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

Reserved on: 10th January, 2020
Date of decision:23rd June 2020

\+ **OMP 680/2011 (New No. O.M.P. (COMM)392/2020) & I.A. 11671/2018**

GAMMON INDIA LTD. & ANR. ..... Petitioners
Through: Dr. P. C. Markanda, Senior Advocate with Mr. Chirag Shroff and Ms. Neihal Dogra, Advocates. (M: 9811032077)

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA .... Respondent
Through: Ms. Padma Priya and Mr. Dhruv Nayar, Advocates. (M: 9810026319)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Arbitration was to be the panacea for the woes of litigation. As an `alternate dispute resolution' mechanism, arbitration has however become complex, owing to several reasons such as long delays, challenges in enforcement, high costs etc., One other reason rendering arbitral processes complex is `MULTIPLICITY' – multiple invocations, multiple references, multiple Arbitral Tribunals, multiple Awards and multiple challenges, between the same parties, in respect of the same contract or the same series of contracts. Repeated steps have been taken in judgments and by amendments to the law, to make the system efficient, but more needs to be done.

Brief Facts

2. In the present case, a contract was executed between Gammon-Atlanta JV, a Joint Venture of Gammon India Ltd. and Atlanta Ltd. (*hereinafter "Contractor"*) and National Highways Authority of India (*hereinafter "NHAI"*) on 23rd December, 2000 for the work of widening to 4/6 lanes and strengthening of existing 2 lane carriageway of NH-5 in the State of Orissa from km 387.700 to 414.000 (Khurda to Bhubaneswar) Contract Pkg. OR-1 (*hereinafter "Project"*). The value of the work was approximately Rs.118.9 crores. The date of commencement of the contract was fixed as 15th January, 2001 and the project was to be executed within 36 months i.e., by 14th January, 2004.

3. The Project was not executed within the prescribed time. Extensions for completing the Project were granted till 31st December, 2006. Vehicular traffic was allowed on the main carriageway in March, 2007 and according to the Contractor, this amounted to a deemed 'taking over' of the carriageway by NHAI and hence completion.

Award No.1 – 5th October, 2007

4. During the course of execution of the Project, disputes had arisen between the parties in respect of some claims. The same were raised both by the Contractor and by NHAI. On 1st August, 2004, the Disputes Review Board (*hereinafter "DRB"*) was constituted in terms of sub-clause 67.1 of the Conditions of Particular Application *(hereinafter, "COPA")*. The DRB is stated to have expressly communicated its inability to resolve issues pertaining to a period earlier to its constitution. The DRB thus did not resolve the issues and accordingly, the Contractor invoked arbitration under sub-clause 67.3 of COPA vide notice dated 27th January, 2005. The relevant

claims referred for arbitration are as under:

> ***"Claim 2.1:*** *Compensation for losses incurred on account of overhead and expected profit*
> ***Claim 2.2:*** *Compensation for reduced productivity of machinery and equipment deployed.*
> ***Claim 2.3:*** *Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement."*

5. The Arbitral Tribunal, consisting of Mr. P.B. Vijay, Mr. C.C. Bhattacharya and Mr. R.T. Atre, was appointed and the award was rendered on 5th October, 2007 (*hereinafter "Award No.1"*). The findings in Award No.1 with respect to Claim Nos. 2.1, 2.2 & 2.3 are as under:

- Claim No.2 was found to not be barred by limitation as even though the DRB was constituted on 1st August, 2004, it expressed its inability to give its recommendation only on 17th November, 2004. Thus, the limitation period of 56 days was considered to begin from 17th November, 2004, making the notice dated 27th January, 2005 within the prescribed limitation period.
- The Contractor claimed compensation on the basis of the following six alleged breaches by NHAI: (1) Late appointment of key personnel, (2) Delay in payments, (3) Virtual suspension of BC work from December, 2003 to March, 2005, (4) Failure to sanction adequate extension of time, (5) Failure to constitute Dispute Review Board and (6) Delay in handing over of site.
- As regards the first five alleged breaches, the Arbitral Tribunal *(hereinafter, "AT")* found that the actions of NHAI either did not materially affect the progress of the work, the Claimant's preparedness itself was inadequate or that alternate relief is available/has been availed by the Contractor. It was therefore held that the Contractor did not deserve any compensation on these grounds.

- As regards the sixth alleged breach, the AT concluded that the initial work of the Contractor was affected by NHAI's inability to fulfill its obligations under Clause 42.01, however, once the hindrances were removed, the Contractor was not able to accelerate the progress of the work. The Contractor's claim for compensation was therefore restricted to the initial contract period during which time approximately Rs.37/- crores worth of work is estimated to have been affected.
- With respect to Claim 2.1, since the Contractor's deployment of resources on overheads and their underutilization was admitted to the extent of 14.28%, compensation of Rs.5.28/- cores (14.28/100 x 37) was awarded to the Contractor. The claim for loss of profits was, however, rejected on the ground that the Contractor is still executing the work and will earn profit/loss commensurate with the work done.
- With respect to Claim 2.2, the AT held that though work worth Rs.37 crores was affected during the initial contract period, since the Contractor itself was responsible for underutilization of machinery and equipment, compensation of only 5% i.e., Rs. 1.85/- crores (5/100 x 37), could be awarded.
- With respect to Claim 2.3, it was observed that this sub-claim had not been mentioned in the list of claims included in the notice dated 27th January, 2005 invoking arbitration, followed by letter dated 21st February, 2005. Claim 2.3 was therefore considered outside the AT's terms of reference.

