IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO.338 OF 2024

Batliboi Environmental Engineering Ltd. ...Applicant
Versus
Hindustan Petroleum Corporation Limited ...Respondent

Mr. Virag Tulzapurkar, Senior Advocate *a/w. Mr. Aadil Parsurampuria & Mr. Aalam Parsurampuria i/b. Mr. Prashant Parsurampuria, Advocates for Applicant.*

Mr. Zal Andhyarujina, Senior Advocate *a/w. Mr. Vijay Purohit, Mr. Jahaan Dastur, Mr. Pratik Jhaveri, Mr. Faizan Mithaiwala & Mr. Vinit Kamdar i/b. P & A Law Offices, Advocates for Respondent.*

CORAM : **SOMASEKHAR SUNDARESAN, J.**

RESERVED ON : **March 3, 2025**

PRONOUNCED ON : **March 11, 2025**

JUDGEMENT :

1. Whether observations made by the Supreme Court in the course of upholding an order of a Division Bench of this Court setting aside an arbitral award, would constitute a ruling on merits of the case, disabling arbitration being conducted afresh, is the issue that is presented for adjudication in the facts of this case.

Context and Factual Background:

2. Pursuant to a tender, a bid was made by the Applicant, Batliboi Environmental Engineering Ltd., formerly, Hydraulic & General Engineers ("***Batliboi***"), and was selected by the Respondent, Hindustan Petroleum Corporation Ltd. ("***HPCL***") for construction of a sewage treatment reclamation plant at a refinery of HPCL on a turnkey basis. The arbitration agreement is contained in a purchase order dated February 27, 1992 for a value of Rs. ~5.73 crores. Disputes and differences arose. Batliboi made a claim of Rs. ~3.41 crores spread over eleven heads of claims on HPCL. A sole arbitrator conducted proceedings.

3. The Statement of Claim entailed five specific heads of claims from Batliboi. The Statement of Defence was accompanied by a counter-claim under seven heads of claims from HPCL. Eventually, on March 23, 1999 the Arbitral Tribunal passed an award ("***Arbitral Award***"), which was upheld by a Learned Single Judge of this Court exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***") by an order dated December 4, 2000 ("***Section 34 Judgement***").

4. An appeal by HPCL under Section 37 of the Act led to a Division Bench of this Court setting aside the Section 34 Judgement by a judgement dated November 2, 2007 ("***Section 37 Judgement***"). Batliboi filed a special leave

petition in the Supreme Court under Article 136 of the Constitution of India, which granted leave, considered the appeal and by a reasoned judgement dated September 21, 2023 ("***SC Judgement***"), upheld the Section 37 Judgement, dismissing Batliboi's appeal.

5. Batliboi invoked arbitration afresh on October 12, 2023, on the premise that the Arbitral Award having been set aside and Batliboi's claims not having been dismissed on merits, it was constrained to invoke arbitration afresh. By a reply dated November 7, 2023, HPCL took the stance that Batliboi's claims had been adjudicated on merits and the same disputes cannot be re-adjudicated again in arbitration. This stand-off led to the captioned Application being filed under Section 11 of the Act.

6. Therefore, at the heart of the controversy before me today lies the question of whether the disputes between the parties stand adjudicated on merits and covered by *res judicata* – preventing the same issues being adjudicated a second time.

Contentions of the Parties:

7. I have heard Mr. Virag Tulzapurkar, Learned Senior Counsel on behalf of Batliboi and Mr. Zal Andhyarujina, Learned Senior Counsel on behalf of HPCL, at length. I have had the benefit of their verbal arguments, written notes on submissions and also copious case law pressed into service.

8. According to Mr. Andhyarujina, in the course of rendering the SC Judgement, the Supreme Court has made extensive observations on merits of the case. The parties even tendered data in a chart to the Supreme Court, Learned Senior Counsel would submit, to buttress the point that the SC Judgement is an adjudication and expression of opinion on merits. He would submit that the SC Judgement endorses the Section 37 Judgement, which means that there are two concurrent findings on merits, and therefore, there is no scope for a fresh adjudication of the merits.

