2019 SCC OnLine Del 7575

In the High Court of Delhi at New Delhi

(BEFORE RAJIV SHAKDHER, J.)

Himachal Sorang Power Private Limited and Another

... Plaintiffs;

Versus

NCC Infrastructure Holdings Limited ... Defendant.

CS (COMM) 12/2019

Decided on March 13, 2019, [Reserved on: 6.2.2019]

Advocates who appeared in this case :

Mr. Sandeep Sethi, Sr. Advocate with Ms. Padmaja Kaul, Mr. Ketan Gaur and Mr. Praharsh Johrey, Advs.

Mr. Nakul Dewan with Dr. Amit George, Mr. Jai Sahai Endlaw, Ms. Neelu Mohan, Ms. Nooreen Sarna and Mr. Shivansh Soni, Advocates.

The Judgment of the Court was delivered by

1. RAJIV SHAKDHER, J.

I.A. No. 291/2019

Prefatory facts:

2. The applicants before me are plaintiffs in a suit instituted by them for declaratory and permanent injunctive reliefs. In effect, the reliefs sought against the defendant both in the suit and the interlocutory application is to injunct the defendant from commencing arbitration proceedings.

3. The defendant, it appears, seeks to commence arbitration proceedings for claiming "incentive payments" under Clause 14 of the Securities Purchase Agreement dated 19.9.2012 (in short 'SPA'). The plaintiffs via this suit and/or the instant interlocutory application seek to resist the arbitration action initiated by the defendant on the plea that it is, *inter alia*, barred by *res judicata*.

4. It is the plaintiff's stand that the controversy with respect to the reliefs which were claimed or could have been claimed was set at rest between the parties herein, which included its parent company, that is, NCC Limited (in short 'NCC') by virtue of an earlier award dated 24.1.2018.

5. For the sake of convenience, hereafter, I would be referring to the parties in the following manner:

6. Plaintiff No. 1, that is, Himachal Sorang Power Private Limited would be referred to as 'HSPL'; Plaintiff No. 2, that is, TAQA India Power Ventures Pvt. Ltd. would be referred to as 'TAQA'; and the Defendant,

that is, NCC Infrastructure Holdings Limited would be referred to as 'NCCL'.

7. Furthermore, unless the context requires me to state otherwise, the two plaintiffs and the defendant will be, collectively, referred to as parties.

8. Before I proceed further, it may be necessary to delve into the background in which the present proceeding has been instituted.

9. NCCL along with NCC, and an entity by the name: IL&FS Energy Development Company Limited (in short 'IL&FS') incorporated HSPL as a Special Purpose Vehicle (in short 'SPV').

10. HSPL was awarded a run of the river Power Project by the Government of Himachal Pradesh (hereafter referred to as 'Power Project'). This Power Project was required to be set up on the Sorang tributary of the Sutlej river.

11. Notably, the equity stake of each of the shareholders in HSPL was as follows:

(i) NCCL held 94.92% of the shares; (ii) NCC held 0.08% of the shares; and (iii) the balance 5% shares were held by IL&FS.

12. The Power Project was required to have a generation capacity of 100 Mega Watt ('MW').

13. In order to execute the Power Project, between 2007-2010, HSPL entered into several sub-contracts. It appears that Abu Dhabi National Energy Company PJSC, an Abu Dhabi based company, which is in the business of generation, transmission and distribution of power in India (and is the holding company of TAQA) was exploring ways and means of investing in suitable projects.

14. It is in this background that in 2011, IL&FS approached NCCL and its holding company i.e. NCC, to invest in HSPL's Power Project.

15. This resulted in the SPA being executed between TAQA, NCCL, NCC and IL&FS. Broadly, the SPA envisaged that TAQA would purchase in two tranches the equity shares of the aforementioned three shareholders and in addition thereto, the entire lot of Fully Convertible Debentures (FCDs) held by NCCL and IL&FS.

16. It is not in dispute that TAQA has paid the entire consideration in respect of the equity shares and FCDs to NCCL, NCC and IL&FS.