6. Thus, as per Award No.1, Claim Nos. 2.1 and 2.2 were allowed and Claim No.2.3 was rejected on the ground that it was outside the terms of reference.

7. Award No.1 was challenged by the Contractor and by NHAI in OMP 99/2008 and OMP 107/2008. In OMP 99/2008, the Contractor withdrew the challenge in respect of Claim No. 2.3, which was rejected and sought liberty to approach the 2nd Arbitral Tribunal. Vide order dated 13th March, 2009, the same was permitted in the following terms:

> *"The petitioner seeks to withdraw the challenge to the claim 2.3 with liberty to agitate the same before the arbitrator. The counsel for the respondent without prejudice to the rights and contentions of the respondent, to take pleas qua the said claim before the arbitrator has no objection to the amendment being allowed.*
>
> *Accordingly, the application is allowed. The grounds XVI and XVII raised with regard to claim 2.3 and the prayer paragraph also in relation to claim 2.3 is allowed to be amended in the aforesaid terms with liberty to the petitioner to pursue the said claim before the Arbitral Tribunal and without prejudice to the rights of the respondent to take all pleas in opposition thereto before the Arbitral Tribunal."*

8. Award No.1 was thereafter upheld by a ld. Single Judge of this Court on 15th November, 2016. Two ld. Division Benches also upheld the award vide judgments dated 18th January, 2017 and 20th February, 2017. Two SLPs, being SLP (C) No. 17022/2017 and 22663/2017, were dismissed on 8th August, 2017 and 11th September, 2017 respectively. Thus, Award No. 1 attained finality.

Award No.2 – 21st February, 2011 (Impugned Award)

9. In 2007, the Contractor had invoked the jurisdiction of the DRB in respect of payment of Tack Coat under bill of quantities (hereinafter, "BOQ") item No. 4.02 (b). The DRB rejected the said claim. Thus, the said claim, along with certain other claims, were referred to the Arbitral Tribunal consisting of three members, namely, Mr. Sarup Singh, Mr. C.C. Bhattacharya and Justice E. Padmanabhan (Retd.). This Tribunal was

constituted on 2nd January, 2008. Claim 2.3 of Award No.1 was then filed before this AT owing to the permission granted by the Court on 13th March 2009. Vide award dated 21st February, 2011 *(hereinafter, "Award No.2")* by a 2:1 majority, claims of the Contractor were rejected. The minority award granted the claims of the Contractor.

10. The various claims referred to the second Arbitral Tribunal, which rendered Award No.2, are as under:

> "*1. Compensation for losses incurred on account of extra expenditure incurred on increased cost of materials, labour, POL etc. for the balance work executed beyond the stipulated date of completion – Rs.1456.83 lacs (Claim 2.3 in AT 1)*
> *2. Payment of tack coat - Rs. 49,17,00,822/-*
> *3. Interest pendente lite and future @ 18% p.a. of the award sum under claim No.1 and claim No.2.*
> *4. Cost of Arbitration proceedings."*

11. The findings of the majority award in respect of Claim No.1 are set out herein-below:

- That claim no.1 is not barred by limitation. The finding of the Arbitral Tribunal is as under:

> "*1.41 The claim was referred to DRB on 17.11.2004 (C-94). DRB could not make recommendations within 56 days. The contractor invoked the Arbitration clause on 25.1.2002 (C-98) for certain claims including Claim No.2.3 (which is claim no.1 here). The first AT ruled that the said claim was outside the reference made to Tribunal. This observation/order is recorded in the award dated 05-10-2007 (C-101). This claim is for seeking compensation for losses incurred on account of extra expenditure incurred on*

increased cost of material, labour, POL etc. beyond 14-01-2004. The contractor invoked Arbitration clause on 25-1-2005, i.e. when the work was still in progress. This period is well within the provision of Article 137 of Limitation Act. This Claim has not been adjudicated upon by the 1st Tribunal."

- On merits, the 2nd AT held that the delay of two weeks in the appointment of the engineer and delay of five weeks, by the NHAI, in intimating the Contractor, was a short delay and did not affect the progress of the work.
- That there was a delay in providing a hindrance-free work site to the Contractor by NHAI.
- The 2nd AT further analysed that the total value of the work was approximately Rs.118.90 crores. Work worth Rs. 5031.43 lakhs was carried out by January, 2004 i.e., the stipulated period for completion of the contract. This constituted 42.3% of the work in monetary terms. The balance work was 57.7%, for which a hindrance-free site was already available. To execute this work, the Contractor took 4 years. Thus, there was clearly a low level of performance by the Contractor despite the site being available, which is, in fact, recorded in minutes dated 15th June, 2004.
- Insofar as delay in payment was concerned, there were three bills which were to be paid. Payments in respect thereof were released on 15th October 2003, 16th December, 2003 and 6th March, 2004. It was held that the delay in payment was very small and did not cause hindrance in the work. It was further observed that in any

case, under clause 60.8, the Contractor was entitled to interest for the delayed period.

