



**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE**

HON'BLE SHRI JUSTICE SANJEEV SACHDEVA

&

HON'BLE SHRI JUSTICE VINAY SARAF

th

ON THE 8 OF NOVEMBER, 2024

MISC. PETITION No. 6219 of 2024

WAGAD INFRAPROJECTS PVT.LTD

Versus

M/S ARYAVRAT PROJECTS DEVELOPERS PVT.LTD.

Appearance:

***Shri Brian D'silva - Senior Advocate with Shri Sarabvir Singh Oberoi -
Advocate for Petitioner.***

ORDER

Per: Justice Sanjeev Sachdeva

1. Petitioner impugns order dated 24.10.2024 whereby an application filed by the Petitioner under Order 6 Rule 17 of Civil Procedure Code seeking to amend the objections filed under Section 34



of the Arbitration and Conciliation Act, 1996 (for short 'the Act') has been dismissed.

2. Learned Commercial Court has dismissed the application filed for amendment on the ground that though a question relating to inherent lack of jurisdiction could be raised at any stage of litigation, however, Petitioner intended to raise the question relating to the jurisdiction of the Arbitral Tribunal belatedly and said question being a mixed question of fact and law could not be permitted to be raised by way of an amendment to the application under Section 34 of the Act.

3. Learned Senior Counsel appearing for the Petitioner submits that the Arbitral Tribunal had inherently lacked jurisdiction to entertain the claim for the reason that there was no arbitration agreement between the parties. It is contended that though an arbitration clause was incorporated in the original contract dated 01.01.2013 executed between the parties, subsequently, by an addendum dated 25.01.2016, said clause was deleted from the agreement.

4. Reliance is placed on the judgment of the Supreme Court in *Hindustan Zinc Limited (H.Z.L.) vs Ajmer Vidyut Vitran Nigam Limited, (2019) 17 SCC 82* to contend that if there is an inherent lack of jurisdiction, said plea can be taken up at any stage and also in collateral



proceedings. Learned Senior Counsel further contends that the Supreme Court in *Hindustan Zinc Limited (supra)* negated the contention that having consented to arbitration, parties could not turn around and challenge the very appointment of the Arbitrator as being invalid and without jurisdiction.

5. Reliance is also placed on the judgment of the Supreme Court in *State of Chhatisgarh vs. M/S Sal Udyog Private Ltd., (2022) 2 SCC 275* to contend that even in an appeal preferred under Section 37 of the Act, permission could be granted to amend the memo of appeal to raise additional/ new grounds and the period of limitation prescribed for filing an application under Section 34 of the Act would not bar an amendment.

6. Further reliance is placed on the judgment of the Supreme Court in *Sushil Kumar Mehta vs. Gobind Ram Bohra, (1990) 1 SCC 193* to contend that defect of jurisdiction cannot be cured by consent or waiver and there can be no waiver, in case there is inherent lack of jurisdiction.

7. Reference may be had to the factual matrix of the subject case. Contract between the parties was executed on 01.01.2013, the agreement contained an alternative dispute resolution mechanism providing for a two tier mechanism; clause 16.3.1 providing for



Mediation and clause 16.3.2 providing for Arbitration. Certain disputes arose between the parties with regard to payment and execution of the Contract Work. As per the Petitioner, an addendum dated 25.01.2016 was executed between the parties modifying the dispute resolution clause.

8. As per learned senior counsel for the Petitioner, since parties agreed to mediation, they decided to amend the clause and restrict the dispute resolution to only mediation and that is why the addendum dated 25.01.2016 was executed.

9. We note that after the so called addendum dated 25.01.2016 was executed and mediators appointed, report was submitted by mediators on 11.02.2016 to the effect that disputes were not resolved. Petitioner thereafter by its letter dated 20.04.2016 requested the respondent to resolve the disputes as per Clause 16.3.1 by convening a meeting of Chief Executive Officers / Directors. However, respondent declined to accede to the request of the Petitioner. Thereafter, by communication dated 18.05.2016, Petitioner reiterated the original arbitration clause and nominated its arbitrator in terms of Clause 16.3.2 and requested the respondent to nominate their arbitrator.

