GCC completely eviscerate the contention of Ms Arora that the invocation of the Bank Guarantees itself amounted to termination of the contract.

33. I am, in fact, unaware of any contract in which it is open to a contracting party to terminate the contract by invoking the Performance Security or encashing the Bank Guarantee furnished in respect thereof. It is, in fact, difficult to conceive that any commercially sensitive contracting party would, willy-nilly, put his signature to a contract which permitted invocation of the Bank Guarantee even before the contract was terminated. Termination of the contract, axiomatically, requires a formal declaration to that effect, in writing by the party terminating the contract to the other contracting party. The contention of Ms Arora that, by invoking the Bank Guarantees furnished by the appellant, the respondent had effectively terminated the contract is, therefore, also contrary to the basic "common sense" of commercial contracts. It is, accordingly, rejected.

34. The fallout is, therefore, that, as correctly held by the learned Arbitrator, the contract was not terminated on the date of passing, by this Court, of its order of reference, i.e. on 11th October, 2019. Termination of the contract may have appeared imminent but, on

facts, could not be treated as inevitable. This Court referred, to arbitration, the disputes which "have arisen" between the parties as on that date. To that extent, the contention, of Ms Arora, that this Court had not limited or circumscribed the ambit of the disputes referred to arbitration, cannot be accepted. Clearly, the intent of the Court was to refer, to arbitration, only the disputes which had arisen, *till that date and which existed, as on that date*, and not disputes relating to events which were to take place in the future. No order terminating the contract having been issued by the respondent till the date of the order, the view, of the learned Arbitrator, that disputes relating to the legality of validity of the termination, or claims arising from such termination, were not arbitrable before him in the present arbitral proceedings, could not be regarded as suffering from patent illegality, or a view which was unconscionable either in fact or in law. At the very least, it is a plausible view, which is sufficient to dispel any attempt, by the Court, to interfere therewith.

35. No attempt was made by the appellant, even after the filing of the application under Section 16 by the respondent, to seek a clarification, from this Court, as to whether the "disputes" covered by the order dated 11th October, 2019, would encompass the termination of the contract which took place thereafter. In the absence of any such clarification, the learned Arbitrator cannot be faulted for the view expressed by him in the impugned Order.

36. The reliance, by Ms Arora, on Section 23(3) of the 1996 Act is, in my opinion, misplaced. Section 23(3) deals with the right of a party to amend or supplement the Statement of Claim or Statement of Defence during the course of the arbitral proceedings. No such application was filed by the appellant. Section 23(3) does not, consequently, even fall for consideration in the present case.

37. Similarly, Section 4 of the 1996 Act is also of no application whatsoever. A bare reading of the said provision makes it apparent that it caters to objections by one or the other party to the arbitration to raise objections regarding non-compliance with any requirement under the arbitration agreement. Quite obviously, this clause does not deal with objections regarding jurisdiction, or to the maintainability, or arbitrability, of claims. Moreover, Section 16 has not, statutorily, been made subject to Section 4 or to any other provision of the 1996 Act. No authority, for the proposition that an objection to maintainability of the claim, as being beyond the scope of arbitration, could be rejected merely because it was not taken immediately upon filing of the Statement of Claim, has been brought to my notice. The contention of Ms Arora that the plea of non-arbitrability, in the presently pending proceedings before the learned Arbitrator, of the legality of the termination by the respondent of the agreement with the appellant, was an "afterthought" and had, therefore, to be rejected as belated, cannot, therefore, be accepted. Equally, I am unable to subscribe to the contention of Ms Arora that, by operation of Section

4, the respondent was estopped from raising the said plea, or that the respondent has waived its right to do so.

38. ***Praveen Enterprises***[5], too, in my view, cannot help the appellant; rather, it may, properly read, militate against the stand canvassed by Ms Arora. Para 11 of the said decision, on which Ms Arora placed especial reliance, reads thus:

> "11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But *where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes*."
>
> (Emphasis supplied)

Para 11 of the decision in ***Praveen Enterprises***[5] would be better appreciated if read in conjunction with para 12, which may be reproduced, therefore, thus:

> "12. Though an arbitration agreement generally provides for settlement of future disputes by reference to arbitration, there can be "ad hoc" arbitrations relating to existing disputes. In such cases, there is no prior arbitration agreement to refer future disputes to arbitration. After a dispute arises between the parties, they enter into an arbitration agreement to refer that specific dispute to arbitration. In such an arbitration, the arbitrator cannot enlarge the scope of arbitration by permitting either the claimant to modify or add

> to the claim or the respondent to make a counterclaim. *The arbitrator can only decide the dispute referred to him, unless the parties again agree to refer the additional disputes/counterclaims to arbitration and authorise the arbitrator to decide them*."
>
> (Emphasis supplied)

Though rendered in the context of *ad hoc* arbitrations, the concluding sentence in the afore extracted para 12 of the judgement in ***Praveen Enterprises***[5] applies, *mutatis mutandis*, to the present case, and also aids in appreciating the extent to which para 11 would apply.