17. The disputes, it appears, arose on account of the purported breach of certain material conditions and consequently, the purported violation of rights and obligations, which had been conferred on the parties under the SPA. The material conditions around which the disputes swirled were, broadly, as follows:

(i) Insofar as NCCL and NCC were concerned, they were required to complete the works in all respects qua the Power Project by 31.3.2013. Under the SPA, this date is described as the Wet

Commissioning Date (WCD). As would be evident, even though the SPA was executed at an earlier point in time, TAQA did not take over the responsibility of completing the Power Project as it was, perhaps, nearing completion, apart from other commercial and practical reasons which may have deterred it from taking a step in that direction.

(ii) The cost of the Power Project was capped at INR 890 Crores.

(iii) Clause 1.1 of the SPA provided that any cost overrun beyond INR 756 Crores would be borne by NCCL and NCC. Importantly, the figure of INR 756 Crores was arrived at after making adjustments qua the following:

(a) INR 40 Crores which had been paid by NCCL, NCC and IL&FS as Sellers' Subordinate Loan (SSL) to HSPL.

(b) INR 81.67 Crores which was paid by TAQA towards cost of achieving WCD by subscribing to FCDs at the time of initial acquisition of shares.

(c) INR 12.33 Crores which IL&FS was required to contribute towards achieving WCD.

18. It appears, even though IL&FS did not contribute the aforementioned amount, TAQA agreed to factor in the said amount in order to enable determination of project cost and cost overrun amounts as provided in the SPA.

19. Pertinently, if one were to take into account the aforementioned adjustments and add them up with INR 756 Crores, it would result in arriving at a cumulative figure of INR 890 Crores, which was the sum at which, as indicated above, the project cost was capped.

20. Importantly, under the SPA, any sum expended in excess of the capped project cost of INR 890 Crores was required to be reimbursed by NCCL and HSPL.

21. The record shows that the Power Project could not be made operational by 31.3.2013, as required under Clause 9.1.1 read with Clause 10.2.1 of the SPA. Given this circumstance, HSPL and TAQA served a pre-arbitration notice dated 4.7.2014 on NCCL and NCC, adverting therein to their claims, which, according to them, required adjudication via arbitration. In other words, via this notice, Clause 14 of the SPA was triggered by HSPL and TAQA.

22. NCCL vide reply dated 2.8.2014, repelled the assertions made in HSPL's and TAQA's notice. This apart, NCCL alluded to their counterclaims. Pertinently, while referring to its counterclaims, NCCL also made a specific claim for incentive payments.

23. Given this background, HSPL and TAQA on 31.12.2014, proceeded to file their Notice of Arbitration (NOA) with the Singapore International Arbitration Centre (in short 'SIAC').

24. It appears that TAQA, thereafter, issued a step-in notice dated 5.3.2014 and took control of the Power Project from NCCL. This was followed by HSPL and TAQA serving upon NCCL and NCC, the NOA, which they had filed with SIAC on 31.12.2014.

25. Via this notice, HSPL and TAQA indicated the name of their nominee Arbitrator. NCC and NCCL responded to the aforementioned notice vide their reply dated 23.1.2015. This was followed by a communication dated 30.1.2015, whereby, NCCL and NCC indicated the name of their nominee Arbitrator.

26. On 23.4.2015, the Registrar of Court of Arbitration, SIAC, acting in her capacity as the President under the relevant SIAC Rules, appointed the Presiding Arbitrator, who, in fact, had been nominated by the two co-arbitrators (hereafter referred to as '1st Arbitral Tribunal').

27. The record shows that thereafter, HSPL and TAQA filed their Statement of Claim (SOC) on 20.7.2015 (as amended by Amendment by the SOC dated 06.9.2016). In response thereto, both NCCL and NCC filed their respective Statement of Defence (SOD) on 15.9.2015. It would be important to note that NCCL in its SOD also included its counterclaim.

28. Evidently, NCCL filed an application with the 1st Arbitral Tribunal for amendment of its counterclaims. The amendment sought was confined to introduction of an additional relief, which was referred to as d(A).

29. The 1st Arbitral Tribunal vide its order dated 12.11.2015, allowed the application, which resulted in the first amendment being brought about by NCCL in its Statement of Counterclaims. Thus, the first amended Statement of Counterclaims was lodged on 3.6.2016.

30. The record also shows that NCCL moved yet another application dated 18.7.2016 for amending its counterclaims. Via this application, leave was sought for incorporation of counterclaims referred to as (g), (h) and (i).

31. This application was also allowed by the 1st Arbitral Tribunal vide its order dated 2.9.2016. Resultantly, NCCL filed its second amended Statement of Counterclaims dated 7.9.2016.