- The ground taken that there was suspension of the entire BC work due to delays by NHAI was rejected after a detailed factual analysis of the Arbitral Tribunal. The Arbitral Tribunal also relied upon Award No.1, which dealt with this very issue, to reject the claim of the Contractor for compensation.
- Non-grant of time extension was not considered in Award No.2 as the same was pending before the DRB.
- The 2nd AT held that there was no delay in constitution of the DRB.
- In view of the above findings, the Arbitral Tribunal in Award No.2 considered Clause 70.3 and 70.2 of the contract. The said clauses are extracted herein below:

> "***Sub- Clause 70.2: Other changes in cost***
> *To the extent that full compensation for any rise or fall in the costs to the Contractor is not covered by the provisions of this or other clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall in cost.*
>
> ***Sub-Clause 70.3: Adjustment formula***
>
> *The adjustment to the Interim Payment Certificates in respect of changes in cost and legislation shall be determined from the following formula:*
> $$Pn = A + b\frac{Ln}{Lo} + c\frac{Mn}{Mo} + d\frac{Fn}{Fo} + \frac{Bn}{B3}$$
> *Where:*

Pn *is a price adjustment factor to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-Clause 60.1(d), and with Sub-Clauses 60.1 (e) and (f), where such variations and Daywork are not otherwise subject to adjustment.*
A = 0.50, b = 0.15, c = 0.25, d = 0.10
Ln. Mn. Fn. *Etc., are the current cost indices or reference prices of the cost elements in the specific currency for month "n" determined pursuant to Sub-Clause 70.5, applicable to each cost element: and*
Lo. Mo. Fo*. Etc. are the base cost indices or reference prices corresponding to the above cost elements at the date specified in Sub-Clause 70.5.*
The amounts, determined as payable to the contractor as a price adjustment factor in a currency or currencies other than the Indian Rupee. Will be converted from Indian Rupees to the currency or currencies of payment at the exchange rate (s), as determined by the Reserve Bank of India, on the date of current index and not at the rate (s) established in the Appendix to Bid, if any."

- After analysing the two clauses, the Arbitral Tribunal arrived at the following conclusion:

"*1.49 Every contract for construction work has some inbuilt uncertainties. Such uncertainties arise during construction period due to lack of complete and timely fulfilment of the obligations by the claimant and the respondent towards the other party. It leads to delay in the completion of work. The financial effect of some of such uncertainties cannot be truly quantified. Therefore it is regulated by making certain provision/conditions in the contract agreement.*
1.50 The 1st AT has awarded Rs. 5.28 crores and

> *Rs. 1.85 crores towards claim 2.1 and claim No.2.2 respectively. Apparently the provisions of section 55 of Indian Contract Act, where ever applicable, stand covered through the award order passed by 1st AT.*
>
> *1.51 With the provisions under clause 70.2 of the contract agreement, statement of the witness CW-1 during cross examination does not provide any support to the claimant.*
>
> *1.52 The Arbitral Tribunal holds that under the provisions of Sub Clause 70.2, this claim does not succeed. Nothing more is admissible for payment beyond the provisions of sub clause 70.3. Hence amount awarded is Rs. Nil only."*

12. The present petition challenges Award No.2.

Award No.3 – 20th February, 2012

13. NHAI imposed liquidated damages on the Contractor for the delay caused. Seven disputes were referred to the DRB on 24th March, 2008. However, dissatisfied with the recommendations of the DRB, a third arbitration was invoked by the Contractor vide letter dated 23rd December, 2008. The following claims were referred to the Arbitral Tribunal consisting of Mr. RH Tadvi, Mr. V. Velayutham and Mr. V.S. Karandikar:

> *"1. Recovery of alleged Liquidated Damages*
> *2. Recovery of Building and other construction Workers Welfare Cess*
> *3. Recovery of Alleged Penalty for not providing vehicles to the Engineer*
> *4. Premature recovery of discretionary advance*
> *5. Interest on Discretionary Advance*
> *6. Earthworks pertaining to Clearing and Grubbing*
> *7. Claim for payment of interest due to premature deductions of secured*

advance by the Respondent.
8. Interest pendente lite and future
9. Cost of Arbitration Proceeding"

14. Vide award dated 20th February, 2012 *(hereinafter, "Award No.3")* the Contractor's claim for recovery of amounts paid as liquidated damages was allowed. The findings in Award No.3 in respect of Claim No.1 are summarised below:

- **Claim 1:** The Contractor was allowed a refund of the entire amount of liquidated damages imposed. Refund was given on the ground that the Contractor was entitled to a further extension of time and hence the imposition of liquidated damages was illegal. It was observed that NHAI could not impose liquidated damages on the Contractor when it had failed to provide a hindrance-free site and had also taken over the road. It was also found that in contravention of the contract, prior notice for imposition of liquidated damages was not issued. Furthermore, since certified payments to the Contractor were withheld, it was held that the Contractor had the right to slow down the rate of work as per the terms of the contract. The Contractor was also awarded interest @10% p.a. compounded monthly for the payments withheld against the liquidated damages. A declaratory award, prohibiting the imposition of further liquidated damages, was also given.