9. In contrast, Mr. Tulzapurkar would submit that the decision in the SC Judgement is essentially that the Arbitral Award did not withstand scrutiny under Section 37 read with Section 34 of the Act. Besides, he would submit, the SC Judgement has led to the Section 37 Judgement merging into the SC Judgement, which necessarily means that the Section 37 Judgement is no longer in existence. Therefore, he would submit, any reference to the Section 37 Judgement and any expression of an opinion on merits in the Section 37 Judgement would be untenable. Mr. Tulzapurkar would submit that the SC Judgement has emphatically ruled that the Arbitral Award is devoid of reasons, which could only lead to the conclusion that in the eyes of the law, the claims have not been adjudicated on merits. Therefore, he would submit, it can never be argued that the Supreme Court adjudicated the merits – if at all, the Supreme Court has held that the adjudication in the Arbitral Award is not on merits.

Analysis and Findings:

10. At first blush, the arguments canvassed on behalf of HPCL appear attractive – the disputes between the parties appears to have gone through four rounds of litigation, namely, the arbitration, the Section 34 Petition (Section 34 Judgement), the Section 37 Petition (Section 37 Judgement) and the appeal before the Supreme Court (SC Judgement). However, on a clearer examination of the law governing these four rounds, it is apparent that the three rounds after the Arbitral Award are bound by a specific jurisdiction mandated by the Act. The jurisdiction created for purposes of judicial review by the Courts into an arbitral award is a limited one, which is governed by Section 34 and Section 37 of the Act. When seen from that prism and taking into account the explicit findings of the Supreme Court in the SC Judgement, it becomes evident that the Supreme Court expressly stated that it did not intend to pronounce upon the merits of the matter at all. Therefore, the vexed question of whether this Application seeking appointment of an arbitrator constitutes the proverbial "second bite at the cherry" has to, in my opinion, be necessarily answered in the negative.

11. That the setting aside of an arbitral award would place parties to the arbitration in the original position that they were in, before the proceedings began, leaving it open to them to arbitrate again, is an essential feature of the legislative design and structure of the Act. When parties opt for arbitration

and that leads to an arbitral award, the Act disallows Courts to conduct an appellate review of arbitral awards, choosing instead, to limit the scope of judicial review of arbitral awards, to the contours of the jurisdiction available on limited grounds set out in Section 34 of the Act. Judicial review of an arbitral award is framed in a binary position – the award is either upheld or set aside on the grounds available in Section 34. No Court is permitted to modify the Arbitral Award, and to substitute its judgement for the judgement of the Arbitral Tribunal. Had the position in law been an appellate review on merits, Mr. Andhyarujina would have a valid point to make. The Section 34 Judgement essentially examined if the Arbitral Award was so badly in conflict with the most basic notions of morality and legality, or was perverse, that it warranted being set aside. It came to the view that the Arbitral Award did not deserve to be set aside. The Section 37 Judgement essentially examined if the Section 34 Judgement was valid in refusing to interfere, and came to the view that the Arbitral Award deserved to be set aside. The SC Judgement reviewed the Section 37 Judgement and held it to be a judgement validly arrived at, unworthy of interference.

12. The necessary corollary would be that the position of the parties undisturbed by the Arbitral Award would stand restored. This position is best explained by the Supreme Court in ***McDermott***[1] – the following extract places the position in law, succinctly:

[1] *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.– (2006) 11 SCC 181*

> *52. 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, the **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. It may be necessary not to treat the aforesaid extract from ***McDermott*** as a *mantra*, mechanically sending parties to arbitration the second time over – a trend of Courts refusing to do is pressed hard into service by Mr. Andhyarujina.