32. HSPL, in turn, was given liberty to file its SOD to the amended counterclaims. Consequently, the SOD to the counterclaims dated 15.9.2015 followed by an additional SOD to the amended counterclaims dated 7.9.2016 was filed by TAQA and HSPL.

33. In the interregnum, while the arbitration proceedings were in progress before the 1st Arbitral Tribunal, TAQA successfully tested and commissioned Unit-1 of the Power Project.

34. The record reveals that the last date on which oral submissions

were heard by the 1st Arbitral Tribunal was 26.1.2017. Thereafter, it appears, the 1st Arbitral Tribunal gave an opportunity for filing opening submissions and written submissions as also cost submissions.

35. On 2.6.2017, the 1st Arbitral Tribunal closed the proceedings in terms of Rule 28.2 of the SIAC Rules for consideration of the matter and rendering the award.

36. It appears that two days before the closure of the arbitral proceedings, that is, on 30.5.2017, NCCL and NCC wrote to HSPL that they neither had nor did they intend to lodge claims under the SPA other than those which had already been submitted to the 1st Arbitral Tribunal.

37. The 1st Arbitral Tribunal, as indicated at the very outset, rendered its award on 24.1.2018.

38. HSPL and TAQA having obtained an award, whereby, certain sums were awarded in its favour, moved this Court by way of an enforcement petition on 9.3.2018, being: OMP(EFA)(COMM.) No. 1/2018. Besides this, it appears, contempt proceedings have also been filed by HSPL and TAQA against NCCL.

39. NCCL had on its part laid a challenge to the award dated 24.1.2018 by initiating proceedings in the Singapore High Court. It appears, HSPL and TAQA have acted likewise.

40. Furthermore, during the course of the arguments, I was informed by the counsel for parties that the Singapore High Court has rejected the petitions of both sides.

41. Continuing with the narrative, on 1.10.2018, NCCL sent a communication to HSPL and TAQA seeking data qua Annual Deemed Generation and Metered Generation, if any, qua the Power Project to buttress its claim for incentive payments under the SPA. This communication, in fact, set the stage for the second round of litigation between the parties.

42. HSPL and TAQA vide their reply dated 12.10.2018 repelled the assertion made by NCCL in its notice dated 1.10.2018. In their reply, HSPL and TAQA have sought to repel the claim for incentive payments both on the ground of maintainability as well as on merits.

43. Undeterred, on 28.12.2018, NCCL filed their NOA with SIAC.

44. It is in this backdrop that on 8.1.2019, HSPL and TAQA received intimation from SIAC that NCCL had initiated the Second (2nd) arbitration proceedings. This communication of SIAC was suggestive of the fact that the arbitration proceedings initiated by NCCL is deemed to have commenced from 31.12.2018.

45. Alarmed by this development, HSPL and TAQA lodged the

instant action, which came up before this Court for the first time on 10.1.2019. On that date, I had issued notice both in the suit as well as in the captioned interlocutory application. Furthermore, I had indicated that any steps taken henceforth in the arbitration proceedings initiated by NCCL would be subject to further orders of this Court in the present proceedings. In addition thereto, I had also laid emphasis on the fact that if any response was issued by HSPL and TAQA to SIAC in the context of their having received a communication that the arbitration proceedings qua them had commenced, the same would be without prejudice to their rights in the instant proceedings. The notice was made returnable on 18.1.2019.

46. On 18.1.2019, Mr. Nakul Dewan, Advocate, instructed by Dr. Amit George, Mr. Jai Sahai Endlaw, Ms. Neelu Mohan, Mr. Rishabh Dheer and Mr. Shivansh Soni, Advocates, entered appearance on behalf of NCCL.

47. Given the urgency in the matter, NCCL was given time to file its reply by 21.1.2019 *vis-a-vis* the captioned application. On the other hand, HSPL and TAQA were given time to file their rejoinder(s) by 23.1.2019. The matter was fixed for hearing on that very date, that is, 23.1.2019.

48. Since NCCL had filed its reply only on 22.1.2019, a request was made on behalf of HSPL and TAQA that the matter be postponed to 25.1.2019 to enable them to file their rejoinder(s) by 24.1.2019. The request was acceded to.

49. Thereafter, arguments in the matter were heard on 25.1.2019, 5.2.2019 and 6.2.2019. Orders in the application were reserved on 6.2.2019 upon conclusion of oral submissions by counsel for parties.