15. Award No.3 has been upheld by a ld. Single Judge and a ld. Division Bench of this Court. NHAI has paid the awarded sum and the award has attained finality.

Procedural History of the Present Petition

16. The present petition was filed in August, 2011. Initially itself, it was submitted by the Contractor that it does not press objections *qua* Claim No.2 i.e., payment of tack-coat. This was recorded in order dated 20th September, 2011 as under:

> "*Learned counsel for the petitioner, on instructions, submits that the petitioner does not press the objections to the award made on claim No.2. Mr. Bansal also submits that another arbitration proceeding in relation to levy of liquidated damages under the same contract, by the respondent, is pending disposal before another tribunal. Arguments have been heard and the award has been reserved in those proceedings.*"

17. The petition was then dismissed for non-prosecution on 20th January, 2017. The same was, however, restored on 15th March, 2017. Vide order dated 6th August, 2019, the counsel for the parties, on a query from the Court, submitted as under:

> "*Dr. P. C. Markanda, ld. senior counsel for the Petitioner submits that according to his client, the indices were frozen as in the original contract period. He relies on a few letters which have been placed on record. Hence according to him, no escalation was in fact paid.*
>
> *On the other hand, ld. counsel for NHAI submits that the escalation as per Clause 70.3 has been paid to the Petitioner to the tune of Rs.15,29,15,363/- up to the last IPC No.94.*
>
> *In view of the Full Court Reference, further hearing is deferred to 4th September, 2019.*"

18. Thus, the only claim to be considered in this petition is Claim No.1, wherein the case of the Contractor is that the revision of rates did not take

place and hence, the Contractor is entitled to additional amounts.

Submissions of Ld. Counsels

19. Mr. Markande, ld. Senior Counsel appearing for the Contractor, has raised a two-fold argument. First, it is submitted that the finding in Award No.3 that NHAI was responsible for the delay would bind the present proceedings as well. Secondly, that even otherwise, the delay was clearly caused by NHAI and the Contractor is entitled to escalation/compensation for the losses due to the said delays. The submission is that there were delays in the appointment of the engineer and handing over of the site and delays caused due to non-payment of dues, placing of variation order which had to be executed by the Contractor, non-grant of extension of time to the Contractor and default/delay in constituting the DRB.

20. The findings of the Arbitral Tribunal in Award No.2 with respect to Claim No.1 are that the consequences for uncertainties and delays during construction work are fully provided for in the contract itself. Insofar as any damages/compensation are concerned, which the Contractor may be entitled to claim under Section 55 of the Indian Contract Act, 1872 *(hereinafter, "ICA")*, the same were found to be covered by Award No.1 which awarded Rs.5.28 crores and Rs.1.85 crores towards Claims 2.1 and 2.2 of the Contractor. Submission of Mr. Markande, ld. Senior Counsel, is that the claim has been confused by the Arbitral Tribunal as being an award under Section 55 of the ICA whereas, in fact, Claim No.1 was not a claim under Section 55.

21. It is further argued by Mr. Markande, that in Award No.3 there was a clear finding that NHAI had caused a delay on various counts and hence, in

view of the finding in Award No.3, this claim ought to be automatically allowed. Reliance is placed on the minority award of the 2nd AT to argue that the minority award clearly distinguishes between compensation payable under Section 55 and Section 73 of the ICA. He urges this Court to uphold the minority award under which the Contractor has been awarded the following sum:

> "*In the result there will be an Award in the following terms:*
>
> *I.* *The Respondent is directed to pay to the Claimant the sum of Rs.49,17,00,822/- with subsequent interest @ of 18% P.A. on Rs.32,97,36,489/- from 22.10.2007 till date of payment towards tack-coat work executed falling under BOQ entry 4.02 (b).*
>
> *II.* *The Claimant is entitled to the relief of declaration declaring that the Claimant is entitled to payment for the balance of work falling under BOQ entry 4.02 (b) Tack-coat as and when executed at the rate of Rs.400/sq.m.*
>
> *III.* *The Respondent is directed to pay Rs.1456.83 Lakhs to the Claimant towards loss incurred on account of extra expenditure incurred on increased cost of materials, labour, POL etc. with interest @ 12% P.A from 01.02.2005 the date of claim and till the date of payment.*
>
> *IV.* *The relief of declaration prayed for as to compensation for the future period and balance of work executed during such period is left open to be agitated in future.*
>
> *And*
>
> *V.* *Both the parties shall bear their respective costs in the present proceedings throughout."*

22. On the other hand, on behalf of NHAI, Ms. Padma Priya, ld. Counsel, submits that Award No.2 is detailed. The Contractor had multiple opportunities before the Arbitral Tribunal and has lost on both counts. The minority award is of no consequence once the majority award has rejected the claims of the Contractor. Ld. Counsel further submits that there was no reason as to why this Claim was not included in the reference leading to Award No.1. This claim according to her is barred. It is further submitted by ld. Counsel that escalation has in fact been granted under Clause 70.3. She further urges that the findings by the DRB, 1st AT and the 2nd AT are consistent and thus the petition is liable to be dismissed.