14. While in essence, the SC Judgement holds that the Arbitral Award was not worthy of acceptance, it is equally true that one must not lose sight of the nature of the jurisdiction that had been exercised by this Court in the Section 37 Judgement. One cannot assume that the jurisdiction of limited review under Section 37 read with Section 34 of the Act would somehow change to a full-blown appellate review, with power to consider the merits and substitute the judgement in the Arbitral Award with its own judgement. Whether such a power can be inferred from the Act is a question that is currently under consideration of a five-judge bench of the Supreme Court. Therefore, when the SC Judgement ruled that the Section 37 Judgement was right, it was

essentially exercising the same jurisdiction as flowing from Section 37 of the Act read with Section 34 of the Act.

15. The upshot is that the Arbitral Award was held to be worthy of interference – and the only interference permissible in law was to set it aside. The appellate review by the Supreme Court was exercised in terms of the jurisdiction conferred by the Act. The appeal considered after granting special leave to appeal, was an appeal filed by Batliboi against the Section 37 Judgement. It was an appeal by HPCL challenging the Section 34 Judgement holding that the Arbitral Award was validly passed, which had led to the Section 37 Judgement. Neither of these rounds was a conventional appellate review of the merits of the Arbitral Award. For such binary outcome (for an arbitral award to be valid or invalid), the Court would have had to examine how the Arbitral Award dealt with issues. However, by no stretch could that be extrapolated to hold that the Court could have substituted the views of the Arbitral Tribunal on merits with its own views on the merits of the case, and thereby modify the Arbitral Award. The Court could only have upheld the Arbitral Award or it could have set it aside.

SC Judgement:

16. In this context, it would be important to also examine what the SC Judgement actually finds. The following extracts are noteworthy – the final conclusion (in *Paragraphs 45 and 46 of the SC Judgement*) is extracted first,

followed by the extracts containing the ruling on the "merits" by the Supreme Court:-

> *45. We have **extensively analysed the award**, its **patent flaws and illegalities which emanate from it**, like the **manifest lack of reasoning** in arriving at the conclusions and the calculation of amounts awarded, **which, in fact, amount to double or part-double payments**, besides **being contradictory** etc. In view of our aforesaid reasoning, **the award has been rightly held to be unsustainable** and set aside by the division bench of the High Court **exercising power and jurisdiction under Section 37 read with Section 34** of the A & C Act.*
>
> *46. In view of the aforesaid discussion, **the appeal is dismissed** without any order as to costs.*
>
> ***[Emphasis Supplied]***

17. On the face of it, the conclusion speaks for itself. What was analysed was the Arbitral Award. It was held to be manifestly lacking in reasoning. It was held to be unsustainable. The Section 37 Judgement was held to be right in coming to a view that the Arbitral Award was unsustainable. However, one must remember that the Division Bench indeed was not exercising an appellate power over the Arbitral Award but only an appellate review over the Section 34 Judgement, which in turn was a product of the exercise of jurisdiction covered by Section 34 of the Act.

18. However, other extracts from the SC Judgement would need analysis, since these are what Mr. Andhyarujina relies upon to assert that the SC

Judgement contains final expression of an opinion by the last Court of the land on merits of the matter. *Paragraph 7 of the SC Judgement* is extracted, and discussed below:

> *7. We have **intentionally quoted the entire findings and reasoning accorded by the learned arbitrator, while allowing the Claim Nos. 1, 2 and 4 of BEEL**. The first **egregious and obvious flaw in the award** is, the omnibus finding and conclusion that HPCL (referred to as the owner and the respondent in the quoted portion of the award) was fully responsible for the inordinate delay that had occurred by not taking proper and timely action in removal of various impediments and obstacles that stood in the way of completing the project within the stipulated period of 18 months. **This finding, in our opinion, is bereft of analysis and examination of facts and contentions**. The relevant and material facts and the respective stances of the parties are **neither decipherable nor evaluated and no reason has been given for arriving at the conclusion**. A conclusion without any discussion and reasons, is non-compliant and violates the mandate of sub - section (3) of Section 31 of A& C Act, an aspect we would examine subsequently.*
>
> ***[Emphasis Supplied]***

19. The Supreme Court found that the Arbitral Award was bereft of analysis and examination of facts and contentions. Neither the facts nor the stances of the parties were decipherable in the eyes of the Supreme Court. Therefore, the Supreme Court evidently held that the Arbitral Award itself was not an expression of an opinion on merits.

