



2025:DHC:3533



\$~5

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of decision 07th May, 2025

+

ARB.P. 1854/2024

HINDUSTAN CONSTRUCTION COMPANY LTDPetitionerThrough: Mr. Sameer Parekh, Mr. Sumit Goel,
Mr. Jayant Bajaj and Ms. Ruchi Krishna Chauhan,
Advocates.

versus

INDIAN STRATEGIC PETROLEUM RESERVES LTD

.....Respondent

Through: Mr. Dinesh Pardasani, Mr. Siddharth
Chechani and Mr. Amrit Singh, Advocates.**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J. (Oral)**

1. This petition is filed on behalf of the Petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('1996 Act') seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. As set out in the petition, case of the Petitioner is that it was awarded a Contract by the Respondent vide Letter of Acceptance dated 29.12.2009 for civil works for underground rock caverns for strategic storage of crude oil at Padur, Karnataka. Total value of the Contract was Rs. 374,65,80,000/-, which was divided into lump sum of Fixed Costs and Variable Costs. Formal Contract was signed on 30.07.2010 with original stipulated date of completion, being 29.03.2012.



3. It is averred that disputes arose between the parties and on 24.02.2017, Petitioner invoked arbitration in terms of Clause 9.0.1.0 of GCC, but receiving no response, it filed a petition in this Court under Section 11 of 1996 Act for appointment of an Arbitrator being ARB.P. 403/2017, which was allowed on 24.07.2017 appointing a Sole Arbitrator. Award was rendered by the learned Arbitrator on 26.06.2021 awarding a sum of Rs. 35,99,86,464/- along with 9% interest in favour of the Petitioner but rejecting some of its claims. Both the parties challenged the Award in separate petitions being O.M.P.(COMM.) 78/2022 by Petitioner and O.M.P.(COMM.) 366/2021 by the Respondent. While Respondent challenged the Award in its entirety, Petitioner challenged it to the extent its Claim 1(g) wholly and Claims No. 1(a), 1(b), 1(c), 1(d), 1(e), 1(f), 2, 4 and 5 were partly disallowed.

4. It is stated that on 02.08.2024 both petitions were disposed of by a common order. Insofar as Respondent's petition was concerned, with the consent of the parties, the same was allowed and the Award to the extent it had awarded a sum of Rs. 35,99,86,464/- was set aside and Petitioner's petition was disposed of as infructuous. It was further observed by the Court that in the event parties agitate any rights or remedies available to them in law, it will be open to the other party to take such defences as available. It is in this backdrop that Petitioner invoked arbitration on 13.09.2024 for fresh adjudication of the disputes, proposing three names of independent Arbitrators, in response to which, Respondent sent a reply dated 12.10.2024 declining to agree to arbitration on the ground that Petitioner was estopped from reagitating the claims.

5. Reply has been filed by the Respondent, in which preliminary



objection is taken to the maintainability of this petition on the ground that the alleged claims are not subject to arbitration in view of the earlier order of this Court allowing the objection of the Respondent to the Award to the extent it had awarded sum of Rs. 35,99,86,464/- in favour of the Petitioner, with the consent of the Petitioner and setting aside the Award to that extent and also disposing of the Petitioner's objection to the extent certain claims were rejected.

6. It is argued that Petitioner on its own volition had submitted before the Court that it was willing to concede to part of the Award being set aside. Even at that stage, Respondent had categorically contended that Petitioner would not be entitled to agitate its claims again, *inter alia*, on account of doctrine of *res judicata* and principles analogous thereto. In fact, as recorded in the order dated 02.08.2024, on request of the Respondent, liberty was reserved with the Respondent to take such defences as available, in the event Petitioner reagitated any issue and this position was accepted by the Petitioner. Petitioner is completely misconstruing the said order as per permitting the Petitioner to reagitate its claims. The voluntary statement made on behalf of the Petitioner constitutes an unequivocal and irrevocable waiver of its rights. Even otherwise, the claims are also barred by principle of *res judicata* as the Arbitral Tribunal has already adjudicated the disputes in its entirety and this petition is only a *mala fide* attempt to reagitate the closed issues.