Submissions of Counsel

50. Arguments on behalf of HSPL and TAQA were addressed by Mr. Sandeep Sethi, learned Senior Counsel, instructed by Ms. Padmaja Kaul, Mr. Ketan Gaur and Mr. Praharsh Johrey, Advocate, while submissions on behalf of NCCL were advanced by Mr. Nakul Dewan.

51. Broadly, the submissions made by Mr. Sethi can be paraphrased as follows:

(i) NCCL has attempted to lay claim to incentive payments, which purportedly arises out of the SPA. The claim made by NCCL is barred by principles of *res judicata*, waiver, and abandonment. The reason as to why NCCL's claim for incentive payments would encounter the abovestated legal impediments would be evident if one were to closely examine the conduct of NCCL before and during the progress of the 1st arbitration proceedings. In this behalf, reference was made to HSPL and TAQA's pre-arbitration notice dated 4.7.2014 and the reply thereto dated 2.8.2014 filed

by NCCL, by which, *inter alia*, NCCL laid a claim for incentive payments.

(ii) Furthermore, reliance was also placed on communication dated 30.5.2017 addressed by NCCL and NCC to HSPL, whereby, NCCL and NCC appear to have conveyed to HSPL that they had no other claims under the SPA other than those qua which the matter was under consideration (at the relevant point in time) before the 1st Arbitral Tribunal.

(iii) Despite NCCL amending its statement of counterclaims, not once but twice, it chose not to make any claim for incentive payments.

(iv) Given these circumstances, NCCL's attempt, once again, at initiating arbitration proceedings on the same cause of action should not be permitted as it was vexatious, time consuming, and would involve expenses which HSPL and TAQA could well avoid.

(v) The aforesaid submissions were buttressed by referring to paragraphs 23, 25, 27, 28, 47(i)(d) and 132 of NCCL's SOD in the 1st arbitration proceedings.

(v)(a) Based on the assertions made in these paragraphs, it was contended that NCCL had argued before the 1st Arbitral Tribunal that if it were to find that NCCL was in breach of its obligations in achieving the WCD and thus, was required to indemnify HSPL and TAQA in respect of Cost Overrun payments, its liability qua them was capped under the SPA and in ascertaining the cap amount, the following had to be taken into account:

(a) SSL; (b) Incentive Payments; (c) CER payment; and (d) Security Bond (I).

(v)(b) These adjustments had been quantified by NCCL at 30% of the purchase consideration. In this context, it was submitted that out of the four areas of adjustments referred to above, NCCL had, in fact, raised a counterclaim *vis-a-vis* only two aspects, that is, SSL and refund of encashed Security Bond (I).

(v)(c) The argument, thus, was that since the counterclaim was made for SSL and refund of encashed Security Bond (I), NCCL could have made a counterclaim for incentive payments as well, which, as the record would show, it failed to put forth in the 1st arbitration proceedings. As a matter of fact, it was contended that NCCL, instead of making a counterclaim, proceeded to treat incentive payments as a cap on its liability.

(vi) The relief sought for by NCCL for the payment of SSL in the sum of INR 26,66,66,667/- was based on the same cause of action and rationale which forms the basis of NCCL now lodging a claim for incentive payments.

(vi)(a) The basis for lodging a claim for SSL was that the Power Project would achieve the WCD by 31.3.2013; NCCL alone would bear the burden of any or all Cost Overrun Payments; and lastly, SSL would be paid only on the achievement of the Final Completion Date.

(vi)(b)In this behalf, reference was made to Clauses 9.1, 9.1.1, 9.1.4 and 9.8.1. Reference was also made to paragraph 14 of NCCL's Statement of Counterclaims in the 1st arbitration proceedings.

(vii) NCCL's stance that its cause of action for laying a claim to incentive payments could not have arisen till such time the 1st Arbitral Tribunal had returned a finding as to when in the given circumstances the WCD could actually have been achieved, is fallacious and contrary to established principles of law.

(vii)(a) The fact that the 1st Arbitral Tribunal in paragraph 254 and 255 of its award observed that the WCD could have been achieved by April, 2014 or latest by June, 2014 could not have given rise to a fresh cause of action, in law, in favour of NCCL. Findings returned by Arbitral Tribunals via awards and likewise, by Courts via judgments rendered by them cannot give rise to a fresh cause of action qua those who are parties to such awards and/or judgments.