20. *Paragraph 8 of the SC Judgement* is extracted, and discussed below:

> *8. The* ***second patent error relates to the computation and award of 10% of the contract value towards loss of overheads and another 10% towards loss of profits/profitability****. The two amounts have been quantified at Rs.78,68,833/- each. Thus, Rs.1,57,37,666/- has been awarded and held as payable by HPCL to BEEL.* ***The award is deficient being completely silent*** *as to the method and the manner in which the arbitral tribunal has computed the figures. Therefore, it* ***leaves us and the parties to wonder*** *the basis for awarding and computing the amounts. We are* ***not commenting or examining the merits of the computation****, but complete absence of any justification and reason to allow the claim and quantification of the sum awarded.* ***We would subsequently examine the chart furnished by BEEL in support of the said computation, albeit at this stage we would like to highlight the apparent contradiction in the award****, which is the* ***third ground to uphold the decision of the Division Bench*** *of the High Court.*
>
> ***[Emphasis Supplied]***

21. The second infirmity declared by the Supreme Court was that the Arbitral Award was deficient being completely silent on the method and manner of computing the figures it arrived at when awarding damages towards loss attributable to overheads and to loss of profits. In this paragraph, the Supreme Court has removed all doubts by stating that the Supreme Court was not commenting on or examining the merits of the computation. Although the Supreme Court did examine a chart with which Batliboi sought to defend the Arbitral Award, the Supreme Court has concluded that the Arbitral Award had inherent contradictions requiring it to dismiss the appeal filed by Batliboi, and upholding the Section 37 Judgement.

22. *Paragraph 10 of the SC Judgement* is extracted, and discussed below:

> *10, **BEEL** had, as observed above, **accepts the position that the loss towards overheads and profits/profitability has to be arrived at by applying the percentage formula**, variant with the execution of the work. Thus, in our opinion, **the loss towards overheads and profits/profitability is to be computed on the payments due for the un-executed work, and should exclude the payments received/receivable for the work executed**. In other words, based on the value of the work executed by BEEL, **the proportionate amount has to be reduced for computing the damage/compensation as a percentage of expenditure on overheads, and damages for loss of profit/profitability**. Damages towards expenditure on overheads and loss of profit are proportionate, and not payable for the work done and paid/payable. **Delay in payment on execution of the work has to be compensated separately**.*
>
> ***[Emphasis Supplied]***

23. Even a plain reading of the foregoing would show that Batliboi concedes that loss towards overheads and loss of profits has to be arrived at by applying a proportionate formula – comparing the payments due for the unexecuted work and excluding the payments received for the work executed. That such a formula was not applied is the finding of the Supreme Court. This is a finding that the merits had not been considered by the Arbitral Tribunal. This cannot translate into an opinion that the merits had been considered and that such consideration on merits was substituted by the Section 37 Judgement. In fact, the Section 34 Judgement found no fault and the Section 37 Judgement set aside such a finding of no fault. The Supreme Court has agreed with the Section 37 Judgement and was not moved by the

attempt by Batliboi to justify the Arbitral Award by use of a chart tendered in the Supreme Court.