10. In response to the invocation of arbitration by Petitioner, by



communication dated 18.05.2016, respondent referred to the addendum dated 25.01.2016 and stated that arbitration clause stood deleted. Matter did not end there. Petitioner thereafter by communication dated 09.06.2016 stated that the contention of the respondents that by addendum dated 25.01.2016 said clause 16.3.2 providing for arbitration stood deleted, was incorrect. It was specifically stated by the Petitioner that any amendment to the agreement required prior written approval of the client MPRDC which had not been obtained and thus Petitioner reiterated that Clause 16.3.2 of the agreement was operational and had been invoked by them on 18.05.2016. Petitioner once again on 09.06.2016 requested the respondents to nominate their arbitrator.

11. Once the reiterated request dated 09.06.2016 was not acceded to, Petitioner thereafter relying upon the arbitration clause 16.3.2. filed an application under Section 11 of the Act seeking appointment of an arbitrator. During pendency of the said application, respondents on 20.08.2018 nominated their arbitrator on 20.08.2018, consequently, the Arbitral Tribunal was constituted with the nominee arbitrator of the Petitioner and the nominee arbitrator of the respondent. Both the arbitrators thereafter nominated a presiding arbitrator.

12. Petitioner thereafter filed its claim before the Arbitral Tribunal which was partly allowed by award dated 06.04.2021. Petitioner then



filed an application under Section 34 of the Act before the concerned Commercial Court impugning award dated 06.04.2021, however did not raise any objection with regard to jurisdiction. The objections of Petitioner were allowed by order dated 16.06.2022 by the Commercial Court and the award was set aside.

13. Respondent being aggrieved by the said order setting aside the award, preferred an appeal under Section 37 of the Act which was allowed by this Court on 10.07.2023 and the matter was remitted to the Commercial Court for re-adjudication of the objections under Section 34 of the Act filed by the Petitioner.

14. It is at this stage on 26.09.2024 that Petitioner filed the subject application under Section 6 rule 17 of CPC seeking amendment of the objections filed under section 34 of the Act. Said application having been dismissed, thus petitioner has filed this petition.

15. The proposed amendment is with regard to the alleged lack of jurisdiction of Arbitral Tribunal. It is contended on behalf of the Petitioner that since the arbitration clause stood deleted by addendum dated 25.01.2016, the Arbitral Tribunal inherently lacked jurisdiction.

16. Normally all amendments are to be liberally allowed, however when a party seeks to withdraw an unequivocal admission made



whereby a legal right has accrued to the opposite party by lapse of time, such an amendment cannot be permitted. (*B.K. Narayana Pillai versus Parameswaran Pillai (2000) 1 SCC 712*).

17. Petitioner has contended that by virtue of an addendum dated 25.01.2016 executed between the parties the clause pertaining to arbitration was deleted. However, it was the Petitioner Company itself who by a subsequent communication dated 18.05.2016, once again reiterated the existence of the arbitration clause. This was disputed by respondents by their communication dated 01.06.2016. In response to which, the stand of the Petitioner themselves was that the addendum was invalid for the reason that same did not have the approval of the client MPRDC.

18. Petitioner kept on insisting that the arbitration clause continued to exist and was not deleted. Thereafter, on reiteration of the respondent that arbitration clause had been omitted, Petitioner filed an application under Section 11 of the Act for appointment of Arbitral Tribunal. Subsequently, both parties nominated their own arbitrator to the Arbitral Tribunal and proceedings commenced.