(vii)(b) NCCL could have, if it wanted, laid a claim for incentive payments on account of Deemed Generation in the 1st arbitration proceedings itself. Had such a claim been made, the 1st Arbitral Tribunal, if found fit, would have allowed for incentive payments from April, 2014 or June, 2014. NCCL having failed to do so, it cannot be given, in a manner of speech, a chance to have a second bite at the cherry.

(viii) Given the aforesaid circumstances, NCCL should be restrained from burdening HSPL and TAQA with the costs and other attendant hassles of a second arbitration proceedings. In this behalf, balance of convenience is squarely in favour of HSPL and TAQA. In case the second (2nd) arbitration proceedings are allowed to continue, HSPL and TAQA would not only incur significant costs, but would also lose its right to choose its nominee Arbitrator, if it fails to act in that behalf by 25.1.2019. In this connection, reference is made to Rule 11.2 of the SIAC Rules.

(ix) Furthermore, the fresh claim made for incentive payments is also barred by limitation if regard is had to the following milestones.

(x) Under the SPA, the WCD was required to be achieved by

31.3.2013; TAQA stepped in to take over the project on 5.3.2014. NCCL issued its notice to lay claim to incentive payments only on 28.12.2018.

(xi) On merits as well HSPL and TAQA have a good case inasmuch as under Clauses 8 and 9 of the SPA, entitlement to incentive payments would arise only upon commissioning of the Power Project; an event which never occurred. Under the SPA, NCCL is to bear the burden of Cost Overrun payments, qua which the 1st Arbitral Tribunal awarded a sum in excess of INR 90 Crores in favour of HSPL.

(xii) Given the aforesaid facts and circumstances, the Arbitration Agreement obtaining between the parties, which is incorporated in Clause 14 of the SPA has been rendered inoperative and/or incapable of being performed.

52. In support of his contention, learned counsel has relied upon the following judgments:

i) *McDonald's India Pvt. Ltd.* v. *Vikram Bakshi*, (2016) 4 Arb LR 250 (Delhi);

ii) *Ramasamy Athappan* v. *The Secretariat of the Court, ICC*, 2008 SCC OnLine Mad 789;

iii) *C.G. Holdings* v. *Ramasamy Atthappan*, 2011 SCC OnLine Mad 1078;

iv) *Satish Kumar* v. *Surinder Kumar*, (1969) 2 SCR 44;

v) *National Insurance Company* v. *Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267;

vi) *Republic of India through Ministry of Defence* v. *Agusta Westland International Ltd.*, 2019 SCC OnLine Del 6419;

vii) *World Sports Group (Mauritius) Limited* v. *MSM Satellite (Singapore) PTE. Limited*, (2014) 11 SCC 639;

viii) *Chloro Controls India Pvt. Ltd.* v. *Seven Trent Water Purification Inc.*, (2013) 1 SCC 641;

ix) *Union of India* v. *Vodafone Group PLC United Kingdom*, 2018 SCC OnLine Del 8842;

x) *Excalibur Ventures LLC* v. *Texas Keystone Inc*, [2011] EWHC 1624 (Comm); and xi) *K.K. Modi* v. *K.N. Modi*, (1998) 3 SCC 573

53. On the other hand, Mr. Dewan made the following submissions:

(i) NCCL which held shares in HSPL transferred the same to TAQA for a sum of INR 278.33 Crores. Under the SPA, NCCL was to bear the burden of Cost Overrun payments and pay the same to HSPL if it went over the threshold of INR 890 Crores.

(ii) NCCL had covenanted under the SPA that HSPL would complete the Power Project by 31.3.2013. While NCCL in consonance with

Clauses 6.4.1.(b) and (c) and 6.6 of the SPA had received the sale consideration in respect of shares held in HSPL, which it sold to TAQA, the Cost Overrun payments beyond the threshold, adverted to above, had to be paid by NCCL after due adjustments were made. In this behalf, reliance was placed on Clauses 9.7, 9.8.1 and 9.10. The contention was that if adjustments were not made, which included sums owed towards incentive payments, the same had to be remitted to NCCL.