24. *Paragraph 27 of the SC Judgement* is extracted, and discussed below:

> *27. **Arbitral tribunal in the present case has given complete go by to these principles well in place, overlooked care and caution required and taken a one-sided view grossly and abnormally inflated the damages**. The figures quoted in paragraph 11 supra show the over- statement and aggrandizement in awarding Rs. 1,57,37,666/-, towards loss of overheads and loss of profits/profitability, in a contract of Rs. 5,74,35,213/-. Rs.1,21,95,859.68/- was paid for the work done within the term. Rs. 2,92,07,619.13 was paid for the work done post the term. Thus, Rs. 4,14,03,478.81/- was paid for 80% of the work. The balance was Rs.1,14,87,042.00/. The amount awarded towards loss of overheads and profits/profitability is Rs.1,57,37,666/-. **No justification for computation of the loss is elucidated or can be expounded.** Even **if one were to rely upon the chart given by the BEEL**, and ignore the contradictions in findings, **the amount awarded is highly disproportionate and exorbitant**. It is clearly a case of **overlapping or at least a part doubling of the loss/damages**.*
>
> ***[Emphasis Supplied]***

25. It is again evident that the Supreme Court has ruled that the Arbitral Award was not accurate in its approach and assessment. The Supreme Court has ruled that there is an overlap and a partial double-count of losses in the Arbitral Award. The net effect of this finding is that the Supreme Court expressed the clear view that Arbitral Award did not contain a justification, and that the attempt by Batliboi to justify the Arbitral Award did not turn the needle in favour of the Arbitral Award. The net result is still that the Arbitral

Award, in its terms, was not defensible, and it would not translate into a finding on merits on what the amount of damage for the loss ought to be awarded, if at all.

26. A careful reading of each of the extracts above and a holistic view of all of them together, would show that the Supreme Court was analysing the Arbitral Award and returned findings of it being untenable. The Supreme Court did not, and did not even purport to, conduct its own assessment of evidence to return findings on merits. If anything, the Supreme Court has stated (in the extracted *Paragraph 8 of the SC Judgement*) that it was not commenting or examining the merits of the computation in the Arbitral Award. Every finding extracted above would show that the Supreme Court was returning findings on how the Arbitral Award did not provide reasons, or demonstrate analysis, or compute correctly. Indeed, Batliboi produced a chart before the Supreme Court hoping to justify and defend the Arbitral Award. After analysing Batliboi's chart, the Supreme Court has ruled that Batliboi's own chart would show that the Arbitral Award was erroneous due to overlapping and part-double counting of damages.

27. Therefore, a careful reading of the SC Judgement does not point to merits having been assessed and considered outside the scope of finding out whether the Arbitral Award was perverse. This is simply because the law did not permit the consideration of the merits of the dispute and the attendant

evidence from the point of view of adjudicating the merits of the dispute. The law indeed required consideration of the merits of the appeal before the Supreme Court i.e. to adjudicate whether the Arbitral Award was rightly held to be invalid in terms of the contours of the jurisdiction under Section 37 read with Section 34 of the Act. Upon such review, in line with such jurisdiction, the Supreme Court found the Arbitral Award to be perverse, being devoid of reasons, and without proper and proportionate consideration of the damages before awarding the same. This decision is evidently a negation of the validity of the Arbitral Award, and not a positive affirmation of the merits of either party's case.

28. Mr. Andhyarujina, on behalf of HPCL would also point me to the Section 37 Judgement and contend that an exhaustive examination of the contract and other documents was conducted to arrive at a finding that the Arbitral Award was untenable. Such findings in the Section 37 Judgement came to be upheld in the SC Judgement. Therefore, it is HPCL's contention that the Section 37 Judgement having been upheld, the Supreme Court has endorsed the findings on merits in the Section 37 Judgement. Therefore, he would submit, the merits of the matter have been finally adjudicated upon, and nothing remains to be adjudicated. The claims are nothing but dead wood, and this Court would have the power to notice that the disputes are evidently not arbitrable any more, requiring it to reject this Section 11 Application.