Analysis and Findings

23. The chronology of facts set out above shows that the parties had appointed three Arbitral Tribunals which adjudicated different disputes and claims. There were three Awards. Award No.1 and 3 have attained finality. In this petition, the challenge is to Award No.2. The Contractor's submission is that the findings in Award no.3 be relied upon, for setting aside Award no.2. The question that arises is whether it is permissible for the Contractor to jettison the findings in Award No.3 to argue that Award No.2 ought to be set aside and the claims of the Contractor ought to be allowed. Before going into the challenge to Award no.2, the legal position on multiple arbitrations and multiple awards needs to be analysed.

24. A perusal of the provisions of the Arbitration and Conciliation Act, 1996 shows that the statute envisages that disputes can be raised at different stages and there can be multiple arbitrations in respect of a single contract.

By way of illustration, Section 7(1), Section 8(3) and Section 21, can be seen, which read:

> ***"7. Arbitration agreement.*** *– (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> ***8. Power to refer parties to arbitration where there is an arbitration agreement –***
>
> *(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.*
>
> ***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."*

Under Sec. 7 the agreement to arbitrate could be for `all or certain disputes which have arisen or which may arise'. Under Sec.8 if a particular proceeding is pending in court and there is a *lis* as whether a particular dispute is arbitrable, for other disputes, arbitration can be commenced or continued and even the award can be made. This means that, if the court, thereafter comes to the conclusion that the dispute is arbitrable, after the first reference is either pending or concluded, a second reference can be made. The commencement of proceedings under Section 21 is to be construed in respect of a particular dispute. Thus, if there are multiple disputes which

have been raised at different times, the commencement of proceedings would be different *qua* each of the disputes. All these provisions show that there can be multiple claims and multiple references at multiple stages.

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

26. The endeavour of Courts in the domain of civil litigation is always to ensure that claims of parties are adjudicated together, or if they involve overlapping issues, the subsequent suit is stayed until the decision in the first suit. It is with the intention of avoiding multiplicity that the principles enshrined in Order 2 Rule 2 CPC, Section 10 CPC and Res Judicata are part of the Code of Civil Procedure from times immemorial. However, since arbitral proceedings are strictly not governed by the Code of Civil Procedure, 1908, it is possible for parties to invoke arbitration as and when the disputes arise, but should the same be permissible without any limitation and ignoring the principles of public policy as enshrined in these provisions.

27. Multiple arbitrations before different Arbitral Tribunals in respect of the same contract is bound to lead to enormous confusion. The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counter-productive.

28. Typically, in construction contracts, the claims may be multiple in number but the underlying disputes about breach, delays, termination etc.,

would form the core of the disputes for almost all claims. As is seen in the present case, parties have invoked arbitration thrice, raising various claims before three different Tribunals which have rendered three separate Awards. Considering that a previously appointed Tribunal was already seized of the disputes between the parties under the same contract, the constitution of three different Tribunals was unwarranted and inexplicable. A situation where multiple Arbitral Tribunals parallelly adjudicate different claims arising between the same parties under the same contract, especially raising overlapping issues, is clearly to be avoided.

29. Multiple arbitrations can be of various categories:

(i) Arbitrations and proceedings between the same parties under the same contract.

(ii) Arbitrations and proceedings between the same parties arising from a set of contracts constituting one series, which bind them in a single legal relationship.

(iii) Arbitrations and proceedings arising out of identical or similar contracts between one set of entities, wherein the other entity is common.

30. In Category (i) cases seeking a second reference under Section 11 of the Arbitration and Conciliation Act, 1996 for adjudication of disputes, the Supreme Court and High Courts have referred disputes between the same parties arising under the same contract, to arbitration. In ***Indian Oil Corporation Vs. SPS Engg Co. Ltd***[1], a claim relating to risk-execution of balance work, which was not referred to the first Tribunal, was referred to arbitration. Similar is the position in ***Sam India Built Well (P) Ltd. v. UOI***

[1] (2011) 3 SCC 507

& Ors. *[Arb. P. 106/17, decided on 8th September, 2017];* ***Parsvnath Developers Limited and Ors. v. Rail Land Development Authority*** *[Arb. P. 724/18, decided on 31st October, 2018];* ***Parsvnath Developers Limited and Ors. v. Rail Land Development Authority*** *[Arb. P. 710/19, decided on 19th May, 2020].*

31. In a set of petitions involving several caterers and the ***Indian Railway Catering & Tourism Corporation Limited[2] (IRCTC cases)*** involving 25 petitions which fell in category (iii) above, the Delhi High Court recently appointed a single arbitrator to adjudicate the disputes.

32. However, what can lead to enormous uncertainty and confusion which ought to be avoided is the constitution of separate Arbitral Tribunals for separate claims in respect of the same contract, especially when the first Arbitral Tribunal is still seized of the dispute or is still available to adjudicate the remaining claims. In ***Dolphin Drilling Ltd. v. ONGC[3],*** the Supreme Court, while considering the question as to whether a second reference for arbitration ought to be made, observed as under:

> *"**5.** The plea raised by the respondent voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time consuming means for resolution of disputes. But on that basis it is difficult to read the arbitration clause in the agreement as suggested by the respondent. ...*
> *6. The plea of the respondent is based on the words "all disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all*

