



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

% Reserved on : 13.02.2025
Pronounced on : 26.03.2025

+ **ARB.P. 1387/2022**

M/S DEWAN CHANDPetitioner
Through: Mr. Tejpal Singh Kang, Advocate.

versus

THE CHAIRMAN CUM MANAGING DIRECTOR
AND ANRRespondents
Through: Mr. Sumit Teterwal, Advocate for R-1.
Mr. Ansh Singh Luthra, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The instant petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the 'A&C Act'), seeking constitution of Arbitral Tribunal (hereafter, referred to as 'AT') comprising of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The dispute in the present case arises out of three work orders emanating from contract No. DTTDC/ENGG./EE(PB-1/123 dated 23.07.2016 awarded by respondent No.1 to the petitioner for carrying out the construction of the Staff Training Institute Building for Punjab & Sind



Bank at Sector - 3, Rohini, New Delhi and other ancillary works, for a total contract price of Rs. 13.57 Crores. Respondent No. 2 was engaged and appointed as the Project Management Consultant (“PMC”) by respondent No. 1. The petitioner claims to have successfully completed the work as per the schedule agreed between the parties. This position is disputed by the respondents. The petitioner had earlier filed a petition before this Court being OMP(I) No. 430/2016 which was disposed of vide order dated 07.11.2016 with direction to approach the Executive Director of the Bank for resolution of the disputes, with liberty to approach this Court for appointment of Arbitrator. Another petition bearing O.M.P. (I) (COMM) No. 16/2017 was preferred, where the matter was referred to mediation wherein a settlement was arrived at and a settlement agreement dated 23.02.2017 was executed between the parties. In terms of the said settlement, certain bank guarantees were furnished by the petitioner to the respondents. It is the petitioner's claim that the said bank guarantees have been wrongly encashed by the respondent no. 2 on 12.04.2022.

3. Pertinently, this is the third petition under Section 11 of the A&C Act which has been preferred by the petitioner. The petitioner had first approached this Court by way of Arb P. 24/2017 after invoking arbitration vide letter dated 28.09.2016. This petition was dismissed as withdrawn with liberty to file with better particulars vide order dated 16.01.2017. The second petition under Section 11 of the A&C Act bearing Arb P. 277/2021 was filed which was withdrawn on 02.08.2022 without any liberty. Now, the present petition, being the third attempt, has been filed on basis of notice dated 08.08.2022 under Section 21 of the A&C Act. Learned counsel for the respondent No.1 has opposed the present petition on two grounds, namely,



limitation and *Res judicata*.

4. Learned counsel for the petitioner submits that the bar of limitation is not applicable to the present petition. He submits that though the settlement was arrived at on 23.02.2017, the outer limit to perform obligations was 15.05.2017. It is submitted that the 3-year limitation period thereafter was extended on account of the Covid-19 pandemic and therefore the previous petition under Section 11 of the A&C Act was not barred by limitation. It is next contended that a fresh cause of action arose when the respondent No.2 wrote the letter dated 28.03.2022 to the bank and subsequently invoked the Bank Guarantees worth Rs 58,00,000/- by stating that the bill for main building work was for Rs. -62,76,336.00/-. It is hence contended that this event gave rise to a fresh cause of action and hence bar of *Res judicata* would not be applicable to the present petition. Lastly, it is submitted that there is no bar to multiple petitions under Section 11 of the A&C Act and reliance is placed on Dolphin Drilling Ltd. v. ONGC Ltd.¹

5. Learned Counsel for the respondent No.1 has vehemently opposed the present petition and respondent No.2 has adopted the arguments of respondent No.1. It is submitted that even the previous petition under Section 11 of the A&C Act was opposed on the grounds that the claims were dead claims which had been preferred after five years, and that the petition was barred by limitation. It is further submitted that after hearing both the sides, the Court had permitted the petitioner to withdraw the petition however, no liberty was granted to approach this Court again. Hence, it is submitted that the present petition is barred by limitation as well as *Res*

¹ Dolphin Drilling Ltd. v. ONGC Ltd., reported as (2010) 3 SCC 267



judicata. Reliance is placed on BSNL v. Nortel Networks (India) (P) Ltd.², and HPCL Bio-Fuels Ltd. v. Shahaji Bhanudas Bhad.³

It is contended that the Claim No.3 mentioned in the notice invoking arbitration dated 08.08.2022 was in fact raised earlier in the notice dated 28.09.2016 as well. It is submitted that the only new ground claimed in the notice is the encashment of Bank Guarantees and the same could have been raised at the time of the pendency of the previous petition and the petitioner cannot now be allowed to reagitate the issue.

6. I have heard learned counsel for the parties and gone through the records.

7. The issue which arises for consideration is that what will be the effect of the unconditional withdrawal of the prior petition filed under Section 11 of the A&C Act. To understand the effect of such withdrawal, a reference may be made to Order 23 Rule 1 CPC. The said rule talks of two types of actions with respect to suits, abandonment and withdrawal. At the time of withdrawal, the Court may also give liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim, in terms of Order 23 Rule 1 (3). The effect of abandonment or withdrawal without liberty has been explained in Order 23 Rule 1 (4) which reads as follows:-

*O23 R1(4)- Where the plaintiff— (a) abandons any suit or part of claim under sub-rule (1), or
(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),
he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*

² BSNL v. Nortel Networks (India) (P) Ltd., reported as (2021) 5 SCC 738

³ HPCL Bio-Fuels Ltd. v. Shahaji Bhanudas Bhad., reported as 2024 SCC OnLine SC 3190.