Doctrine of Merger:

29. Mr. Tulzapurkar would submit that the Section 37 Judgement has merged into the SC Judgement, and there is no question of the Section 37 Judgement continuing its existence after merging into the SC Judgement. Towards this end, Learned Senior Counsel would cite the judgement of the Supreme Court in ***Kunhayammed***[2], the principles from which have been followed or expanded in other judgements of the Supreme Court[3]. In reliance upon ***Kunhayammed***, Mr. Tulzapurkar would submit that once special leave to appeal is granted by the Supreme Court, the appellate jurisdiction takes over. Any order passed in that appeal would attract the doctrine of merger. It would make no difference whether the order is one of reversal, modification, dismissal or affirmation. Once it is shown that the appellate jurisdiction has been exercised and there has been judicial scrutiny of the order appealed against, under the doctrine of merger, the order appealed against would "sink or disappear" into the order passed in appeal. Merger is the absorption of something of lesser importance by a greater thing, and the lesser thing ceases to exist, but the greater thing is not increased. The absorption is a swallowing up so as to involve a loss of identity and individuality, he would submit. Therefore, there is no relevance to the Section 37 Judgement any more since the Supreme Court has explicitly ruled on its

[2] *Kunhayammed & Ors. Vs. State of Kerala & Ors – (2000) 6 SCC 359 – Paragraphs 41 to 44*
[3] *Omprakash Verma & Ors. Vs. State of Andhra Pradesh – (2010) 13 SCC 158; Gangadhar Palo vs. Revenue Divisional Officer – (2011) 4 SCC 602*

own terms, in the SC Judgement, after granting leave to appeal the Section 37 Judgement.

30. Mr. Andhyarujina would equally endorse the doctrine of merger as being applicable to the matter at hand, and submit that because of the merger, the reasons and findings in the Section 37 Judgement are now reasons and findings of the SC Judgement. Indeed, he would also submit that the doctrine of merger is a not a straightjacket and hidebound formula to be applied mechanically. He would go a step further and state that for the doctrine of merger to apply (as is being contended by Batliboi) it is necessary that the higher court ought to have dealt with the merits of the issues decided by the Court below and recorded its findings on merits. On this basis, Learned Senior Counsel would argue that if Batliboi's stance that the Supreme Court did not rule on merits were right, then the Section 37 Judgement, could not have merged into the SC Judgement.

31. In my opinion, the Section 37 Judgement indeed merges into the SC Judgement, and one must not lose sight of the nature and scope of the jurisdiction that was being exercised by the respective courts. The Section 37 Judgement was a ruling under Section 37, which in turn was a disposal of an appeal challenging a ruling under Section 34. The Supreme Court ruled on a challenge to the Section 37 Judgement granting special leave to appeal against the ruling under Section 37 of the Act. The Supreme Court explicitly

ruled that the award had been rightly held to be unsustainable in such exercise of power and jurisdiction under Section 37 read with Section 34 of the Act. The Supreme Court was explicit in its language (*Paragraph 45 and 46 thereof*) that what it was endorsing was the finding in the Section 37 Judgement that the Arbitral Award was unsustainable, and that such finding was in the context of the exercise of jurisdiction under Section 37 of the Act read with Section 34 of the Act. Therefore, the Supreme Court was evidently mindful of the nature and scope of jurisdiction in which the Section 37 Judgement came to be passed. Such jurisdiction was not one of a full appellate review but a challenge that could only lead to a binary outcome – either the Arbitral Award being set aside or being upheld, with no power to modify it.

32. Towards this end, Paragraph 44(iii) in ***Kunhayammed*** is of special significance and is extracted below:

> *The* ***doctrine of merger is not a doctrine of universal or unlimited application****. It will* ***depend on the nature of jurisdiction exercised*** *by the superior forum* ***and the content or subject-matter of challenge laid*** *or capable of being laid shall be determinative of the applicability of merger.* ***The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it.*** *Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgement-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.*
>
> ***[Emphasis Supplied]***