[2] ARB.P. 745-51/2019; ARB.P. 753/2019; ARB.P. 755-61/2019; ARB.P. 763/2019; ARB.P. 765-70/2019; ARB.P. 780/2019; ARB.P. 789/2019 & ARB.P. 797/2019
[3] AIR 2010 SC 1296

> *disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes"* ***that might be in existence when the arbitration clause is invoked*** *and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future."*

33. A perusal of the above finding of the Supreme Court clearly shows that the Court has expressed its displeasure about the arbitration process becoming a highly expensive and time-consuming means for resolution of disputes. Owing to the wording of the clause, in the said case, the Supreme Court referred the parties to arbitration for the second time. The underlying ratio of ***Dolphin (supra)***, on a careful reading, is that all disputes that are in existence when the arbitration clause is invoked, ought to be raised and referred at one go. Though there is no doubt that multiple arbitrations are permissible, it would be completely contrary to public policy to permit parties to raise claims as per their own convenience. While provisions of the CPC do not strictly apply to arbitral proceedings, the observations of the Supreme Court in ***Dolphin (supra)*** show that when an arbitration clause is invoked, all disputes which exist at the time of invocation ought to be

referred and adjudicated together. It is possible that subsequent disputes may arise which may require a second reference, however, if a party does not raise claims which exist on the date of invocation, it ought not to be given another chance to raise it subsequently unless there are legally sustainable grounds. This is necessary in order to ensure that there is certainty in arbitral proceedings and the remedy of arbitration is not misused by parties. The constitution of separate arbitral tribunals is a mischief which ought to be avoided, as the intent of parties may also not be *bona fide*.

34. It is the settled position in law that the principles of *res judicata* apply to arbitral proceedings[4]. The observations of the Supreme Court in ***Dolphin (supra)*** also clearly show that principles akin to Order II Rule 2 CPC also apply to arbitral proceedings. The issue as to whether any claims are barred under Order II Rule 2 CPC or whether any claim is barred by *res judicata* is to be adjudicated by the arbitral tribunal and not by the Court[5]. Keeping in mind the broad principles which are encapsulated in Order II Rule 2 CPC, as also Section 10 and Section 11 of the CPC, which would by itself be inherent to the public policy of adjudication processes in India, it would be impermissible to allow claims to be raised at any stage and referred to multiple Arbitral Tribunals, sometimes resulting in multiplicity of proceedings as also contradictory awards. Thus, this Court is of the considered opinion that:

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[4] *K.V. George v. Secretary to Government, Water and Power Department, Trivandrum & Ors., AIR 1990 SC 53*

[5] *Indian Oil Corporation v. SPS Engg. Co. Ltd, (2011) 3 SCC 507; Sam India Built Well (P) Ltd. v. UOI & Ors. [Arb. P. 106/17, decided on 8th September, 2017]; Parsvnath Developers Limited and Ors. v. Rail Land Development Authority [Arb. P. 724/18, decided on 31st October, 2018]; Parsvnath Developers Limited and Ors. v. Rail Land Development Authority [Arb. P. 710/19, decided on 19th May, 2020]*

i. In respect of a particular contract or a series of contracts that bind the parties in a legal relationship, the endeavour always ought to be to make one reference to one Arbitral Tribunal. The solution proposed by the Supreme Court *(Aftab Alam, J.,)* in paragraph 9 of ***Dolphin (supra)*** i.e., to draft arbitration clauses in a manner so as to ensure that claims are referred at one go and none of the claims are barred by limitation, may be borne in mind. The said observation in ***Dolphin (supra)*** reads:

> *"9. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that* ***the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement*** *and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non-arbitrable."*

ii. If under a contract, disputes have arisen and the arbitration clause is to be invoked, at different stages, the party invoking arbitration ought to raise all the claims that have already arisen on the date of invocation for reference to arbitration. It would not be permissible for the party to refer only some disputes that have arisen and not all. If a dispute and a claim thereunder has arisen as on the date of invocation and is not mentioned, either in the invocation letter or in the terms of reference, such claim ought to be held as being barred/waived, unless permitted to be raised by the Arbitral Tribunal

for any legally justifiable/sustainable reasons.

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

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

v. At the time of filing of petitions under Section 11 or Section 34 or any other provision of the Arbitration and Conciliation Act, 1996, specific disclosure ought to be made by parties as to the number of arbitration references, Arbitral Tribunals or court proceedings pending or adjudicated in respect of the same contract and if so, the stage of the said proceedings.

vi. If there are multiple challenges pending in respect of awards arising out of the same contract, parties ought to bring the same to the notice of the Court adjudicating a particular challenge so that all the challenges can be adjudicated comprehensively at one go. This would ensure avoiding a situation as has arisen in the present case where

Award Nos.1 and 3 have attained finality and the challenge to Award No.2 continued to remain pending.