Thus, when the plaintiff withdraws the suit without liberty being granted by the Court to file afresh, he is precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

8. Though Order 23 Rule 1 mentions the words, “plaintiff” and “Suit”, the Courts have extended the same principles to writ petitions, SLPs and even petitions such as the present one, filed under Section 11 of the A&C Act. Due reference in this regard may be made to the decision of the Supreme Court in HPCL Bio-Fuels Ltd (Supra), wherein it was held that:-

“51. One important policy consideration which permeates the scheme of Order 23 Rule 1 is the legislative intent that legal proceedings in respect of a subject-matter are not stretched for unduly long periods by allowing a party to reargue the same issue over and over again, which also leads to uncertainty for the responding parties. Arbitration as a dispute resolution method, too, seeks to curtail the time spent by disputing parties in pursuing legal proceedings. This is evident from the various provisions of the Act, 1996 which provide a timeline for compliance with various procedural requirements under the said Act. An application for appointment of arbitrator under Section 11(6) of the Act, 1996 is required to be filed when there is failure on the part of the parties or their nominated arbitrators to commence the arbitration proceedings as per the agreed upon procedure. This Court, being conscious of the temporally sensitive nature of proceedings under Section 11(6), has issued various directions from time to time to ensure that applications for appointment of arbitrators are decided in an expeditious manner. Keeping in view the approach of this Court and the nature of applications under Section 11(6) of the Act, 1996, we find no reason to not extend the principles of Order 23 Rule 1 to such proceedings, when the very same principles have been extended to writ proceedings before High Courts under Articles 226 & 227 and SLPs before this Court under Article 136.

52. One important aspect that needs to be kept in mind while applying the principles of Order 23 Rule 1 to applications under Section 11(6) of the Act, 1996 is that it will act as a bar to only those applications which are filed subsequent to the withdrawal of a previous Section 11(6) application filed on the basis of the same cause of action. The extension of the aforesaid principle cannot be construed to mean that it bars invocation of the same arbitration clause on more than one occasion. It is possible that



certain claims or disputes may arise between the parties after a tribunal has already been appointed in furtherance of an application under Section 11(6). In such a scenario, a party cannot be precluded from invoking the arbitration clause only on the ground that it had previously invoked the same arbitration clause. If the cause of action for invoking subsequent arbitration has arisen after the invocation of the first arbitration, then the application for appointment of arbitrator cannot be rejected on the ground of multiplicity alone.

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60. As we are of the view that the principles underlying Order 23 Rule 1 can be extended to applications for appointment of arbitrator, the only recourse to the respondent to defend the second application as maintainable despite it having been withdrawn earlier without liberty was to show bona fides on its part. From the conduct of the respondent, it is evident that it thought fit to initiate insolvency proceedings perhaps thinking that the issues existing between the parties may not get resolved through arbitration. Further, no document has been placed on record to substantiate the so called incorrect legal advice the respondent claims to have received. Therefore, the failure on the part of the respondent to withdraw the first Section 11 application without seeking any liberty cannot be condoned in the facts of the present case.

61. In light of the aforesaid discussion, we are of the view that in the absence of any liberty sought by the respondents from the High Court at the time of withdrawal of the first arbitration application, the fresh Section 11 petition arising out of the same cause of action cannot be said to be maintainable.”

9. In the present case, a third attempt has been made for reference to arbitration. It is noted that at the time of the withdrawal of the first petition, liberty was granted to the petitioner by the Court to file afresh vide order dated 16.01.2017. Even in the order dated 07.11.2016 passed in OMP(I) No. 430/2016, liberty was granted to approach this Court for appointment of arbitrator. However, this liberty was not exercised by the petitioner at that point, who instead entered into a settlement agreement dated 23.02.2017 with the respondents. The second petition, i.e., Arb P. 277/2021 was filed on 18.02.2021. The petition was dismissed as withdrawn on 02.08.2022, and



a portion of the said order is extracted below:-

“After making some submissions in the matter, Mr. T.P.S. Kang, learned counsel appearing for the petitioner seeks leave to withdraw the present petition. The petition is accordingly dismissed as withdrawn. Other pending applications, if any, also stand disposed of.”

From the perusal of the above extract, it is clear that that the petitioner had withdrawn the previous petition after some arguments. Moreover, no liberty was granted to the petitioner to file the petition afresh. Hence, in view of the effect of Order 23 Rule 1 (4), the petitioner was barred from approaching the Court again for the same cause of action.

10. The petitioner has contended that the letter dated 28.03.2022 by the respondent No.2 and the subsequent invocation of Bank Guarantees gave rise to a new cause of action, in consequence of which, the second notice dated 08.08.2022 invoking arbitration was given. However, it is evident that at the time of the aforesaid letter, and even at the time of the ultimate encashment of the Bank Guarantees on 12.04.2022, the previous petition bearing Arb P. 277/2021 was still pending. BG was invoked during the pendency of Arb P. 277/2021, yet the Petitioner consciously chose to unconditionally withdraw the petition on 02.08.2022.

11. Thus, it cannot be said that the present petition has been preferred on account of a new cause of action.

12. In view of the above facts and the law discussed hereinabove, I find no merit in the present petition and the same is dismissed.

**MANOJ KUMAR OHRI
(JUDGE)**

MARCH 26, 2025