



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF JANUARY, 2026

BEFORE

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

CIVIL MISC. PETITION NO. 12 OF 2025

BETWEEN

M/S RE SUSTAINABILITY HEALTHCARE SOLUTIONS LIMITED
(A COMPANY REGISTERED UNDER THE
COMPANIES ACT, 1956)
HAVING ITS REGISTERED OFFICE AT
DOOR NO. 6-3-1089/G/10 AND 11,
GULMOHAR AVENUE, RAJ BHAWAN ROAD,
SOMAJIGUDA, HYDERABAD 500 082.
REPRESENTED BY ITS AUTHORIZED REPRESENTATIVE
MS. NEELCHAL AGRAWAL

.... PETITIONER

(BY SRI. K.N. PHANINDRA., SR., ADVOCATE FOR
SRI. RAHUL DEV S DESHAMUORE ., ADVOCATE)

AND



1. BRUHAT BENGALURU MAHANAGARA PALIKE
N.R. SQUARE,
BENGALURU - 560 002.
REPRESENTED BY ITS
DEPUTY COMMISSIONER (HEALTH)

2. BENGALURU SOLID WASTE MANAGEMENT LIMITED.
(A COMPANY INCORPORATED UNDER THE
COMPANIES ACT, 2013)
HAVING ITS REGISTERED OFFICE AT
30/1, 1ST AND 2ND FLOOR, UNI BUILDING,
THIMMAIAH ROAD, VASANTH NAGAR,
BENGALURU 560051.
REPRESENTED BY ITS MANAGING DIRECTOR.

.... RESPONDENTS

(BY SRI. PRASHANTH CHANDRA., ADVOCATE FOR R2;



SRI. SATYANAND B.S., ADVOCATE FOR R1)

THIS CMP IS FILED UNDER SECTION 11(6) OF THE ARBITRATION AND CONCILIATION ACT, 1996 PRAYING TO APPOINT A SOLE ARBITRATOR TO ADJUDICATE THE DISPUTES BETWEEN THE PETITIONER AND THE RESPONDENT IN TERMS OF ARTICLE 11.2 OF THE CONCESSION AGREEMENT DATED 11.08.2004 PRODUCED AS ANNEXURE A.AND ETC.

THIS CMP COMING ON FOR ORDERS AND HAVING BEEN RESERVED FOR ORDERS ON 12.12.2025, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:
CORAM: HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

CAV ORDER

1. The Petitioner is before this Court seeking for the following reliefs:

- a) *"Appoint a Sole Arbitrator to adjudicate the disputes between the petitioner and the Respondent in terms of Article 11.2 of the concession Agreement dated 11.08.2004 produced as Annexure-A;*
- b) *And/or pass such other orders as this Hon'ble Court may deem fit in the interest of justice and equity."*

2. The Petitioner and Respondent No.1 had entered into a concession agreement on 11.08.2004 for the development, operation and maintenance of an integrated Municipal Solid Waste (MSW) processing



facility, which was amended by a supplementary agreement dated 24.03.2009, under which various obligations were to be performed by both parties.

3. Alleging that Respondent No.1 had wrongfully terminated the concession agreement on 28.05.2016, the Petitioner had invoked the Arbitration Clause. The invocation not having been accepted by Respondent No.1, the Petitioner had approached this Court by filing a petition in CMP No.198/2016. Though the Arbitration Clause envisaged the appointment of three Arbitrators, this Court, at the request of both the parties, had appointed a sole Arbitrator to decide the disputes.
4. The sole Arbitrator passed an award on 03.05.2018, partly allowing the claim of the Petitioner and directing the payment of a sum of Rs.4,00,00,000/- as against the claim of Rs.1,08,44,03,582/-. The said award was challenged by the Petitioner in



A.S.No.159/2018 and by Respondent No.1 in A.S.No.163/2018. The III Additional City Civil and Sessions Judge, Bengaluru, allowed the petition filed by Respondent No.1 and set aside the arbitral award vide a common judgement dated 12.08.2020.

5. The said common judgement was challenged in MFA Nos.5111/2020 and 5232/2020. This Court allowed the said appeals and set aside the order passed under Section 34 and remitted the arbitration suits to the Commercial Court, Bengaluru, for reconsideration.
6. The Commercial Court reconsidered the petitions filed by the Petitioner and Respondent No.1 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A&C Act' for short). Com.A.S.No.159/2018 filed by the Petitioner was allowed vide judgement dated 28.02.2023 and the arbitral award dated 03.05.2018 was set aside.



Com.A.S.No.163/2018 filed by Respondent No.1 was dismissed. The Commercial Court has observed as under:

"52. *Section 34 of Arbitration and Conciliation Act 1996 Indicates that the power of the Courts is limited to setting aside the arbitral awards, strictly in terms of the specific grounds urged before the Court. The Act contains no provision that allows the Courts to either modify the arbitral awards or grant additional/alternative reliefs that the arbitral tribunal did not grant. The Act provides only two mechanisms for making changes in the arbitral award passed by the arbitral tribunal. The first being provided under Section 33, whereby the arbitral tribunal is empowered to make clerical and technical corrections in the arbitral award that it deems fit after receiving the request for the same from the parties to the proceedings. The second mechanism is under Section 34(4), whereby the Courts can adjourn the proceedings for setting aside arbitral awards and provide an opportunity to the arbitral tribunal to take appropriate actions to eliminate the grounds for setting aside such arbitral awards. Thus, even during the pendency of the proceedings under Section 34, the defects in the arbitral award can only be cured by the arbitral tribunal. In view of the above, it is clear that that power to make changes in the arbitral award only resides with the arbitral tribunal, and the Courts cannot make any such changes in the arbitral award under any circumstance whatsoever. The Courts should recognize that while opting to resolve disputes through arbitration, the parties consciously choose to exclude the Court's jurisdiction. Thus, the exercise of modifying or altering the arbitral award by the Courts not only goes against the scheme of the Act but also defeats the objective of the arbitration process. Therefore, after the dispute between the parties is resolved through arbitration, the Courts should recognize that their role is limited to setting aside arbitral awards based on the specific grounds enshrined under Section 34 and should*



refrain from making any modifications in the arbitral awards."

7. It is on that basis, contending that the matter would have to be again agitated before the arbitral Tribunal, that the Petitioner issued a legal notice on 03.11.2023, invoking the Arbitration Clause in Article 11.2 of the concession agreement and requesting Respondent No.1 to name a sole Arbitrator. Respondent No.1, though initially had indicated that the matter had been sent for legal opinion, did not thereafter respond to the legal notice. Thereafter, the Petitioner was informed on 18.05.2024 that the Bangalore Solid Waste Management Limited- Respondent No.2 had been incorporated. It is in that background that the Petitioner was directed to correspond with Respondent No.2. Despite the follow-up by the Petitioner with Respondent No.2 and a reminder notice having been issued on 29.08.2024, no positive response having been received. Hence,



the Petitioner is before this Court seeking for the aforesaid reliefs.

8. The submission of Sri K.N.Phanindra, learned Senior Counsel appearing for the Petitioner is that:

8.1. In view of the observations made by Section 34 Court Supra, the Petitioner, instead of choosing to file a further appeal under Section 37 of the A&C Act, has chosen to reagitate the matter before the Arbitral Tribunal.

8.2. It is his submission that, if the Section 37 Court were also to hold that the rights of the Petitioner had to be agitated before the Arbitral Tribunal, the Petitioner would be wasting valuable time. Similarly, it is his submission as regards approaching the Hon'ble Apex Court under a Special Leave Petition and as such, he submits that this Court could appoint an



Arbitrator so as to enable the parties to reagitate the issues before the Arbitral Tribunal.

8.3. Once an arbitral award has been set aside, a fresh notice under Section 21 of the A&C Act is not necessary in order to seek the appointment of an Arbitrator under Section 11 of the A&C Act. In this regard, he relies upon the decision of the Hon'ble Delhi High Court in ***M/s. Supercon Vs. Union of India***¹, more particularly, paras 4, 6 to 10 thereof, which are reproduced hereunder for easy reference:

"4. Against this award, the petitioner herein filed O.M.P.(COMM) 88/2021 under Section 34 of the Act, before the learned District Judge, Central Delhi. The petition was allowed by a judgment dated 25.11.2023 of the learned District Judge, Commercial Court-08, Central, Tis Hazari. The only ground upon which the award was set aside was that the learned arbitrator was ineligible to act and the appointing authority was also ineligible to make the appointment, in terms of Section 12 of the Act and the Schedules thereto, read with judgments of the Supreme Court in TRF Limited vs. Energo Engineering Projects Limited [(2017) 8 SCC 377] and Perkins Eastman Architects DPC vs. HSCC (India) Limited [(2020) 20 SCC 760].

6. The only objection taken by Mr. Prakash is that after the judgment of the learned Commercial Court

¹ ARB.P.NO.506/2024 DATED 23.04.2024



dated 25.11.2023, the petitioner has not invoked arbitration afresh in terms of under Section 21 of the Act.

7. Having heard learned counsel for the parties on this point, I am of the view that the objection is unmerited. The requirement of invocation of arbitration derives from Section 21 of the Act, which provides as follows:

"21. Commencement of arbitral proceedings. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

8. In the facts of the present case, the invocation was made prior to first arbitral proceedings. The Division Bench judgments of this Court in Ram Kumar vs. Shriram Transport Finance Co. Ltd. [2022 SCC OnLine Del 4268] and Govind Singh vs. Satya Group Pvt. Ltd. [2023 SCC OnLine Del 37] make it clear that the award rendered by a unilaterally appointed arbitrator or ineligible arbitrator, is itself a nullity. The position, therefore, is that the proceedings commenced by the original invocation have not come to a legal or valid end. When the matter is looked up from this angle, the relief sought is in fact for appointment of an independent arbitrator to conduct the same proceedings, which were commenced by the original invocation letter.