33. The SC Judgement is an outcome of an appeal against the Section 37 Judgement. The Section 37 Judgement merges into it. However, the nature of jurisdiction ought to be borne in mind. The Section 37 Judgement was passed under Section 37 of the Act, read with Section 34 of the Act. That jurisdiction has its own limitations on the ability of the Court to conduct a full appellate review. Therefore, the outcome of the SC Judgement was that the Arbitral Award had rightly been held to be untenable by the Section 37 Judgement. The observations of the Section 37 Judgement, if any, that could be considered to be a finding on merits are therefore evidently findings in relation to whether the Arbitral Award, in its substance and content, was sustainable. It was not a ruling of what ought to have been the correct outcome of the arbitral proceedings. When the SC Judgement is so clear in its terms, it is clear that the SC Judgement holds the field and the Section 37 Judgement merges into it.

34. Mr. Andhyarujina would also point to another perceived anomaly. He would submit that the SC Judgement is silent on one facet of the claims in question while the Section 37 Judgement is eloquent on that claim. Therefore, he would submit, it cannot be that the findings on that portion of the claims would stand obliterated by the SC Judgement despite its silence on that component. When a judgement of a Court merges into the judgement of the Court hearing an appeal from it, the entire judgement would stand merged. Indeed, the doctrine of merger is not a mechanical and straightjacket

concept, and the simplest means of resolving the perceived conundrum is to examine the jurisdiction in which appellate review was conducted. The Supreme Court indeed heard an appeal but such appeal was to consider whether the Section 37 Judgement (which itself was on an appeal from the Section 34 Judgement) had been rightly decided – the only decision relevant in view of the jurisdiction, was the setting aside of the Arbitral Award. Evidently, the Supreme Court having made it clear that it was not expressing any opinion on the merits, the Supreme Court was mindful of the nature and scope of the jurisdiction in play, and that is why in its conclusion, the Supreme Court has specifically referred to the exercise of jurisdiction under Section 37 of the Act read with Section 34 of the Act.

Jaiprakash Associates – its Import:

35. Finally, Mr. Andhyarujina would cite a decision by a Learned Single Judge of the Delhi High Court in the case of ***Jaiprakash Associates***[4]. The submission is that, without losing sight of the limited scope of jurisdiction available to a Section 11 Court, the Delhi High Court has refused to refer parties to arbitration in a post-award reference on grounds of public policy, and refused to permit what was dead wood and non-arbitrable to be dragged into arbitration afresh. In ***Jaiprakash Associates***, an arbitral tribunal had adjudicated on merits that there was no evidence to enable granting of the

[4] *Jaiprakash Associates Limited vs. NHPC Limited – 2025 SCC OnLine Del 170*

claim raised by the applicant in the Section 11 Petition. Yet, the same arbitral tribunal awarded damages of Rs. 60 crores. The winning party (the party that was awarded Rs. 60 crores) without evidence filed a petition to set aside the award since it was of the view that it ought to have been paid even more. In disposal of that Petition, the Section 34 Court set aside the arbitral award but on grounds totally contrary to the grounds of challenge to the award, and held that when the arbitral tribunal had found that there is no evidence or basis to make a claim, it could never have awarded damages of Rs. 60 crores. This decision of the Section 34 Court was not challenged, and instead, the party went in for a second initiation of arbitration.

36. In those circumstances, the Delhi High Court ruled that it was a second bite at the cherry and a dead wood claim was being pursued. Evidently, in ***Jaiprakash Associates***, the arbitral tribunal had clearly ruled that the party seeking the second round of arbitration had no legs to stand on. This was a case of the arbitral tribunal returning findings on merits that there was no evidence. Yet, without any merit, damages of Rs. 60 crores had been awarded. The Section 34 Court set aside the award, not on the petition of the party that was asked to pay Rs. 60 crores but on a challenge mounted by the party that was awarded the damages despite the arbitral finding that the claim for damages had no legs to stand on. The judgement under Section 34 was not challenged despite the availability of a statutory right to appeal. Therefore, that judgement became absolute and final. In that context, the

Delhi High Court ruled that evidently dead wood was being pursued and a second bite at the cherry was being sought.