39. The learned Arbitrator has taken the view that the order, dated 11th October, 2019, referred, to him, only disputes which were in existence on that date and did not, therefore, cover the legality of the termination order which was yet to be issued. The view is, in my view, undoubtedly plausible.

40. The sequitur would be that the disputes referred to the learned Arbitrator would only be those disputes which were existing, in *praesenti*, on 11th October, 2019, when the order was passed by the Court. Packages SS3-B and SS2-C were terminated on 11th October, 2019, but a reading of the order passed by this Court, on the said date, indicates that, at the time of passing the order, the order of termination had yet to be served on the appellant. I may note, here, that it is nobody's case – and, indeed, Ms Arora, too, does not advance the initial submission – that this Court was seized with the fact that the contract already stood terminated, qua these packages. Indeed, a reading of the order dated 11th October, 2019, makes it apparent that,

till the passing of the said order, at least, no termination of the contract had taken place or, at the very least, that this Court was never made aware of any such order of termination. Qua Package SS2-C, the contract was terminated on 22nd October, 2019, after the passing of the order, by this Court, on 14th October, 2019. In any event, Ms Arora does not dispute the factual position that, at the time of passing of the concerned referral orders by this Court, the contract, qua the package(s) forming subject matter thereof, was yet to be terminated. The learned Arbitrator was, therefore, *prima facie* justified in taking the view that this Court did not refer, or intend to refer, for arbitration, the legality of the actual order of termination which came to be passed on 11th October, 2019 or 22nd October, 2019, or any claims arising as a result thereof.

41. Whether any other view was possible, or not, is not for this Court to deliberate upon. Any such exercise would transgress the authority vested in it by law. Once the Court finds that the view taken by the learned Arbitrator was a plausible view, then, given the pervading philosophy of the 1996 Act, which is to minimise interference, by Courts, with the arbitral process, the Court must necessarily step back and decline to interfere.

42. The expansive contours of the arbitration agreement, as contained in the GCC, too, cannot help the appellant. Undoubtedly, the arbitration agreement covers "all disputes and differences of any kind whatsoever arising out of or in connection with the contract…

whether before or after the determination of the contract". Ms Arora maybe right in her contention that the termination of the contract was also a dispute referrable to arbitration. The question is, however, not whether the dispute was referrable to arbitration, *but whether it had been referred to arbitration by this Court on 11th October, 2019 and 14th October, 2019*. As the Supreme Court observed in ***Praveen Enterprises***[5], once there was a specific reference to arbitration, the arbitration would have to abide by the terms of such reference, and only those disputes, which were referred to arbitration, could be arbitrated. The order, dated 11th October, 2019, specifically referred, to arbitration, disputes which "have arisen between the parties". To the same effect is the order dated 14th October, 2019. Plainly, the order of termination not having been passed till then, the legality, or otherwise, thereof, or any claims consequent thereto, could not be regarded as disputes which "had arisen", till then, between the parties. The jurisdiction of the learned Arbitrator having been circumscribed by the order of reference of this Court, no fault can be found with the interpretation, by the learned Arbitrator, that the reference did not encompass the legality, or otherwise, of the order of termination, which came to be passed later.

43. The challenge, by the appellant, to the impugned Order dated 5th March, 2021, insofar as it excludes, from the scope of the arbitral proceedings, disputes regarding the legality of the order of termination of the contract between the appellant and the respondent, as well as claims based on such termination, therefore, fails.

44. Insofar as the challenge to the finding, of the learned Arbitrator, regarding non-arbitrability of "excepted" matters, is concerned, while no patent error may be found even in that regard, Ms Arora restricts the prayer to an observation, by this Court, that the finding of the learned Arbitrator may be treated as *prima facie* in nature. To the limited extent, I see no objection to accede to the submission of Ms. Arora. While, therefore, not interfering with the finding, of the learned Arbitrator, that excepted matters were not amenable to arbitration, it is clarified that the finding would be treated as *prima facie* in nature. The appellant would, therefore, be at liberty, at the stage of final hearing before the learned Arbitrator, to argue against such *prima facie* finding. I am inclined to grant this much latitude to the appellant only as the impugned order has been passed at the interlocutory stage, and keeping in mind the interests of an expeditious resolution of the arbitral exercise.

Conclusion

45. Subject to the limited caveat in para 44 *supra*, the appeals are, consequently, dismissed *in limine*, with no orders as to costs.

C. HARI SHANKAR, J.

MAY 18, 2021