7. Mr. Parekh, learned counsel for the Petitioner, on the other hand, submits that it is not open to this Court in a petition filed under Section 11 of 1996 Act to examine the tenability of a claim, particularly the issue whether the claim is barred by *res judicata* and in support, relies on the judgment of



Supreme Court in ***Indian Oil Corporation Limited vs. SPS Engineering Limited, (2011) 3 SCC 507***, wherein the Supreme Court held that it is for the Arbitral Tribunal to examine and decide whether the claim is barred by *res judicata*. In light of this judgment, it is urged that an Arbitrator be appointed by this Court, leaving it open to the Arbitrator to decide whether or not the claims sought to be referred to arbitration by the Petitioner are barred by *res judicata*, wholly or in part.

8. Heard learned counsels for the parties.

9. The issue arising in this case for consideration by this Court is in a narrow compass as to whether this Court in a petition under Section 11 of 1996 Act can examine whether a claim is barred by *res judicata*. Broadly understood, the objection of the Respondent is that in the earlier round of litigation, both parties had challenged the Arbitral Award dated 26.06.2021 and on Petitioner's own volition and consent, petition under Section 34 of 1996 Act filed by the Respondent challenging part of the Award in favour of the Petitioner, was set aside and Petitioner's objections to the Award to the extent some of its claims were rejected, was disposed of as infructuous and hence, in light of this order as also the fact that the Arbitral Tribunal has adjudicated the dispute in its entirety, Petitioner is estopped by the doctrine of *res judicata* from reagitating the claims by seeking fresh arbitration.

10. In my considered view, there is merit in the contention of the Petitioner that this Court cannot decide the issue whether the claims of the Petitioner are barred by *res judicata* and it is for the Arbitral Tribunal to adjudicate on this aspect. In ***Indian Oil Corporation Limited (supra)***, one of the questions arising for consideration before Supreme Court was whether the Chief Justice or his designate can examine the tenability of a claim, in



particular whether claim is barred by *res judicata*, while considering an application under Section 11 of 1996 Act and the question was answered as follows:-

“16. The question whether a claim is barred by res judicata, does not arise for consideration in a proceeding under Section 11 of the Act. Such an issue will have to be examined by the Arbitral Tribunal. A decision on res judicata requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. The limited scope of Section 11 of the Act does not permit such examination of the maintainability or tenability of a claim either on facts or in law. It is for the Arbitral Tribunal to examine and decide whether the claim was barred by res judicata. There can be no threshold consideration and rejection of a claim on the ground of res judicata, while considering an application under Section 11 of the Act.”

11. It is a settled law that in the scope of jurisdiction under Section 11 of 1996 Act, the referral Court does not examine the tenability of the claims sought to be referred to arbitration by the applicant. The enquiry at this stage of appointment of Arbitrator is restricted to existence of Arbitration Agreement and/or whether the petition itself is barred by limitation. Significantly, the only objection taken by the Respondent with respect to the claims being allegedly barred by *res judicata* was the very issue arising in ***Indian Oil Corporation Limited (supra)***, and the Supreme Court has in no uncertain terms held that the limited scope of Section 11 does not permit such examination and it is for the Arbitral Tribunal to decide whether the claim is barred by *res judicata*. It was also held that there can be no threshold consideration and rejection of a claim on the ground of *res judicata* while considering an application under Section 11 of 1996 Act.

12. In light of the judgement of the Supreme Court, this Court cannot agree with the Respondent that the issue of *res judicata* be decided at the threshold in this petition. Accordingly, this petition is allowed and Mr.



2025:DHC:3533



Justice Swatanter Kumar, former Judge of the Supreme Court (Mobile No.9560413636) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. Fee of the Arbitrator shall be as per Fourth Schedule of 1996 Act.

13. Learned Arbitrator shall give disclosure under Section 12 of the 1996 Act before entering upon reference.

14. The issue whether the claims sought to be referred to arbitration by the Petitioner are barred by principle of *res judicata* is left open to be raised by the Respondent before the learned Arbitrator and if and when the same is raised, the same will be adjudicated by the learned Arbitrator in accordance with law.

15. It is made clear that this Court has not expressed any opinion on the merits of the case.

16. Petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

MAY 7, 2025

S.Sharma