19. Petitioner not only reiterated its stand that the addendum dated 25.01.2016 deleting the arbitration clause was not operative and the



arbitration clause continued to exist, it even invoked arbitration, reiterated its stand for referring disputes to arbitration and then approached the High Court for appointment of an Arbitral Tribunal and even submitted its claim before the Arbitral Tribunal and thereafter continued to participate in arbitration proceedings. Petitioner never raised any objection either before the Arbitral Tribunal or at the time of filing its objections under Section 34 of the Act that the arbitration agreement stood deleted. On the contrary, Petitioner at all stages negated the contention of the respondent that the arbitration clause stood deleted. Since 25.01.2016 till 26.09.2024, for nearly 9 years, the categorical stand of the Petitioner had been that the Arbitration clause exists and Petitioner has all along acted upon the Arbitration Clause without a demur.

20. The contention of the Petitioner was that the addendum is not operable because the requisite prior permission of the Client MPRDC was not obtained. The operability of the addendum dated 25.01.2016 is a question of fact. Petitioner has throughout unequivocally admitted that there was a valid and subsisting Arbitration Agreement. Petitioner cannot be now permitted to withdraw the admission made particularly when the Respondent has acceded to the stand and the Arbitral Tribunal constituted and the arbitration proceedings culminating in an Arbitral



Award without a demur from the Petitioner. Looked at from another angle, we may note that there is no standard format for an arbitration agreement. Parties can agree to settlement of the disputes through the process of arbitration after the disputes have arisen.

21. Reference may be had to the Section 7 of the Arbitration and Conciliation Act which reads as under :-

“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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or



(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

22. Even if the contentions of the Petitioner were to be accepted that the original arbitration agreement stood deleted, subsequent conduct of Petitioner of reiterating the existence of an Arbitration Agreement and repeatedly requesting for referring the disputes to arbitration and the acceptance by the Respondents would amount to an Arbitration Agreement in terms of Section 7 of the Act.

23. Conduct of the Petitioner as noticed hereinabove clearly establishes that there was a valid and subsisting arbitration agreement between the parties and thus, the contention of the Petitioner that Arbitral Tribunal inherently lacked jurisdiction cannot be sustained and accordingly Petitioner cannot be permitted to amend the objection under Section 34 of the Act at this belated stage and withdraw the admission made.

24. Reliance placed by learned Senior counsel for Petitioner on the



judgment of Supreme Court in *Hindustan Zinc Limited (supra)* is misplaced for the reason that in the said case the Supreme Court was considering the issue of constitution of the Arbitral Tribunal by one of the parties to the dispute. Said case pertained to reference of the disputes to the Statutory Arbitration Mechanism under Section 86 of the Electricity Act and the Supreme Court held that the State Commission could not both decide the disputes itself and also refer the same to an arbitrator. Said judgment is not applicable to the factual matrix of the present case.

25. Reliance placed on the judgment of *State of Chhatisgarh vs. M/S Sal Udyog Private Ltd.(supra)* is misplaced for the reason that though a plea of inherent lack of jurisdiction could be taken by a subsequent amendment to the objections under Section 34 of the Act, however, in the factual matrix of the present case, as noticed hereinabove, Petitioner cannot be permitted to amend the objections and resile from an unequivocal admission that there exists a valid arbitration agreement between the parties. Said judgment is also not applicable to the facts of the present case.

26. Further reliance placed on the judgment of *Sushil Kumar Mehta vs. Gobind Ram Bohra (supra)* to contend that defect of jurisdiction cannot be cured by consent or waiver, is also not applicable to the facts



of the present case. The present case is not one where respondents had been contending the existence and validity of an Arbitration agreement and Petitioner consented or waived its objections to the same. In the present case, the Petitioner itself, despite denial by the respondent, had been time and again reiterating the existence and validity of the original arbitration agreement. Petitioner cannot be permitted to blow hot and cold with regard to the existence of the arbitration agreement. Consequently, said judgment also does not further the case of the Petitioner.

27. In view of the above, we hold that the learned commercial judge has committed no error in rejecting the application filed by the Petitioner seeking to amend the objections under section 34 of the Act. We find no merit in the present petition. The petition is consequently, dismissed.

(SANJEEV SACHDEVA)
JUDGE

(VINAY SARAF)
JUDGE

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