9. My attention is also drawn to a recent judgment of the Bombay High Court, which takes the same view. In Kirloskar Pneumatic Company Ltd. vs. Kataria Sales Corporation [Commercial Arbitration Petition No. 16/2023, decided on 21.03.2024], the Bombay High Court has summarised the position thus:-

"13 The argument of Mr. Dalal, will have to be appreciated in the aforesaid statutory scheme, as it is his contention that when an unilateral appointment of an arbitrator was frowned upon and resultantly, the award passed by such an arbitrator, who was de jure ineligible to act is set aside, once again the arbitration, will have to be invoked by issuing a notice under Section 21.



The above argument on its face is fallacious, since the petitioner has already forwarded a request to the respondent for referring the dispute, that had arisen between them to arbitration and the arbitral proceedings in respect of that dispute has commenced. Merely because the award passed by an ineligible arbitrator is set aside, is not sufficient enough to give new contour to the dispute, as the dispute between the parties still remain the same but now what is sought by the petitioner today, is appointment of a competent arbitrator to arbitrate the dispute and the petitioner expect the arbitrator to be eligible to act as such ie he shall be a neutral and independent person and his appointment is not in teeth of Section 12 of the Act of 1996 or schedule V and VII of the Act.

10. *I am in respectful agreement with the aforesaid view taken by the Bombay High Court. The alternative course, which would require a party in these circumstances to invoke arbitration afresh and for the arbitral proceedings to be thus "commenced" de novo, does not commend to me. It militates against the underlying objective of speedy and efficient resolution of disputes, which underpin the scheme of the Act."*

8.4. By relying on **Supercon's** case, his submission is that if an arbitral award is set aside, observing that the matter has to be reagitated before the Arbitrator, the proceedings will not commence *de novo*, but would have to be considered only with respect to the observations made by the Section 34 Court. In that background, he submits that no fresh



notice under Section 21 of the A&C Act is required to be issued.

8.5. He relies upon the decision of the Hon'ble High Court of Judicature at Bombay, Nagpur Bench in **Mohan Murali Vs. Shri Bhagwandas**², more particularly, paras 10, 11, 13, 14, 21 to 26 thereof, which are reproduced hereunder for easy reference:

10. *In view of the setting aside of the arbitral award dated 12.01.2019 by the learned District Judge, the applicant has now filed the present application under Section 11 (6) of the Act, 1996, seeking appointment of a fresh arbitrator to adjudicate the dispute between the parties.*

11. *Learned counsel for the applicant submitted that the learned Arbitrator failed to conduct the arbitration proceedings in accordance with the provisions of the Act, 1996. It is contended that the applicant had duly filed his statement of claim, supporting documents, and affidavit of evidence before the learned Arbitrator. However, despite the availability of such material on record, the learned Arbitrator did not adjudicate the dispute on merits as required under Section 25 of the Act, 1996.*

13. *Per contra, learned counsel for the non-applicant submitted that the present application under Section 11 (6) of the Act, 1996 is not maintainable in the absence of prior issuance of a*

² MCA No.136/2025, dated 17.10.2025,



legal notice invoking the arbitration clause. It is contended that before approaching this Court for appointment of an arbitrator, it was incumbent upon the applicant to comply with the procedural requirements under the Act, particularly by issuing a notice invoking the arbitration clause and calling upon the other party to concur in the appointment of an arbitrator.

14. *While the existence of an arbitration clause is not disputed by the non-applicant, it is submitted that the applicant has failed to adhere to the mandatory pre-requisites before invoking the jurisdiction of this Court under Section 11 (6) of the Act. The objection raised pertains not to the arbitrability of the dispute, but to the procedural lapse in approaching the Court prematurely, without exhausting the statutory process. The arbitration clause between the parties is not in dispute. The respondent contends that the arbitral award was set aside by the learned trial Court on the ground that the procedure contemplated under the Act, 1996 was not duly followed. The respondent has further raised a preliminary objection to the maintainability of the present application under Section 11 of the Act, 1996 asserting that in view of Section 21 a fresh notice invoking arbitration ought to have been issued by the applicant prior to seeking appointment of an arbitrator afresh. According to the respondent, in the absence of such a notice, the application is premature and not maintainable. In support of these submissions, reliance was placed on the following judgments:*

Arif Azim Company Limited v. Aptech Limited, reported in 2024(5) SCC 313; and M/s D.P. Construction v. M/s Vishvaraj

Environment Pvt. Ltd., decided on 06.07.2022 in Misc. Civil Application (Arbn) No. 31 of 2021.

21. *As regards the objection raised by the non-applicant regarding maintainability of the present application under Section 11 (6) of the Act, 1996,*



it is to be noted that the requirement of issuing a notice invoking the arbitration clause applies where arbitration is sought for the first time. In the present case, the arbitration clause had already been invoked, an arbitrator was appointed pursuant to judicial order, proceedings were conducted, and an award was passed, which was subsequently set aside by a competent Court. In this context Section 21 of the Act reads thus:

"Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

Therefore, the question of issuing a fresh notice under Section 21 of the Act does not arise. The legislative intent behind Section 21 is to mark the commencement of arbitral proceedings for the purpose of limitation as well as to provide procedural clarity. The respondent argues that, following the setting aside of the arbitral award, any further proceedings would amount to a fresh initiation of arbitration, thereby requiring the applicant to issue a fresh notice invoking arbitration. Once the award has been set aside, the logical consequence is revival of the dispute, and a fresh appointment under Section 11 (6) is permissible. The objection raised by the non-applicant is thus without merit.

22. *However, it is pertinent to consider whether the earlie invocation of arbitration which had led to the constitution of arbitral tribunal and pronouncement of an award loses its efficacy entirely upon the award being set aside. Judicial precedents have indicated that once an award is set aside under Section 34, the arbitration clause revives, and the parties are at liberty to reinstitute arbitration unless barred by limitation or other legal impediments In NBCC (India) Ltd. v. Zillion Infraprojects (P) Ltd., 2022 SCC OnLine Del 1774, the Delhi High Court observed that a fresh notice under Section 21 may not be necessary in every*



case where the award has been set aside, particularly where the arbitration clause subsists and the dispute remains unresolved. That said, the requirement of a fresh notice may be viewed differently depending on the facts of the case. Where the arbitral award is set aside due to procedural infirmities (e.g., violation of natural justice or failure to follow the agreed procedure), and not on merits, some courts have emphasized the need for re-invocation to ensure compliance with due process and procedural fairness.

23. *A fresh notice may not be required if original arbitration proceedings were validly initiated. As in such case the proceedings already initiated and original arbitration can be recommenced.*

24. *The Court has to consider if initial procedural failure (which led to the award being set aside) was due to lack of proper notice to other side under Section 34(2) (a) (ii). Thus in case if the setting be critical for new arbitrator, aside was a direct result of lack of notice, then a fresh notice would*

25. *A pragmatic approach needs to be adopted. Arbitration earlier, was duly initiated. The non-applicant took part in arbitration proceedings. Award was set aside on the ground other than legality and/or requirement of notice. Therefore, asking the applicant to issue fresh notice in the facts and circumstances of the case, would defeat the purpose of the Act, which is to avoid unnecessary delays and swift disposal of arbitrable disputes.*

26. *The decisions cited by the non-applicant, including Arif Azim Co. Ltd. v. Aptech Ltd., 2024 (5) SCC 313, are distinguishable on facts. Those decisions deal with pre-reference procedural non-compliance, whereas the present case pertains to a post-award situation where the award has already been annulled by the competent court.*

In view of the above discussion, this Court is of the opinion that the applicant is entitled to seek a



fresh reference of the dispute to arbitration under Section 11 (6) of the Act, 1996. The prior arbitral award having been set aside, the arbitration clause stands revived, and a fresh appointment is necessary to adjudicate the dispute afresh on merits, without issuance of fresh notice for appointment of Arbitrator.”

8.6. By relying on **Mohan Murali's** case, his submission is that once an arbitral award is set aside, the issuance of a notice under Section 21 of the A&C Act would be required only when the Arbitrator is sought to be appointed for the first time. Once an award is set aside, there would be no requirement to issue a fresh notice under Section 21 of the A&C Act. An appointment could be made under Sub-Section (6) of Section 11 of the A&C Act by this Court without the requirement of a prior notice.

8.7. He relies upon the decision of the Hon'ble Bombay High Court in **Kirloskar Pneumatic Company Ltd., Vs. Kataria Sales**



Corporation³, more particularly, paras 7 to 15 thereof, which are reproduced hereunder for easy reference:

"7. I have heard learned counsel Mr. Sunny Shah for the petitioner, who would justify the prayer in the petition and seek appointment of the Sole Arbitrator in the background facts. He is opposed in his submission by Adv. Dormaan Dalal representing Kataria Sales, who would raise a preliminary objection about the maintainability of the petition and according to Mr. Dalal it being 'pre-mature' since the petition is filed under Section 11 (6) without first invoking the arbitration clause under Section 21.

According to him, the dispute commences only from the date on which the request for arbitration is received by the other side, unless otherwise agreed between the parties. According to him, the arbitration clause do not contemplate 're-invocation of arbitration' and it is the submission of Mr. Dalal that without invocation, the proceedings under Section 11(6) are not maintainable.

Highlighting the scheme of the enactment, the submission is by now It is a fairly settled position of law that the cause for filing an application under Section 11, would arise upon the failure to make the appointment of arbitrator within period of 30 days from issuance of the notice by invoking arbitration. He would invoke the relevant observation of the Apex Court in case of BSNL v. Nortel Networks (India) Private Limited,

³ 2024 SCC Online Bom 941



(2021) 5 SCC 738 and in particular the following observation:

"An application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment."