35. Coming to the facts, a perusal of the dates would reveal that Award No.1 was passed on 5th October, 2007 and the Contractor *inter alia*, challenged the rejection of Claim 2.3 under Section 34 of the Arbitration and Conciliation Act, 1996. Parallelly, the Contractor invoked arbitration in respect of some more claims in 2007. So, while the challenge to Award No.1 was pending, including the rejection of Claim 2.3, the second arbitration was continuing. In 2009, the Contractor then sought permission of the Court to agitate Claim 2.3 before the second AT, which it was permitted to do, keeping open NHAI's objections. It didn't end there. Thereafter, a third arbitration, in respect of recovery of amounts collected as liquidated damages, along with other claims, was invoked by the Contractor on 23rd December, 2008. Award No.2 was passed on 21st February, 2011 i.e., when the third arbitration was still continuing. The present OMP came to be filed in August, 2011. In order dated 20th September, 2011, it is noticed that the third arbitral proceeding is underway. The third Arbitral Tribunal concluded its proceedings and rendered its award on 20th February, 2012. The said award attained finality on 14th August, 2013. NHAI is also stated to have paid the awarded sum thereunder.

36. While Awards No. 1 and 3 have attained finality, the challenge in respect of Award No.2 i.e., the present petition, continues to remain pending. Parties may not have brought to the notice of the Court deciding OMP No.584/2012, arising out of Award No. 3, that the OMP relating to Award No.2 is pending before the Court.

37. It is in this background that the Court has to consider the submissions made on behalf of the Contractor that the findings in Award No.3 have to be read for deciding the present petition. The question that arises is whether it is permissible to read the findings of a subsequent award to decide objections against the previous award.

38. Claim No. 2.3 related to compensation for non-grant of escalation of rates i.e., revision of rates to cover increased cost of material and labour beyond the escalation provision provided in the agreement. This claim was one of the claims raised before the first AT which was, however, rejected by the first AT in the following terms:

> *"2.2.3.4 Arbitral Tribunal's observations and Conclusion.*
>
> *2.2.4.1 The Claimant preferred this Claim No.2 under three sub-heads as follows:*
>
> *Claim 2.1: Compensation for losses incurred on account of overhead and expected profit,*
>
> *Claim 2.2: Compensation for reduced productivity of machinery and equipment deployed.*
>
> *Claim 2.3:"Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement.*
>
> *Under sub-claims 2.1, 2.2 & 2.3 the Claimant demanded compensation of Rs. 3751.48 lacs, Rs. 1374.93 lacs and 1406.03 lacs respectively for the*

period from 15.01.2004 to 06.07.2006 (CA-XV dated 30.10.2006). The Claimant has finally not demanded a declaratory award for these sub-claims.

2.2.4.2 *Out of the above three sub claims, the sub claim No. 2.3 does not find a mention in the list of claims included in the notice invoking Arbitration dated 27.01.2005 (C-87) followed by letter dated 21.02.2005 (C-89). Although, this notice (C-87) is in continuation of the Claimant's notice dated 25.01.2005 to the General manager of the Respondents (C-86), the letter dated 27.01.2005 (C-87), being the later of two letters and addressed to the Chairman (Employer), finally prevails over the letter dated 25.01.2005 (C-86). The notice to commence arbitration dated 27.01.2005 in its third para graph clearly mentions as follows - "In terms of clause 67.1, we give notice of our intention to commence arbitration in respect of the following issues/claims" (Emphases supplied). Here the Claimants have listed 9 claims. Sub-Claims 2.3 referred to above is not included in this list. In the very first meeting of the AT held on 06.04.2005 it was made clear by the AT that the present arbitration is only for the claims contained in the Contractor's letters dated 27.01.2005 and 21.02.2005.*

Hence the AT rules that sub-claim 2.3 is outside its terms

reference."

39. Thus, the first AT was of the opinion that Claim 2.3 ought to have been part of the invocation/reference letter. The said claim, having not been raised in the invocation letter, was held to be outside the terms of reference. There is no doubt that in 2009 this Court permitted the Contractor to agitate the claim before the second AT, however, all objections of NHAI were kept open. The Second AT has, in the impugned award, come to the conclusion that escalation is not liable to be granted because of Clause 70.2, as also the fact that the first AT has taken care of all the escalations which were to be awarded to the Contractor. The reasoning of the Arbitral Tribunal is that insofar as delays, if any, by NHAI are concerned, the first AT has granted all the claims raised by the Contractor and no further claims are liable to be granted. The second AT has also analysed the aspects of delay and concluded that the four year delay by the Contractor after the site was available, was wholly unjustified.

40. The reasoning of the second AT is that Clause 70.2 provides for all possible changes in cost i.e., rise or fall in prices. Clauses 70.2 and 70.3 provide the formula for grant of escalation which has been granted to the Contractor. In view of the said clauses, the second AT holds that no further compensation is liable to be granted. The escalation clause in the contract has a clearly specified formula. If any rise or fall in costs is not covered by the contract, as per Clause 70.2 the unit rates and prices mentioned in the contract would be deemed to cover such contingency. A clear interpretation of this clause would be that if escalation is otherwise not provided under the contract, the only escalation permissible would be under Clause 70.2. The

impugned award records that the Contractor did not provide any evidence to support this claim. Since NHAI has already paid as per the escalation clause in the contract, no further escalation is permissible.