(iii) The liability of HSPL and TAQA to pay monies to NCCL towards incentive payments arose out of Clause 8 read with Clause 10.4.2 of the SPA. Incentive payments were deferred consideration as they were dependent on deemed generation of electricity by the Power Project after the Final Completion Date. It was suggested that incentive payments were envisaged as deferred consideration as there was a difference in the projection of water flow. In this behalf, reliance was placed on the term sheet, the extracts from the due diligence reports, draft project report and e-mails dated 5.4.2012 and 27.3.2012.

(iv) In terms of Clause 9.7 of the SPA, if TAQA or HSPL was to issue a Cost Overrun payments notice, then, NCCL was required to make payments within a period of 14 days of the receipt of the said notice. In case NCCL failed to make the payments towards Cost Overrun, HSPL was required to adjust SSL to the extent of the Cost Overrun. If Cost Overrun exceeded the SSL, HSPL had the option to, *inter alia*, reduce and/or adjust the incentive payment.

(v) In this case, though, Cost Overrun payments exceeded the SSL, HSPL neither adjusted the incentive payments from the SSL, nor did it make adjustments to that extent from the cost overrun payments. This omission on the part of HSPL conferred a positive right on NCCL to receive an incentive payments after the Final Completion Date.

(vi) The award dated 24.1.2018 partially allowed the claims of HSPL and TAQA in terms of Clause 9.10 of the SPA. The 1st Arbitral Tribunal via the said award dated 24.1.2018, *inter alia*, held that the WCD could have been achieved latest by 30.6.2014. Notably, the 1st Arbitral Tribunal held that there was, in fact, no breach of the SPA by NCCL even though the WCD had not been reached by 31.3.2013. Thus, on account of failure of HSPL and/or TAQA in making incentive payments, based on the findings of the 1st Arbitral Tribunal in respect of the WCD, NCCL was forced to issue the NOA dated 28.12.2018 by which it sought to commence the 2nd arbitration proceedings.

(vii) The assertions made by HSPL and TAQA can be examined and adjudicated upon by a 2nd Arbitral Tribunal, which in law has primacy in this behalf. There is, in law, no fetter on a 2nd Arbitral Tribunal in determining issues which are related to the purported inoperability of the Arbitration Agreement. This exercise can be conducted by a 2nd Arbitral Tribunal either under Rule 28.2 or Rule 29 of SIAC Rules.

(viii) Furthermore, any jurisdictional challenge can then be tested before the concerned Court in Singapore under Section 10 of the International Arbitration Act (CHAPTER 143A).

(ix) The cause of action for laying a claim qua incentive payments could have arisen only after the 1st Arbitral Tribunal had determined the WCD. This position has also been accepted by HSPL and TAQA by making an assertion to that effect in paragraph 3.3(e) of the plaint. Since, HSPL and TAQA did not adjust the incentive payments while raising its claims for cost overrun payments, a positive cause arose in favour of NCCL to lay claim to incentive payments after determination of the WCD by the 1st Arbitral Tribunal.

(x) It was emphasized that HSPL and TAQA had not made due adjustments as required under the SPA. There was, therefore, no occasion for NCCL to raise a claim with respect to incentive payments in the SOD or in the Statement of Counterclaims lodged with the 1st Arbitral Tribunal.

(xi) In other words, the stand taken was that the claim for incentive payments now made was not barred by the principles of *res judicata* or constructive *res judicata* and that it was open for NCCL to raise such a claim as it was based on a separate and distinctive cause of action. In support of this submission, it was stressed that the claim now made for incentive payments would require evidence, which would be different from the evidence laid in the 1st arbitration proceedings.

(xii) Furthermore, it was contended that on the basis of the same rationale and logic, it could not be suggested that NCCL had abandoned its claim for incentive payments. The argument was that under the SPA, HSPL and TAQA were obliged to reduce and/or adjust their Cost Overrun claim.

(xiii) In this context, what was sought to be put forth was that a mere reference to incentive payments claim in a schedule attached to NCCL's letter dated 2.8.2014 would not constitute an abandonment in law. Abandonment requires a more resolute stand than a mere reference in respect in a pre-arbitration notice.

Abandonment cannot occur when a claim has not legitimately arisen.

(xiv) The argument advanced on behalf of HSPL and TAQA that the claim for incentive payments had been waived in view of what was stated in communication dated 30.5.2017 was unsustainable for the following reasons: (i) First, TAQA was neither addressed nor mentioned even though it was jointly and/or severally liable in these proceedings. (ii) Second, the contents of communication dated 30.5.2017 cannot be construed as waiver in respect of a claim *vis-a-vis* which cause of action had not been arisen at that point in time.