He would also place reliance upon decision of the learned Single Judge of this Court in case of Associated Constructions v. Mormugoa Port Trust, (2010) 5 Mah 739 and another decision in case of Wadhwa Group Holdings Pvt. Ltd. v. Homi Pheroze Ghandhy (CARBAP No. 414 of 2019) dated 7/03/2022, to buttress his submission that when there is no invocation, the appointment of the arbitrator cannot be sustained.

Another decision delivered by me in case of RJ Shah and Co. Ltd. v. State of Maharashtra (CARBAP NO. 13 of 2021 is also relied upon by Mr. Dalal.

8. *In order to dispel the said contention, I must first turn my attention to the Scheme of the Act of 1996 and the procedure for appointment of Arbitrator (s).*

In light of an existing 'arbitration agreement' between the parties as contemplated under Section 7 of the Act, the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators.

This provision is however subjected to sub-Section (6) of Section 11, which provide for appointment of an arbitrator by the arbitral institution designated by the Supreme Court in case of International Commercial Arbitration or



by the High Court, in case of Arbitrations other than the International Commercial Arbitration in the following scenario:

"(6) Where, under an appointment procedure agreed upon by the parties,-

(a) A party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,"

9. *Chapter-III of the Arbitration and Conciliation Act, 1996 set out the ground for challenge and also set out the challenge procedure, once an arbitrator or arbitrators are appointed.*

Chapter-V of the Act relate to the Conduct of Arbitral proceedings and it includes provisions for determination of the rules of procedure, the place of arbitration, language, etc.

In this chapter, Section 21, which in normal parlance is referred to as 'invocation of arbitration', though this specific terminology is not part of the Section is to be found.

For the sake of convenience the Section itself deserve a reproduction.

"21. Commencement of arbitral proceedings. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a



request for that dispute to be referred to arbitration is received by the respondent."

10. *Reading of the Section would clearly indicate that the arbitral proceedings in respect of a particular dispute, commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent.*

In other words, Section 21 has fixed the date of commencement of the arbitral proceedings, premised on the arbitration agreement between the parties and Section 21 provide that the commencement applicant for referring the dispute to arbitration. shall be the date on which the respondent received a request from the

11. *The above procedure is normally understood as 'invocation of arbitration' proceedings ie, triggering of the process, which is accepted between the parties as a mode for settlement of the dispute/s that has arisen between the parties, to an arbitration agreement.*

When the above provision is read as it stands, it shall be applicable to all arbitration proceedings, unless it is otherwise agreed between the parties. The moment a request for referring a dispute to arbitration is received by one party from the other, it shall mark the commencement of arbitral proceedings.

12. *Upon receipt of such a notice at the end of the respondent, the applicant has triggered the arbitral proceedings, but if the party at the other end fails to act as required i.e. agree to the appointment of the arbitrator or a panel of arbitrators as decided between the parties and set out in the arbitration agreement, which comply the test of Section 7, or if the parties,*



who have appointed the respective arbitrator fail to reach a consensus, under the procedure, upon an application being preferred under sub-Section (6) of Section 11, the arbitrator/s shall be appointed to take the process of arbitration ahead.

Once an arbitral tribunal is constituted in this manner, follows the regime of arbitration, which is set out in chapter-V by filing of statement of claim and defence, hearing, appointment of an expert etc. and this proceeding would culminate on declaration of an award by the arbitrator under Section 31

13. *The argument of Mr. Dalal, will have to be appreciated in the aforesaid statutory scheme, as it is his contention that when an unilateral appointment of an arbitrator was frowned upon and resultantly, the award passed by such an arbitrator, who was de jure Ineligible to act is set aside, once again the arbitration, will have to be invoked by issuing a notice under Section 21.*

The above argument on its face is fallacious, since the petitioner has already forwarded a request to the respondent for referring the dispute, that had arisen between them to arbitration and the arbitral proceedings in respect of that dispute has commenced. Merely because use award passed by an ineligible arbitrator is set aside, is not sufficient enough to give new contour to the dispute, as the dispute between the parties still remain the same but now arbitrate what is sought by the petitioner arbitrator to the dispute tor to be eligible to act as such person and his appointment is today, is appointment of a competent and the petitioner expect the arbitrator he shall be a neutral and



independent not in teeth of Section 12 of the Act of 1996 or schedule V and VII of the Act.

14. *Dispute which in colloquial language is understood as a disagreement between two parties is often referred to as altercation, squabble, bickering etc. As per Cambridge dictionary the word dispute is defined as 'an argument or disagreement, especially an official one between e.g. workers and employers or two countries with a common border'*

The disagreement between the parties before me arose long back, when the respondent refused to pay the amounts due under the invoices and made only part payment.

This constrained the petitioner to invoke arbitration, and it must be clarified that when it is said that it invoked arbitration, what it did was it forwarded a notice to respondent apprising it about the amount due and payable under the Dealership Agreement between the parties, with respective obligations cast on each of them and which contained the clause, providing that any dispute that would arise between the parties shall be referred to and settled through Arbitration.

The only problem arose, is the appointment of an Arbitrator was unilaterally made by the petitioner and as such it was capable, of casting a doubt on the independence and impartiality of the arbitrator and hence not permissible in law.

Though the Sole Arbitrator unilaterally appointed continued with the proceedings and even declared an award dated 23/11/2023, it is set aside on 7/01/2023, by the competent Court on this very ground.



15. *In the sequence of events mentioned above, when the arbitration mechanism is already triggered and the proceedings have commenced upon the issuance of the notice by the petitioner to the respondent on 30/10/2018, and therefore when the petitioner now seek appointment of an independent and impartial arbitrator, through the mechanism of sub-Section (6) of Section 11, I do not deem it necessary that it should be preceded by a fresh notice under Section 21, though the respondent preferred to call it as 'Invocation notice', as the arbitration proceedings are already commenced and the respondent is aware about the existence of a dispute and also of the fact, that this dispute in terms of the agreement between the parties deserve to be resolved through an independent arbitrator.*

For the above, the submission of Mr. Dalal do not deserve any consideration and is rejected."

8.8. By relying on ***Kataria Sales Corporation's*** case, his submission is that in terms of the scheme of appointment of an Arbitrator under the A&C Act, invocation of the arbitration clause is only required to be made on the first occasion. Once an arbitrator has passed an award, the same is set aside by the competent Court, requiring the parties to reagitate the



matter before an Arbitrator and a fresh notice under Section 21 of the A&C Act is not required.

8.9. As regards the objections raised by the Respondents in their objections that an award having earlier been rendered, the claim of the Petitioner is barred by the principles of *res judicata*. His submission is that the Section 34 Court having categorically opined that it does not have the power to vary the arbitral award and it is only the arbitral Tribunal which can do so, the aspect of *res judicata* would not apply in the given facts in support of this contention.

8.10. He relies upon the decision of the Hon'able Apex Court in ***Bharat Sanchar Nigam Limited and Another Vs. Nortel Networks India Private Limited***⁴, more particularly,

⁴ 2021 (5) SCC 738



paras 29 to 34 and 45 to 47 thereof, which are reproduced hereunder for easy reference:

"29. *The 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 which came into force with effect from 23-10-2015. The said Amendment was based on the recommendations of the 246th Report of the Law Commission of India. The 2015 Amendment Act made three significant changes:*

29.1. *It replaced the Chief Justice of the High Court as the appointing authority for exercising the default power of appointment in the case of domestic arbitrations, by the High Court concerned; and, in respect of international commercial arbitrations, the default power would be exercised by the Supreme Court, in place of the Chief Justice of India.*

29.2. *It inserted sub-Sections (6-A) and (6-B) in Section 11, which reads as:*

"11. Appointment of arbitrators.-(1)-(6)

(6-A) *The Supreme Court or, as the case may be, the High Court, while considering any application under sub-Section (4) or sub-Section (5) or sub-Section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.*

(6-B) *The designation of any person or institution by the Supreme Court, or, as the case may be, the High Court, for the purposes of this Section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."*



Sub-Section (6-A) by a non-obstante clause provided that notwithstanding any judgment, decree or order of any court, the scope of examination at the Section 11 stage, would be confined to the existence of the arbitration agreement. The effect of the amendment was that if the existence of the arbitration agreement was not in dispute, all other issues would be left for of kompetenz-kompetenz, which empowers the tribunal to rule on its own the Arbitral Tribunal to decide. This was in reinforcement of the doctrine jurisdiction, including any objections with respect to the validity of the arbitration agreement; and thereby minimise judicial intervention at the pre-reference stage.

29.3. *Sub-Section (6-B) was inserted to provide that the designation of any person or institution, by either the Supreme Court or the High Court, as the b appointing authority under Section 11. would not be regarded as a delegation of judicial power.*

30. *The amendments to Section 11 were brought in to legislatively overrule Construction22, etc., which had enlarged the scope of power of the appointing the line of judgments including SBP & Co. 20 Boghara Polyfab21 Master authority to decide various issues at the pre-reference stage.*

31. *Sub-Section (6-A) came up for consideration in Duro Felguera, S.A.V. at the appointment stage. In an under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 Amendment, all that the courts are required to examine is whether an arbitration agreement is in existence nothing more, nothing less: (SCC PP. 759 & 765, paras 48 & 59)*



"48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-Section (4) or sub-Section (5) or sub-Section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect-the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple-it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP & Co.²⁰ and Boghara Polyfab²¹. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists-nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected." (emphasis in original and supplied)

32. *In Mayavati Trading (P) Ltd. v. Pradyut Deb Burman* 24, a three-Judge Bench held that the scope of power of the Court under Section 11(6-A)



had to be construed in the narrow sense. In para 10, it was opined as under: (SCC pp. 724-25)

*"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position. it is difficult to agree with the reasoning contained in the aforesaid judgment²⁵, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in *Duro Felguera*, S.A.²³" (emphasis in original)*

33. *In Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.* ²⁶, this Court took note of the recommendations of the Law Commission in its 246th Report, the relevant extract of which reads as: (SCC p. 460, para 7)