37. The Delhi High Court took pains to articulate the facts of the case to explain why it was deviating from the normal rule that the parties to an arbitral dispute would be free to commence arbitration afresh. A clear judicial finding was allowed to become absolute without exercise of the statutory right to appeal. It is in this context that the claims were held to be stale and dead. This is totally different from the facts at hand. In the instant case, the Supreme Court has clearly held that it was not opining on the merits. This meant that the Supreme Court was not endorsing the findings in the Section 37 Judgement, if that were to be regarded as a ruling on merits. In fact, by explicit reference to the jurisdiction under Section 37 read with Section 34 of the Act, the Supreme Court made it clear that it was endorsing the view that the Arbitral Award was untenable. The attempt to defend the Arbitral Award with a chart was also unsuccessful. Unfortunately for HPCL, the position in law that would follow is that the parties were restored to their pre-Arbitral Award positions for the proceedings to start afresh. No exceptional circumstances such as the one found in ***Jaiprakash Associates*** can be discerned for a similar view to be taken by me in these proceedings.

Tantia Construction – its Import:

38. Mr. Andhyarujina would also rely on ***Tantia Construction***[5] to point to how the Calcutta High Court rejected a Section 11 Application on the premise that the claims sought to be pursued had already been adjudicated by the arbitral tribunal. I have carefully gone through ***Tantia Construction*** and the order of the Supreme Court dismissing the special leave petition seeking to appeal that judgement. The ruling in that case is based on a completely different fact pattern. An arbitral tribunal was appointed under Section 11 of the Act on September 16, 2016, when a project was underway. The arbitral tribunal was constituted and gave its final award in December 2020. When the proceedings were underway, a notice was issued on August 21, 2017 after the final bill had been raised. That led to another Section 11 Application. By the time such second application was heard, the arbitral award had been passed. A Learned Single Judge of the Calcutta High Court *(Rajesh Bindal, ACJ, as he then was*) compared the specific contents of the claim for which the first Section 11 Application had been filed, with the claim made and adjudicated by the arbitral tribunal; and the claim sought to be pursued in the second Section 11 Application. In these circumstances, it was ruled that since the very same claim for which the second reference was sought had already been adjudicated upon there was no question of a second reference

[5] *Tantia Construction Limited Vs. Union of India – 2021 SCC OnLine Cal 2465*

being made to arbitration. The Supreme Court refused to entertain a petition seeking special leave to appeal. Evidently, this being a completely different situation, ***Tantia Construction*** is no assistance in rejecting the captioned Section 11 Application.

Conclusion and Order:

39. In view of the foregoing, I do not think it necessary to burden this judgement with any further prolixity with more analysis of every other judgement cited by either side on the doctrine of merger. In my opinion, the SC Judgement is clearly an opinion that the Arbitral Award ought to have been held as not being sustainable in exercise of the jurisdiction under Section 37 of the Act read with Section 34 of the Act. The Supreme Court explicitly ruled that it was not commenting on the merits. Taking such explicit findings into account and that too in the context of the specific nature of the jurisdiction that Section 34 and Section 37 of the Act entails, I am of the opinion that no case has been made out to deviate from the norm that the parties are restored to the original pre-Arbitral Award position. Therefore, necessarily, this Section 11 Application deserves to be allowed. Consequently, this Application is finally disposed of in the following terms:

40. In these circumstances, this Application is ***finally disposed of*** by referring all disputes and differences covered by this proceeding to

arbitration by the Learned Sole Arbitrator hereby appointed in the following terms:-

A] Justice S.C. Gupte (Email Id: guptesc@gmail.com), a Former Judge of this Court, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above.

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from today. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration and;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

41. Needless to say, nothing in this judgement is an expression of an opinion on the merits of the matter. The Arbitral Tribunal appointed hereby shall issue directions to the parties on how to proceed further in the matter.

42. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN J.]