41. In Award No.1, on delay, the Tribunal concludes that delay is attributable to NHAI only to the extent that there was a delay by NHAI in handing over the site. The first AT observes that though the initial work of the Contractor was affected by NHAI's inability to fulfil its obligations under Clause 42.01, once the hindrances were removed, the Contractor was not able to accelerate the progress of the work. However, the 3rd AT, while dealing with the claim for recovery of liquidated damages, records that NHAI did not provide sufficient evidence to support the claim that delay was caused by the Contractor. These awards have to independently stand on their own legs. Any attempt to conflate Award no.1 into Award no.2 or Award no.3 into Award no.2 would lead to extremely unpredictable consequences. Ideally, since the core issue was of delay, one Tribunal ought to have dealt with all claims. However, that has not happened. It has been a 20-year long journey since the contract was executed in 2000 and the Court is still wrestling with multiplicity of proceedings, arising out of one contract. There needs to be an end to such multiplicity of litigations. The second Award on its own, is quite well reasoned and is also in terms of the clauses of the contract. In view of the same, it cannot be said that the findings in the impugned Award no.2 are prone to challenge.

42. On behalf of the Contractor, various judgments have been cited to support the proposition that claims for damages due to delay and claims for escalation/revision of rates are distinct. Both claims can be adjudicated upon and granted separately. Grant of damages does not defeat the claim for

escalation. This proposition is not in doubt. However, in the present case, escalation/revision of rates as per the contract has already been granted and the Contractor has been compensated for the delays both in Award No.1 and Award No.3. Claim No.1 (Claim No.2.3 before the first AT) is rightly rejected on two counts: (i) that the same was not included in the initial reference, though the dispute had already arisen, (ii) the delays after the clear availability of site was that of the Contractor and (iii) no escalation beyond what is permissible in Clause 70.2 is liable to be granted. Escalation as provided in the Contract has already been granted. This reasoning is not faulty and is not liable to be interfered with.

43. While hearing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, it would be incongruous to hold that a finding in a subsequent award would render the previous award illegal or contrary to law. The award would have to be tested as on the date when it was pronounced, on its own merits, and not on the basis of subsequent findings which may have been rendered by a later Arbitral Tribunal. In ***Vijay Karia & Ors. v. Prysmian Cavil E Systemic SRL & Ors.***[6] the Supreme Court rejected the argument that since the award under challenge is irreconcilable and inconsistent with another award, it deserved to be set aside. Thus, the findings of the second AT do not suffer from any patent illegality or perversity and no other grounds for interference under Section 34 of the Arbitration and Conciliation Act, 1996 are made out. Even if, for the sake of argument, one looks at the findings of the third AT, those relate to delays caused in the project and the right of NHAI to impose liquidated damages. Escalation or compensation for non-payment of increased rates, is not the

[6] [Civil Appeal No. 1544 of 2020, decided on 13th February, 2020]

subject matter of Award No.3. Thus, none of the findings in Award No.3 can be jettisoned or incorporated into the present petition to rule in favour of the Contractor *qua* Award No.2 for awarding compensation/rate revision/escalation. The stand of the Contractor is thus not tenable and is liable to be rejected. The findings of the majority award are clear and succinct - the scope of interference is very limited. This Court does not find any merit in the present petition.

44. The issue of multiplicity in arbitral proceedings also needs to be effectively dealt with to ensure that a long-drawn arbitral journey, as in the present case, is avoided. Parties to arbitration are expected to adhere to a *bona fide* discipline of use of arbitral processes. There appears to be a clear need for streamlining the same. The Delhi High Court has issued several practice directions under the Act. One such direction[7] requires that when petitions under Section 9 of the Arbitration and Conciliation Act, 1996, are filed, it is mandatory for the party to mention that no other petition on the same cause of action was filed. In an attempt to further avoid multiplicity of Tribunals and inconsistent/contradictory awards, as has arisen in the present case, the following directions are issued:

i. In every petition under Section 34 of the Arbitration and Conciliation Act, 1996 *(hereinafter, "Section 34 petition")*, the parties approaching the Court ought to disclose whether there are any other proceedings pending or adjudicated in respect of the same contract or series of contracts and if so, what is the stage of the said proceedings and the forum where the said proceedings are pending or have been adjudicated.

[7] Practice Direction No.16/Rules/DHC, dated 7th December, 2009

ii. At the time when a Section 34 petition is being heard, parties ought to disclose as to whether any other Section 34 petition in respect of the same contract is pending and if so, seek disposal of the said petitions together in order to avoid conflicting findings.

iii. In petitions seeking appointment of an Arbitrator/Constitution of an Arbitral Tribunal, parties ought to disclose if any Tribunal already stands constituted for adjudication of the claims of either party arising out of the same contract or the same series of contracts. If such a Tribunal has already been constituted, an endeavor can be made by the arbitral institution or the High Court under Section 11, to refer the matter to the same Tribunal or a single Tribunal in order to avoid conflicting and irreconcilable findings.

iv. Appointing authorities under contracts consisting of arbitration clauses ought to avoid appointment or constitution of separate Arbitrators/ Arbitral Tribunals for different claims/disputes arising from the same contract, or same series of contracts.

45. The present order be sent to the Ld. Registrar General for being placed before Hon'ble the Chief Justice for considering if any modifications are required to be made in the Rules of the Delhi High Court framed under the Arbitration and Conciliation Act, 1996.

46. The present order be also sent to the Secretary, Ministry of Law & Justice, Government of India and the Chairman, National Highway Authority of India.

PRATHIBA M. SINGH
JUDGE

JUNE 23, 2020/*dk/dj/T*