"7.6. The Law Commission in the 246th Report²⁷ recommended that:

33. the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration



only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal.' (emphasis in original)

34. *In view of the legislative mandate contained in the amended kompetenz principle. The doctrine of kompetenz-kompetenz implies that the be decided by the arbitrator under Section 16, which enshrines the kompetenz-Arbitral Tribunal is empowered, and has the competence to rule on its own intended to minimise judicial intervention at the pre-reference stage, so that the jurisdiction, including determination of all jurisdictional issues. This was arbitral process is not thwarted at the threshold when a preliminary objection is raised by the parties.*

45. *In a recent judgment delivered by a three-Judge Bench in Vidya Drolia v. Durga Trading Corpn. 31, on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes". The prima facie review at the reference stage is to cut the deadwood, where dismissal is barefaced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject-matter is not arbitrable, that reference may be refused.*

45.1. *In para 144, the Court observed that the judgment in Mayavati Trading 24 had rightly held*



that the judgment in Patel Engg. 20 had been legislatively overruled. Para 144 reads as: (Vidya Drolia case³¹, SCC pp. 114-15)

"144. As observed earlier, Patel Engg. Ltd.²⁰ explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd.²⁴, in our humble opinion, rightly holds that Patel Engg. Ltd.²⁰ has been legislatively overruled and hence would not apply even post omission of sub-Section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd.²⁴ has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-Section (6-A) to elucidate that the Section, as originally enacted, was facsimile with Article 11 of the e UNCITRAL Model of law of arbitration on which the Arbitration Act was drafted and enacted."

(emphasis supplied)

While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute. Para 148 of the judgment



reads as follows: (Vidya Drolia case 31, SCC p. 119)

"148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. g Sub-Section (2) states that for the purposes of the Arbitration Act and the Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage the position in case of disputed "no-claim certificate" or defence on the ples be referred to the Arbitral Tribunal for decision on merits. Similar would be barred and dead or there is no subsisting dispute. All other cases should of novation and "accord and satisfaction". As observed in Premium Nafta transactions inter se would knowingly create a system which would require Products Ltd. 32, it is not to be expected that commercial men while entering or avoided or rescinded, as the case may be, and then if the contract is held that the court should first decide whether the contract should be rectified to be valid, it would require the arbitrator to resolve the issues that have arisen."

(emphasis supplied)

45.2. *In para 154.4, it has been concluded that: (Vidya Drolia case31, SCO p . 121)*

"154.4. Rarely as a demurrer the court may interfere at Sections 8 agreement is non-existent. invalid or the disputes are non-arbitrable. though the nature and facet of non-arbitrability would, to some extent, or 11 stage when it is manifestly and ex facie certain that the arbitration determine



the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the relating to non-arbitrability are plainly arguable; when consideration in deadwood. The court by default would refer the matter when contentions summary proceedings would be insufficient and inconclusive: when facts are contested; when the party opposing arbitration adopts delaying tactics are impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(emphasis supplied)

45.3. *In para 244.4 it was concluded that: (Vidya Drolia case 31, SCC p. 162)*

"244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".

(emphasis supplied)

46. *The upshot of the judgment in Vidya Drolia³¹ is affirmation of the position of law expounded in Duro Felguera 23 and Mayavati Trading 24, which continue to hold the field. It must be understood clearly that Vidya Drolia³¹ has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd. 20*

47. *It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the*



dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

8.11. As regards the other objection raised by the Respondent that the period of limitation has expired inasmuch as the first cause of action having expired, a fresh arbitration cannot be initiated, Article 137 of the Limitation Act, 1963, (hereinafter referred to as 'the Limitation Act' for short) being applicable.

8.12. His submission again is that the second reference to arbitration would not be barred under Article 137 of the Limitation Act and the limitation period of three years would not be applicable. In this regard he relies upon the decision of the Hon'ble Apex Court in ***Bharat Sanchar Nigam Limited and Another Vs.***



Nortel Networks India Private Limited⁵,
more particularly, paras 14 to 19 thereof, which
are reproduced hereunder for easy reference:

"14. Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of an arbitrator under Section 11, it would be covered by the residual provision Article 137 of the Limitation Act, 1963. Article 137 of the Limitation Act, 1963 provides:

"THIRD DIVISION – APPLICATIONS			
	<i>Description of application</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
137.	<i>Any other application for which no period of limitation is provided elsewhere in this Division.</i>	<i>Three years</i>	<i>When the right to apply accrues."</i>

15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or

⁵ (2021) 5 SCC 738



conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraj v. Orissa Mining Corpn. Ltd. [J.C. Budhraj v. Orissa Mining Corpn. Ltd., (2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows : (SCC p. 460)

"26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Inder Singh Rekhi v. DDA [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] , Panchu Gopal Bose v. Port of Calcutta [Panchu Gopal Bose v. Port of Calcutta, (1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [Utkal Commercial



Corpn. v. Central Coal Fields Ltd., (1999) 2 SCC 571] also make this position clear.”

17. *Various High Courts have taken the view that Article 137 of the Limitation Act would be applicable to an application under Section 11 of the Arbitration Act.*

17.1. *The question of the applicability of Article 137 to applications under Section 11 of the 1996 Act came up for consideration before the Bombay High Court in Leaf Biotech (P) Ltd. v. Municipal Corpn., Nashik [Leaf Biotech (P) Ltd. v. Municipal Corpn., Nashik, 2010 SCC OnLine Bom 1363 : (2010) 6 Mah LJ 316] wherein it was held that the period of limitation for an application under Section 11 would be governed by Article 137 of the Limitation Act.*

17.2. *Subsequently, in Deepdharshan Builders (P) Ltd. v. Saroj [Deepdharshan Builders (P) Ltd. v. Saroj, 2018 SCC OnLine Bom 4885 : (2019) 1 AIR Bom R 249] the Bombay High Court framed the following issue : (SCC OnLine Bom para 38)*

"38. ... (ii) Whether Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application filed under Section 11(6) of the Arbitration Act and if applies whether Section 5 of the Limitation Act, 1963 would be applicable to this arbitration application and if Section 5 applies to this arbitration application, whether the applicant has made out a sufficient cause for condonation of delay in filing this arbitration application?"

The Bombay High Court held that : [Deepdharshan Builders (P) Ltd. case [Deepdharshan Builders (P) Ltd. v. Saroj, 2018 SCC OnLine Bom 4885 : (2019) 1 AIR Bom R 249] , SCC OnLine Bom paras 42 & 46-48]

"42. In my view, since the proceedings under Section 11(6) of the Arbitration Act are required to be filed before the High Court, Article 137 of the Schedule to the Limitation Act, 1963 would apply to such application filed under Section 11(6) of the Arbitration Act. In my view, since Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application under



Section 11(6) of the Arbitration Act, Section 5 of the Limitation Act, 1963 would also apply to the arbitration application filed under Section 11(6) of the Arbitration Act.

46. It is not in dispute that under Section 20 of the Arbitration Act, 1940, an application was required for taking the arbitration agreement on record and for appointment of an arbitrator in accordance with the arbitration agreement before a court. Since the said proceedings under Section 20 were required to be filed before an appropriate court, the provisions of Article 137 of the Limitation Act, 1963 were applicable to such proceedings filed before such appropriate court. In my view, since the proceedings under Section 11(6) or Section 11(9) of the Arbitration Act for seeking appointment of Arbitral Tribunal are also now required to be filed before the High Court or the Hon'ble Supreme Court, as the case may be. Article 137 of the Schedule to the Limitation Act, 1963 would apply. It is not in dispute that no other Article of Schedule to the Limitation Act, 1963 provides for any other period of limitation for filing an arbitration application filed under Section 11(6) or Section 11(9) of the Arbitration Act respectively.

47. It is not in dispute that Article 137 of the Schedule to the Limitation Act, 1963, such application has to be filed within three years from the date when the right to apply accrues. In my view, under Article 137 of the Limitation Act, 1963, application for appointment of an arbitrator under Section 11(6) or Section 11(9) of the Arbitration Act before the High Court or the Hon'ble Supreme Court would apply from the date when a notice invoking an arbitration agreement is received by other side and other side refuses to the name suggested by the opponent or refusing to suggest any other name in accordance with the provisions of Section 11 or the agreed procedure prescribed in the arbitration agreement within the time contemplated therein or specifically refuses to appoint any arbitrator in the event of such other party being an appointing authority.



48. In my view, the limitation prescribed under Article 137 of the Schedule to the Limitation Act, 1963 which applies to an application under Section 11(6) or Section 11(9) of the Arbitration Act filed before the High Court or before the Hon'ble Supreme Court cannot be mixed up with the period of limitation applicable to the claims prescribed in various other Articles of the Schedule to the Limitation Act, 1963. Both these periods of limitation i.e. one applicable to the claims being made and another being applicable to the application under Section 11(6) or Section 11(9) of the Arbitration Act to which Article 137 of the Schedule to the Limitation Act, 1963 applies, are two different periods of limitation and cannot be made applicable to each other."

(emphasis supplied)

The special leave petition [SLP (C) No. 305 of 2019] against the said judgment was dismissed vide order dated 16-1-2019 [Saroj v. Deeparshan Builders (P) Ltd., 2019 SCC OnLine SC 1996] .

18. *Other decisions of the High Courts on the applicability of Article 137 are Prasar Bharti v. MAA Communication [Prasar Bharti v. MAA Communication, 2010 SCC OnLine Del 526 : (2010) 115 DRJ 438] and Golden Chariot Recreations (P) Ltd. v. Mukesh Panika [Golden Chariot Recreations (P) Ltd. v. Mukesh Panika, 2018 SCC OnLine Del 10050, SLP (C) Diary No. 40627 of 2018 against this decision was dismissed on 31-1-2019 [Golden Chariot Recreations (P) Ltd. v. Mukesh Panika, 2019 SCC OnLine SC 1997]] passed by the Delhi High Court. The SLP filed in Golden Chariot was dismissed vide order dated 31-1-2019 in Golden Chariot Recreations (P) Ltd. v. Mukesh Panika [Golden Chariot Recreations (P) Ltd. v. Mukesh Panika, 2019 SCC OnLine SC 1997] .*

19. *The reasoning in all these judgments seems to be that since an application under Section 11 is to be filed in a court of law, and since no specific Article of the Limitation Act, 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application under Section 11 is 3 years*



from the date of refusal to appoint the arbitrator, or on expiry of 30 days, whichever is earlier."

8.13. By relying on **Nortel Networks'** case, his submission is that once an award which had been passed has been set aside, the parties would be returned to their original litigating positions and as such, the parties can reagitate the matter before an Arbitrator.

8.14. He draws a distinction between the scope of Section 34 of the A&C Act and an appeal filed as against a regular civil decree. In this regard, he relies upon the decision of the Division Bench of the Hon'ble Delhi High Court in **State Trading Corporation of India Ltd. Vs. Toepfer International Asia Pte Ltd⁶**, para 7 to 9, 11, 12, 17 and 18, which are reproduced here under for easy reference:

⁶ 2014 SCC OnLine Del 3426/(2014) 144 DRJ 220 (DB)



"7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given



"award" because what was labeled an award is the result of an illegitimate process of decision.

9. *This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.*

11. *Arbitration under the 1940 Act could not achieve the savings in time and money for which it was enacted and had merely become a first step in lengthy litigation. Reference in this regard can be made to para 35 of Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552. It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground, of the award being in conflict with Public Policy of India, was also incorporated. However the juxtaposition of Section 34(2)(b)(ii) shows that the reference to 'Public Policy' is also in relation to fraud or corruption in the making of the award. The new Act was being understood so*



[see Konkan Railway Corporation Ltd. v. Mehul Construction Co. (2000) 7 SCC 201 (para 4 and which has not been set aside in S.B.P. & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618)] till the Supreme Court in Saw Pipes Ltd. (supra) held that the phrase 'Public Policy of India' is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so unfair and unreasonable that it shakes the conscience of the court.

12. *The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.*

17. *The Supreme Court in Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran (2012) 5 SCC 306 refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the*



view which it holds to be correct one after considering the material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (2010) 11 SCC 296 and on Kwaliti MFG. Corporation v. Central Warehousing Corporation (2009) 5 SCC 142. Similarly, in P.R. Shah, Shares & Stock Broker (P) Ltd. V. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in National Highways Authority of India v. Lanco Infratech Ltd. MANU/DE/0609/2014 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relating to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion.

18. *If we were to start analyzing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it will be nothing else than sitting in appeal over the arbitral award and which is not permissible.”*



8.15. Lastly, he submits that once an arbitral award is set aside, the parties are but required to begin the arbitration once again, since neither the Section 37 Court nor even the Apex Court, exercising its jurisdiction in a special leave petition, can modify the award passed by the Arbitrator.

8.16. In this regard, he relies upon the decision of the Hon'ble Delhi High Court in ***Steel Authority of India Limited Vs. Indian Council of Arbitration and Another***⁷, more particularly, paras 21, 22, 27, 45 to 49 thereof, which are reproduced hereunder for easy reference.

"21. Mr. Ganguli, thereafter, submitted that the principle of *res judicata* would apply to arbitration proceedings. He referred to the decision of the Supreme Court in *K.V. George, Secy. To Govt., Water and Power Deptt. : (1989) 4 SCC 595* in support of his contention that the principle of *res judicata* would also apply to the arbitration proceedings and submitted that the claims

⁷ 2015 SCC OnLine Del 13394/(2015) 225 DLT 348



made by GE Shipping were barred by principle of res judicata.

22. *Mr. Ganguli next contended that Section 34 of the Act also contemplated an order whereby the Court would remand the disputes to the Arbitral Tribunal. He submitted that in the present case although GE Shipping had succeeded in its petition under Section 34 of the Act, the Court had merely set aside the arbitral award and not remanded the matter. He submitted that since this decision had become final, therefore, it was not open for GE Shipping to re-agitate the said issue. He referred to the decision of a Division Bench of this Court in National Highways Authority of India v. ITD Cementation India Ltd. : (2007) 4 Arb. LR 555 (Delhi) whereby a Division Bench of this Court had remitted the disputes to the arbitrator on the issue of quantification of the amount and further directed that the parties would be afforded an opportunity to adduce evidence on the question of quantification of the amount before making a fresh award. Mr. Ganguli also drew attention of this Court to another decision of a Division Bench of this Court in BSNL v. Canara Bank : 169 (2010) DLT 253 (DB) wherein this Court had referred to the decision in Vindhya Tele Links Ltd. v. Bharat Sanchar Nigam Ltd. : FAO(OS) 433/2006 whereby this Court had rejected the contention that the power to remit the disputes to the arbitrator was foreign to the Act. Mr. Ganguli contended that once it was established that this Court had the power to remit the disputes to the arbitrator under Section 34 of the Act and as the same has not been done, the disputes could not be re-agitated before the Arbitral Tribunal.*

27. *The learned counsel further contended that the principles of res judicata were not applicable as the award rejecting the claims made by GE Shipping had been set aside and, thus, the disputes between the parties had not been finally adjudicated. The learned counsel also joined issues on whether the Court had the power to remit an award under Section 34 of the Act. He submitted that once the Court has decided to set aside the award under Section 34 of the Act, it would*



have no power to pass further directions to remand the matter to the Arbitral Tribunal. He submitted that the decisions in the case of IVRCL Infrastructures & Projects Ltd. (supra) and Videsh Sanchar Nigam Ltd. (supra) could not be considered as authorities for the proposition that once an award had been set aside, the arbitration agreement would stand exhausted in respect of the disputes, which were subject matter of the award. He submitted that the same would be contrary to the decision of the Supreme Court in Mcdermott International Inc. v. Burn Standard Corporation Ltd. : (2006) 11 SCC 181.

45. *In my view, the contention that the arbitration proceedings initiated by GE Shipping are barred by principles of res judicata is also flawed. Admittedly, the award declining the claims of GE Shipping was set aside by this Court under Section 34 of the Act. The finding of the Arbitral Tribunal that lay time did not commence till 12th February, 2008 - which was the basis for rejecting GE Shipping's claims for demurrages and balance freight - was held by this Court as unsustainable in law. This Court had also held that the award passed by the Tribunal was passed on misreading of documents and, therefore, rejection of GE Shipping's claim could not be sustained in law. This Court also found that the Tribunal's finding that vessel in question was not ready in all respects at the time when the NOR was issued, was not based on any evidence but on a conjecture and, thus, suffered from a patent irregularity. In view of the aforesaid findings, GE Shipping's claims still survived and could not be stated to have been finally decided. In the circumstances, it is difficult to understand as to how principles of res judicata could possibly apply.*

46. *The petitioner's contention that since the disputes had been subject matter of an arbitration award, the arbitration agreement stood exhausted also cannot be accepted. An arbitration agreement merely provides for an alternative forum for resolution of disputes. Thus, all disputes that the parties agree to resolve by arbitration are to be resolved by arbitration. Thus, as long as the disputes that are covered under the arbitration*



agreement remain unresolved, the parties would be free to take recourse to arbitration for resolution of the said disputes and the other party would be contractually bound to submit the disputes to arbitration. Plainly, the claims made by GE Shipping arise under the Charter party and thus are covered under clause 57 of the Charter party, that is, the arbitration agreement.

47. *It was also earnestly argued that since this Court had not remanded the disputes to arbitration while setting aside the arbitration award under Section 34 of the Act, de novo arbitration was not permissible. This contention is also not sustainable in law. The question whether the Court has the power to remand the disputes to arbitration under Section 34 of the Act has been subject matter of several decisions by this Court. There is apparently, a conflict in the views expressed in National Highways Authority of India (supra) and Vindhya Tele Links Ltd. (supra) and in the later decisions of this court. However, a Division Bench of this Court Puri Construction Pvt. Ltd. V. Larsen & Toubro Ltd. : FAO(OS) 23/2009 had noticed several conflicting decisions with regard to the aforesaid issue and following the principle laid down by the Supreme Court in Mcdermott International Inc. (supra) held that "the power to modify, vary or remit the award does not exist under Section 34 of the Act". Thus, it is now no longer open for the petitioner to contend that since this Court did not remit the award under Section 34 of the Act, the disputes therein could not be referred to a de novo arbitration.*

48. *Notwithstanding the issue whether a Court has the power to remit the award under Section 34 of the Act, the fact is that this Court had by a judgment dated 9th May, 2012 set aside the award rejecting GE Shipping's claim but had not remitted the matter. Thus the claims of GE Shipping remained to be finally adjudicated. Admittedly, the parties had agreed to resolve the disputes arising out of the Charter Party by arbitration. Thus, it would not be open for SAIL to avoid resolution of such disputes through arbitration. At this stage, it is necessary to refer to the following observations of the*



Supreme Court in Mcdermott International Inc. (supra) whereby the Supreme Court had held as under : -

"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, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

49. *A plain reading of the aforesaid passage also clearly indicates that once an award has been set aside, the parties would be free to begin the arbitration once again. Thus, in my view, the contention that GE Shipping could not initiate the arbitration after the decision of this Court under Section 34 of the Act, cannot be accepted. Mr. Ganguli sought to suggest that the observation made by Supreme Court in Mcdermott International Inc. (supra) was a "stray observation" and was not determinative of the issue at hand. This contention is also unacceptable. First and foremost, the observations of the Supreme Court are relevant to the decision rendered by it; secondly, in Puri Construction Pvt. Ltd. (supra) a division bench of this Court followed the principles laid down by the Supreme Court in Mcdermott International Inc. (supra) while interpreting the provisions of Section 34 of the Act."*

8.17. He relies on the decision of the Hon'ble Bombay
High Court in ***Associated Constructions Vs.***



Mormugoa Port Trust⁸, more particularly,
paras 11 to 19 thereof, which are reproduced
hereunder for easy reference:

"11. The question, therefore, is whether in view of the said award having been set aside, except as to one claim on grounds other than on merit, the present application under Section 11 of the said Act is maintainable.

12. The learned counsel appearing on behalf of the applicant relied upon following observations of the Supreme Court in *Mc Dermott International Inc. v. Burn Standard Co. Ltd.*, JT 2006 (11) SC 376.

"55. 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 scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

(emphasis supplied)

13. The learned counsel appearing on behalf of the Applicant also relied upon the following observations in the said judgment of the Division Bench of this Court in Appeal No. 981 of 2001 decided on 4th October, 2007 in the case of *Pushpa Mulchandani v. Admiral Radhakishan Tahliani (Retd.)*, 2008 (7) LJ SOFT 161:—

⁸ (2010) 5 Mah LJ 739



26. It is, thus, clear that if the Court finds that the award is vitiated because of violation of principles of natural justice or such other reasons, which cannot be called as "adjudication" on merits, the Court can set aside the Award and if the Award is set aside for such reasons, it is open to the parties to invoke the arbitration clause again and initiate arbitration proceedings. In our opinion, in this regard reference can be made to the provisions of sub-Section (4) of Section 43. They read as under:—

43(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted. When the award is set aside for the reasons other than merits, then it is open to the parties to the arbitration agreement, if arbitration agreement survives, to invoke the arbitration agreement and to have the matter referred to arbitration. In other contingencies they can adopt other remedy that may be available to them and in that situation, either for adopting any other remedy or in initiating arbitration, the period spent during the earlier arbitration is liable to be excluded while computing the period of limitation."

These observations have not been set aside by the Full Bench. In fact, this aspect did not fall for consideration in the reference to the Full Bench.

14. *The judgments support the submission on behalf of the Applicant that a fresh arbitration is permissible at least in the event of an award being set aside for reasons other than on merits. In the present case the entire award except as to one claim, was set aside for reasons other than on merits. This is clear from the fact that although the award in respect of only three items/claims was set aside, the entire award was set aside. The claims, other than those referred to in the judgment, were not considered or even referred to. In any event, as noted earlier, at least the claim in respect*



of a sum of Rs. 1,50,000/- was set aside, not on merits but on the ground that no reasons were furnished. This was obviously in view of the Judgments which held that under the 1996 Act an award cannot be segregated and therefore even if a part thereof is liable to be set aside the entire award must be set aside. The Applicants are therefore entitled to begin the arbitration again.

15. *Mr. Shetty then submitted that it is only the Court setting aside an award that can permit a fresh arbitration under the same arbitration agreement. He based his submission upon the observation of the Supreme Court extracted above: "It can only quash the award leaving the parties free to begin the arbitration again if it is desired." He submitted that the term "It" implies that it is only the Court that sets aside the award that can leave the parties free to begin the arbitration again.*

16. *There is nothing in the judgment of the Supreme Court that even remotely suggests the same. In fact the Supreme Court did not consider this aspect. The Supreme Court has not specified as to the manner in or the stage at which the parties are free to begin the arbitration again. Having held that the parties are free to begin arbitration again there is nothing in the Act, the judgment or in principle that warrants restricting the enforcement of this right to any particular stage, point of time or proceeding.*

17. *Mr. Shetty also submitted that the observations of the Supreme Court and the Division Bench of this Court in the case of Pushpa Mulchandani (supra) indicate that after an Award is set aside a fresh arbitration can begin again only with the consent of both the parties.*

18. *The submission is based on the erroneous presumption that the exercise of the right to begin the arbitration again is dependent upon a fresh arbitration agreement. An arbitration agreement, can be entered into only with the consent of the parties. Once an arbitration agreement is entered into it may be invoked by any of the parties unilaterally. If one of the parties refuses to abide by the arbitration agreement, the other*



party is entitled to invoke or enforce it under the said Act. Where an award is set aside as in the above case, the commencement of the arbitration again is pursuant to and under the existing arbitration clause. The same is neither based on nor dependent upon a fresh arbitration agreement between the parties.

19. *It is not necessary to decide whether this Court has the discretion whether or not to allow the arbitration to begin again for I am clearly of the view that in the present case it must be exercised in the Applicants favour. A rejection of this application would be a travesty of justice. The entire award has been set aside only because a part of it was found to be contrary to law. Thus, even that part of the award which was found to be sustainable or at least was not held to be unsustainable is set aside. This as noted above was in view of the judgments of this Court prior to their being overruled by the judgment of the Full Bench."*

8.18. On the basis of all the above, he submits that the Petitioner and the Respondents have no option but to reagitate their claim before the Arbitrator. Insofar as the Respondent No.1 is concerned, if the Respondent does not want to reagitate the counterclaims which have been filed by the Respondent, which have been rejected, it is the choice of the Respondent. But as regards the claims of the Petitioner, the



Petitioner wishes to agitate all his claims before an Arbitrator to be appointed by this Court.

9. Sri Prashant Chandra, learned counsel for Respondent No.2 would, however, submit that:

9.1. The arbitration Clause contemplates a panel of three Arbitrators; the present petition filed for the appointment of a sole Arbitrator is not maintainable.

9.2. The Section 34 petition filed by the Petitioner having been dismissed. The Petitioner cannot seek for appointment of a fresh Arbitrator.

9.3. The decision of the Commercial Court in Commercial A.S.No.159/2018 not having attained finality. In terms of there being an appeal provided under Section 37 of the A&C Act, a fresh application for the appointment of an Arbitrator under Section 11 of the A&C Act is not maintainable.



9.4. His submission is that there is no liberty which has been reserved in the order passed by the Commercial Court in Com.A.S.No.159/2018 entitling the Petitioner to appoint an Arbitrator afresh or to approach this Court for appointment of an Arbitrator as the principle of *res judicata* would apply, requiring this Court to dismiss the petition as filed.

9.5. His submission is that the termination having occurred on 28.05.2016, no fresh arbitration can be initiated. Any claim as regards the said cause of action is hopelessly barred by limitation since there is no surviving cause of action, nor is there a new cause of action which is arising. The Petitioner has not averred anywhere in the petition as regards the cause of action. At the most, this alleged cause of action can only relate to the termination dated 28.05.2016, which is barred by limitation.



9.6. The Petitioner has not entered into any agreement with Respondent No.2 and Respondent No.2 cannot be made subject to arbitration proceedings. The arraying of Respondent No.2 as a party, is completely misconceived.

9.7. He refers to and relies upon the decision of the Co-ordinate Bench of this Court in **Starlog Enterprises Limited Vs. Board of Trustees of New Mangalore Port Trust⁹**, more particularly, paras 21 and 22 thereof, which are reproduced hereunder for easy reference:

"21. In light of the findings recorded by the Court under Section 34 proceedings and subsequently affirmed by the Hon'ble Apex Court, the pivotal issue that arises for determination before this Court is whether the setting aside of the arbitral award by judgment and award dated 08.02.2017 permits the petitioner to invoke the arbitration clause as per the agreement dated 31.03.2009. This Court emphatically holds that the answer to this question is 'No'.

⁹ CMP.No.372/2023 dated 25.02.2025



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

- 9.8. By relying on **Starlog Enterprises'** case, his submission is that the setting aside of the arbitral award by judgment and award would not permit the Petitioner to invoke the Arbitration Clause as per the agreement. An adverse finding having been given by the Section 34 Court, the same cannot be reagitated in the arbitration proceedings and as such, no Arbitrator could be appointed at the request of the Petitioner.



10. Heard Sri K.N.Phanindra, learned Senior Counsel for the Petitioner and Sri. Prashanth Chandra, learned counsel for Respondent No.2, Sri Satyanand B.S., learned counsel for Respondent No.1 and perused papers.

11. The points that would arise for consideration are:

- 1) Whether the Petitioner has any locus to agitate the *lis* in the contract entered into between M/s.Ramky Energy and Environment Ltd. and Respondent No.1, more particularly, against Respondent No.2?**
- 2) Firstly, whether an arbitration notice under Section 21 of the A&C Act is required to be issued once an arbitral award is set aside, and even if so issued, can such a notice be issued when an award has already been passed by the sole Arbitrator and subsequently set aside?**
- 3) On passing an award, the arbitration proceedings having been terminated in terms of Section 32 of the A&C Act, could fresh proceedings be initiated for arbitration?**
- 4) Whether the present arbitration notice dated 03.11.2023 can be said to be barred by the law of limitation?**
- 5) Whether the Petitioner can maintain the present petition without availing the remedy under Section 37 of the A&C Act and, on failure in those proceedings,**



without availing the remedy of filing a special leave petition before the Hon'ble Apex Court, the notice dated 03.11.2023 not having been issued to Respondent No.2 could Respondent No.2 be made a party to these proceedings and be subjected to arbitral proceedings?

6) Whether a sole Arbitrator could be appointed when the Arbitration Clause contemplates a Panel of three Arbitrators?

7) What order?

12. I answer the above points as under:

13. **Answer to Point No.1: Whether the Petitioner has any locus to agitate the *lis* in the contract entered into between M/s.Ramky Energy and Environment Ltd. and Respondent No.1, more particularly, against Respondent No.2?**

13.1. An objection as to locus standi is raised on behalf of the Respondents on the ground that the Petitioner, M/s. Re Sustainability Healthcare Solutions Limited, is not a signatory to the original agreement entered into with Respondent No.1 and, therefore, cannot maintain the present proceedings.

13.2. The objection is wholly misconceived. The agreement in question was admittedly executed



by M/s. Ramky Infrastructure Limited with Respondent No.1. The record unequivocally establishes that the said entity subsequently underwent a change of name—first to M/s. Ramky Energy and Environment Limited and thereafter to M/s. Re Sustainability Healthcare Solutions Limited. This is a case of mere change of nomenclature and not one of novation, assignment, or corporate succession by transfer. The corporate identity of the contracting party has remained unchanged.

13.3. What is of decisive significance is that Respondent No.1, in proceedings initiated by it under Section 34 of the A&C Act, has itself expressly pleaded and acknowledged that M/s. Re Sustainability Healthcare Solutions Limited was formerly known as M/s. Ramky Energy and Environment Limited and earlier as M/s. Ramky Infrastructure Limited. Having unequivocally



recognised the Petitioner as the contracting entity in earlier proceedings, Respondent No.1 cannot now be permitted to approbate and reprobate by disputing the Petitioner's locus standi in the present proceedings.

13.4. The objection is, therefore, barred by the doctrine of estoppel by conduct. A party which has consciously treated the Petitioner as the contracting party in earlier judicial proceedings is precluded from contending otherwise when it suits its convenience. Such a plea strikes at the root of procedural fairness and cannot be countenanced.

13.5. Insofar as Respondent No.2 is concerned, it is not in dispute that it is a Special Purpose Vehicle (SPV) constituted for the implementation of solid waste management functions in Bengaluru. Respondent No.2



operates as the instrumentality through which Respondent No.1 discharges its obligations under the agreement. Consequently, the contractual rights and obligations originally undertaken by Respondent No.1 are enforceable through and against Respondent No.2, which has stepped into the operational shoes of Respondent No.1 for all practical purposes.

13.6. The existence of such an SPV arrangement does not divest the Petitioner of its right to maintain the *lis*. At best, it bears upon the manner of enforcement and the entities against whom relief may be effectuated. It does not affect the maintainability of the proceedings or the Petitioner's locus standi.

13.7. Accordingly, I answer point No.1 by holding that the Petitioner—formerly known as M/s.



Ramky Energy and Environment Limited and earlier as M/s. Ramky Infrastructure Limited—has the requisite locus standi to agitate the *lis* arising out of the agreement, and the proceedings are maintainable against Respondent No.1, with consequential enforceability against Respondent No.2 in accordance with law.

14. **ANSWER TO POINT No.2: Firstly, whether an arbitration notice under Section 21 of the A&C Act is required to be issued once an arbitral award is set aside, and even if so issued, can such a notice be issued when an award has already been passed by the sole Arbitrator and subsequently set aside?**

14.1. The Section 34 Court, having held that the award requires interference, has set aside the award without making any changes or corrections in the award by observing that it is only an arbitral Tribunal which can do so. Thus, merely passing of an award would not therefore amount to *res judicata* as sought to be



contended by Sri Prashanth Chandra, learned Senior Counsel, and as has been held by the Hon'ble Apex Court in ***Nortel Networks'*** case supra.

14.2. The objection of the Respondents is premised on the contention that since an arbitral award had already been rendered by the sole Arbitrator, the disputes stood concluded and, consequently, the present arbitral proceedings are not maintainable. Such a contention proceeds on a fundamental misconception as to the legal effect of an order passed under Section 34 of the A&C Act.

14.3. A careful reading of the observation made by the Court under Section 34, as extracted hereinabove, makes it evident that the Court found serious and material infirmities in the arbitral award warranting interference.



However, the Court consciously refrained from modifying or correcting the award, not because the award was found to be sustainable, but solely on account of the statutory limitations imposed by Section 34 of the A&C Act, which restrict the Court's power to either uphold or set aside the award.

14.4. Having found the award to be legally unsustainable, the Section 34 Court proceeded to set aside the award, expressly observing that any reappreciation of evidence or correction of errors could only be undertaken by an arbitral tribunal. The legal consequence of such an order is that the award is obliterated and ceases to exist in the eye of law.

14.5. Once an arbitral award is set aside, it becomes non est and incapable of conferring any finality upon the disputes between the parties. The



doctrine of *res judicata* applies only where there is a final and binding adjudication. An award which has been set aside under Section 34 does not meet this threshold. Consequently, the mere fact that an award had earlier been rendered does not bar the parties from re-agitating their disputes through arbitration.

14.6. This position is no longer *res integra*. The Hon'ble Supreme Court has consistently held that setting aside of an arbitral award revives the disputes between the parties and restores their right to seek adjudication afresh in accordance with law, subject to the terms of the arbitration agreement and the law of limitation.

14.7. Insofar as the requirement of issuance of a notice under Section 21 of the Act is concerned, a notice under Section 21 serves the limited



purpose of formally invoking the arbitral process. Once an arbitral award has been set aside and the disputes stand revived, the initiation of fresh arbitral proceedings cannot be rendered impermissible on the ground that an award had earlier been passed. The setting aside of the award restores the parties to the position as if no adjudication had taken place. In such circumstances, the requirement of a fresh notice under Section 21 is procedural and cannot be elevated to a jurisdictional bar so as to defeat the substantive right of a party to seek arbitration, particularly when the opposite party is already fully aware of the disputes and has previously participated in arbitral proceedings.

14.8. As regards limitation, the period during which the arbitral proceedings and the proceedings under Section 34 were pending is liable to be



excluded while computing limitation for the purpose of initiating fresh arbitral proceedings. A party which has bona fide pursued its remedies under the Act cannot be non-suited on the ground of limitation once the award is set aside and the disputes are revived. To hold otherwise would render the statutory remedy under Section 34 illusory and defeat the very object of the Act.

14.9. Accordingly, I answer Point No.2 by holding that the passing of an arbitral award which has subsequently been set aside in proceedings under Section 34 does not operate as res judicata. The disputes stand revived, and the parties are entitled to seek resolution through fresh arbitral proceedings in accordance with law, subject to limitation and the terms of the arbitration agreement, as recognised by the decisions of the Hon'ble Supreme Court in



Nortel Networks, Steel Authority of India, and Associated Construction.

14.10. Hence, I answer point No.2 by holding that passing an award which has been set aside in Section 34 proceedings cannot amount to *res judicata*, leaving the parties free to agitate their rights in a fresh arbitral proceeding, as held by the Hon'ble Apex Court in ***Steel Authority of India's*** case and ***Associated Constructions'*** case supra.

15. **ANSWER TO POINT NO.3: On passing an award, the arbitration proceedings having been terminated in terms of Section 32 of the A&C Act, could fresh proceedings be initiated for arbitration?**

15.1. By referring to Section 32 of the A&C Act, it is sought to be contended that the mandatariness of the arbitration mechanism having been terminated, the arbitral proceedings have come to an end. Section 32 of the A&C Act is reproduced hereunder for easy reference:



"32. Termination of proceedings.

(1)The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-Section

(2)The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where

(a)the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b)the parties agree on the termination of the proceedings, or

(c)the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3)Subject to Section 33 and

sub-Section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."

15.2. The submission on behalf of Respondent No.2, founded on Section 32 of the Arbitration and Conciliation Act, 1996, is that once a final arbitral award is passed, the arbitral



proceedings stand terminated and the mandate of the arbitral tribunal comes to an end, thereby extinguishing any further recourse to arbitration in respect of the same disputes.

15.3. The contention proceeds on a misreading of Section 32. The said provision deals with the termination of arbitral proceedings *before a particular arbitral tribunal* and the consequent termination of the *mandate of that tribunal*. It does not bring about the extinction of the arbitration agreement, nor does it foreclose the substantive right of the parties to seek resolution of their disputes through arbitration where the award does not attain finality.

15.4. The statutory scheme of Section 32 itself makes this position explicit. Sub-section (3) thereof provides that the termination of the tribunal's mandate is *subject to* Sections 33 and



34 of the Act. The Act, therefore, contemplates that notwithstanding the termination of proceedings before the arbitral tribunal, statutory remedies challenging the award remain available, and the arbitral process does not attain irreversible finality merely upon the passing of an award.

15.5. Where an arbitral award is set aside in proceedings under Section 34, the legal consequence is that the award is rendered non est and is obliterated in the eye of law. Once the award ceases to exist, the termination of proceedings under Section 32 cannot be relied upon as a bar to further arbitration. The foundation for invoking Section 32 as a disabling provision disappears with the setting aside of the award. The termination contemplated thereunder signifies the conclusion of proceedings before a particular



arbitral tribunal; it does not result in the permanent extinction of the arbitration mechanism or the disputes themselves, especially where the award has been judicially set aside.

15.6. Upon the setting aside of the award, the parties stand relegated to the position as if no adjudication had taken place. In such circumstances, the disputes revive and may be referred afresh to arbitration, subject to the terms of the arbitration agreement and the law of limitation.

15.7. Accordingly, I answer Point No.3 by holding that while the passing of an arbitral award results in the termination of proceedings and the mandate of the arbitral tribunal under Section 32 of the Act, the setting aside of such award under Section 34 revives the disputes



between the parties. The parties are therefore entitled to agitate their claims in fresh arbitral proceedings, as held by the Hon'ble Delhi High Court in ***Steel Authority of India's*** case and by the Bombay High Court in ***Associated Constructions'*** case supra.

16. ANSWER TO POINT NO.4: Whether the present arbitration notice dated 03.11.2023 can be said to be barred by the law of limitation?

16.1. It is contended on behalf of the Respondents that the notice dated 03.11.2023 issued under Section 21 of the Arbitration and Conciliation Act, 1996, is barred by limitation, on the premise that the cause of action arose upon termination of the contract on 28.05.2016 and that the invocation of arbitration after more than seven years is ex facie time-barred.

16.2. The submission proceeds on an erroneous assumption that the limitation applicable to the present notice must necessarily be traced back



to the original cause of action arising from termination of the contract. As noticed earlier, the arbitration clause had already been invoked pursuant to the original disputes, arbitral proceedings were conducted, and an award had been rendered by the arbitral tribunal. The present notice is not an invocation of the arbitration clause for the first time.

16.3. It is well settled that the initial invocation of an arbitration clause is governed by the law of limitation applicable to the underlying cause of action, and a notice under Section 21 issued for the first time must fall within the period prescribed under the Limitation Act, ordinarily referable to Article 137. However, where an arbitral award has been rendered and subsequently set aside under Section 34 of the Act, the legal landscape materially changes.



16.4. Upon the setting aside of an arbitral award, the disputes between the parties stand revived and a fresh cause of action arises to seek adjudication of those disputes through arbitration. In such a situation, the clock of limitation cannot mechanically be reverted to the date of the original cause of action. To do so would render the statutory remedy under Section 34 illusory and defeat the scheme of the Act, which expressly contemplates the possibility of further arbitral proceedings upon the setting aside of an award.

16.5. In the present case, the arbitral award came to be set aside by the Court under Section 34 on 28.02.2023. The notice under Section 21 invoking fresh arbitral proceedings was issued on 03.11.2023, i.e., within a period of approximately nine months from the date on which the award was set aside. In such



circumstances, the issuance of the notice cannot be tested on the anvil of limitation referable to the original termination of contract in the year 2016.

16.6. Once an award is set aside, the question is not one of statutory limitation in the strict sense, but one of delay, laches, or acquiescence. Unless the delay is such as to demonstrate abandonment of the claim or results in manifest prejudice to the opposite party, the right to seek fresh arbitration cannot be defeated on the ground of limitation.

16.7. In the present matter, the Petitioner has explained the intervening period by stating that it was considering its remedies, including the filing of an appeal under Section 37 of the Act, and upon due deliberation, elected to seek re-adjudication of the disputes through arbitration.



The delay of approximately nine months, in the facts of the case, cannot be said to be unreasonable, inordinate, or indicative of acquiescence so as to non-suit the Petitioner at the threshold.

16.8. Accordingly, I answer Point No.4 by holding that the arbitration notice dated 03.11.2023 is not barred by the law of limitation. The notice having been issued within a reasonable period after the setting aside of the arbitral award, no case is made out to reject the invocation of arbitration on the ground of limitation, delay, or laches.

17. **ANSWER TO POINT NO.5: Whether the Petitioner can maintain the present petition without availing the remedy under Section 37 of the A&C Act and, on failure in those proceedings, without availing the remedy of filing a special leave petition before the Hon'ble Apex Court, the notice dated 03.11.2023 not having been issued to Respondent No.2 could Respondent No.2 be made a party to these**



proceedings and be subjected to arbitral proceedings?

17.1. The Respondents contend that the Petitioner, having chosen not to challenge the order passed under Section 34 of the Act by way of an appeal under Section 37, and thereafter not having approached the Hon'ble Supreme Court, is disentitled from invoking fresh arbitral proceedings and from maintaining the present petition under Section 11 of the Act.

17.2. The contention is devoid of merit. The remedies under Sections 34 and 37 of the Act, and the discretionary jurisdiction under Article 136 of the Constitution, are corrective remedies directed against the validity of an arbitral award or a judicial order. Proceedings under Section 11 of the Act, on the other hand, are constitutive in nature, intended to facilitate the constitution of an arbitral tribunal once disputes



are found to be arbitrable. These remedies operate in distinct fields, and the election not to pursue an appellate remedy cannot be construed as a bar to invoking arbitration afresh when the award has been set aside and the disputes stand revived.

17.3. There is no provision under the Act which mandates exhaustion of the appellate remedy under Section 37, or the filing of a special leave petition, as a condition precedent for seeking re-adjudication of disputes through arbitration. To read such a requirement into the statute would run contrary to the scheme of the Act, which consciously preserves party autonomy in the choice of remedies.

17.4. The further objection that the present petition is vitiated by delay and laches also cannot be accepted at this stage. The award was set aside



on 28.02.2023; the notice under Section 21 was issued on 03.11.2023; a further notice was issued on 09.09.2024; and the present petition under Section 11 was filed on 08.01.2025. Whether the interregnum demonstrates abandonment, acquiescence, or causes prejudice to the Respondents is a matter involving factual adjudication.

17.5. At the stage of consideration of a petition under Section 11 of the Act, this Court is required to undertake only a prima facie examination. Unless the claim is ex facie barred by limitation or the arbitration agreement itself is demonstrably non-existent or inoperative, issues of delay, laches, waiver, or acquiescence fall within the domain of the arbitral tribunal and cannot be conclusively determined by this Court.



17.6. Insofar as Respondent No.2 is concerned, the objection that it cannot be made a party to the arbitral proceedings on the ground that it was not a signatory to the agreement and was not issued a notice dated 03.11.2023 under Section 21 of the Act is wholly misconceived.

17.7. The record clearly discloses that the Petitioner initially sought appointment of an arbitrator against Respondent No.1. It was Respondent No.1 which categorically asserted that it was no longer the entity responsible for the subject matter of the dispute, as a separate company, namely Bengaluru Solid Waste Management Limited (Respondent No.2), had been constituted to carry out the solid waste management functions and that any claim of the Petitioner could only be agitated against Respondent No.2. It is pursuant to this stand



taken by Respondent No.1 that Respondent No.2 was impleaded in the present proceedings.

17.8. Respondent No.2, having thus stepped into the operational and functional shoes of Respondent No.1 in respect of the very contract and obligations in dispute, is a successor-in-interest for the purposes of the present arbitration. Once such succession is asserted by Respondent No.1 itself, Respondent No.2 cannot resist arbitral proceedings on the technical plea that it was not an original signatory to the agreement or that it was not separately addressed in the initial notice under Section 21.

17.9. The requirement of a notice under Section 21 is to communicate the invocation of arbitration and the disputes sought to be referred. Where Respondent No.2 claims through Respondent



No.1, and where it is impleaded on the basis of Respondent No.1's own stand, the absence of a separate notice addressed to Respondent No.2 does not vitiate the proceedings, particularly when Respondent No.2 has full notice of the disputes and has actively contested the present petition.

17.10. The law does not countenance a situation where a party first asserts succession and substitution to avoid liability, and thereafter resiles from that position to resist arbitration. Such conduct attracts the doctrine of approbation and reprobation and cannot be permitted.

17.11. Accordingly, Point No.5 is answered by holding that:

17.11.1. The Petitioner is entitled to maintain the present petition under Section 11 of the



A&C Act without availing the appellate remedy under Section 37 or approaching the Hon'ble Supreme Court;

17.11.2. The issue of delay or laches does not bar the present petition and, in any event, is a matter to be examined by the arbitral tribunal; and

17.11.3. Respondent No.2, having stepped into the shoes of Respondent No.1, can validly be made a party to the arbitral proceedings notwithstanding the absence of a separate notice dated 03.11.2023 addressed to it.

18. **ANSWER TO POINT NO.6: Whether a sole Arbitrator could be appointed when the Arbitration Clause contemplates a Panel of three Arbitrators?**

18.1. It is not in dispute that the arbitration clause in the agreement between the parties contemplates adjudication of disputes by a panel of three Arbitrators. It is equally not in



dispute that, in the earlier round of arbitral proceedings between the very same parties arising out of the same agreement, both parties had consciously and unequivocally consented to the appointment of a sole Arbitrator.

18.2. The said consent was not incidental or provisional. It was acted upon by the parties, resulted in the constitution of an arbitral tribunal consisting of a sole Arbitrator, and culminated in the passing of an arbitral award. Having once consciously waived the requirement of a three-member tribunal and participated in arbitral proceedings before a sole Arbitrator without demur, the Respondents cannot now be permitted to resile from that position.

18.3. The Arbitration and Conciliation Act, 1996, is founded on the principle of party autonomy.



The number of arbitrators, though initially stipulated in the arbitration clause, is not immutable and can be varied by mutual consent of the parties. Such consent, once acted upon, constitutes a valid waiver of the contractual stipulation relating to the composition of the arbitral tribunal.

18.4. In the present proceedings, the Petitioner has stated that it has no objection even if a panel of three Arbitrators is constituted. However, such a submission does not dilute the legal position that the Respondents, having earlier consented to a sole Arbitrator, stand bound by such consent.

18.5. Learned counsel appearing for the Respondents has, upon enquiry by the Court, fairly submitted that the Respondents have no objection to the appointment of a sole



Arbitrator. This submission reinforces the conclusion that there exists a consensus between the parties for adjudication of the disputes by a sole Arbitrator.

18.6. In proceedings under Section 11 of the Act, where the Court is required to facilitate the constitution of the arbitral tribunal, such consensus must be given due effect. Insistence on a three-member tribunal in the face of express consent for a sole Arbitrator would defeat the objective of expeditious and effective dispute resolution.

18.7. Accordingly, I answer Point No.6 by holding that notwithstanding the arbitration clause contemplating a panel of three Arbitrators, the appointment of a sole Arbitrator is legally permissible and justified in the facts of the present case, having regard to the prior waiver,



the conduct of the parties, and their present consensus.

19. **ANSWER TO POINT NO.7: What order?**

19.1. In view of the above, I pass the following:

ORDER

- i. The CMP is ***allowed***.
- ii. ***Sri Justice Ajit J Gunjal***, a former judge of this Court is appointed as a sole arbitrator to arbitrate the dispute between the parties under the aegis of the Arbitration Centre attached to this Court.
- iii. Registry is directed to forward a copy of this order to the Director, Arbitration & Conciliation Centre for doing the needful.
- iv. Since the order is passed in the presence of both the counsels, the counsels are directed to appear before the Director, Arbitration &



Conciliation Centre without requirement of any notice at **2.30 p.m. on 22.01.2026.**

- v. All contentions are left open.
- vi. Registry is directed to return the original and/or certified copies, if produced, to the respective parties who have produced it/them by following due procedure.

**Sd/-
(SURAJ GOVINDARAJ)
JUDGE**

KTY
List No.: 2 SI No.: 1