(xv) Likewise, in respect of argument advanced that the claim for incentive payments was barred by limitation, it was submitted that the cause for such a claim had not arisen, as suggested, on 5.3.2014, when TAQA stepped in to take over the Power Project. In this context, it was submitted that the step-in right available to TAQA was unrelated to the Final Completion Date/WCD. The argument was that limitation for incentive payments could commence only from the date of the award.

(xvi) Qua the aspect of inoperability of the Arbitration Agreement, it was argued that arbitration agreements are not extinguished merely because arbitration qua one set of disputes stands concluded. It was stressed that the same Arbitration Agreement can operate *vis-a-vis* new claims as is sought to be done in the instant case by NCCL.

(xvii) In support of its stand, NCCL relied upon the following judgments:

a) *Kusum Ingots & Alloys Ltd.* v. *Union of India*, (2004) 6 SCC 254;

b) *Alka Gupta* v. *Narender Kumar Gupta*, (2010) 10 SCC 141;

c) *Himachal Pradesh Financial Corporation* v. *Anil Garg*, (2017) 14 SCC 634;

d) *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of Uttar Pradesh*, (1979) 2 SCC 409;

e) *Sonell Clocks and Gifts Limited* v. *New India Assurance Company Limited*, (2018) 9 SCC 784;

f) *Dolphin Drilling Limited* v. *Oil and Natural Gas Corporation Limited*, (2010) 3 SCC 267;

g) *Soumitra Kumar Sen* v. *Shyamlal Kumar Sen*, (2018) 5 SCC 644;

h) *Mcdonald's India Private Limited* v. *Vikram Bakshi*, (2016) 232 DLT 394;

i) *GMR Energy Limited* v. *Doosan Power Systems India Power*

Systems India Private Limited, 2017 SCC OnLine Del 11625

j) *GMR Energy Limited* v. *Doosan Power Systems India Private Limited*, Order dated 14.11.2017, passed in CS (Comm.) 447/2017 before the High Court of Delhi.

k) *Malini Ventura* v. *Knight Capital Pte. Ltd.*, (2015) SGHC 225;

l) *Union of India* v. *Khaitan Holdings (Mauritius) Limited*, judgment dated 29.01.2019, paased in CS (OS) 46/2019 before the High Court of Delhi.

Analysis and Reasons

54. Having heard the learned counsel for the parties and perused the record, to my mind, the central issue which emerges in respect of this matter is as to whether or not NCCL could continue with the 2nd or a new arbitration. It is HSPL's and TAQA's submission that NCCL could have or ought to have raised its claim for incentive payments in the 1st arbitration proceedings.

55. The fact that NCCL did not do so, according to HSPL and TAQA, the continuation of the 2nd arbitration is barred by law. In support of this submission, on behalf of HSPL and TAQA, principles such as *res judicata*, waiver, and abandonment have been put forth.

56. It was also contended that the arbitration agreement, which subsisted between the parties, (based on which the 1st arbitration proceedings was commenced, which concluded in an Award), had become inoperative and/or incapable of being performed.

57. This stand taken on behalf of HSPL and TAQA is sought to be supported on facts by adverting to various circumstances, which preceded the commencement of the 1st arbitration proceedings as also on the defences raised in the 1st arbitration proceedings, which were considered and dealt with by the 1st Arbitral Tribunal while rendering its Award.

58. Insofar as the events which preceded the commencement of 1st arbitration proceedings are concerned, reference was made to the reply dated 02.08.2014 concerning the pre-arbitration notice dated 04.07.2014, served by HSPL and TAQA on NCCL and NCC. In the reply dated 2.8.2014, concededly, in Appendix B at serial No. 6, a claim on account of loss of incentive payments to the extent of INR 28,34,10,000 was made by NCCL.

59. The other communication, on which reliance was placed by HSPL and TAQA was the communication dated 30.05.2017. This communication was addressed by NCCL and NCC, *inter alia*, to its creditors, who had given notice of invocation of the pledge. The communication was also marked to HSPL and a prospective transferee

company, one, Greenko Energies Private Limited, to whom, the pledged securities were intended to be transferred.

60. In this communication, NCCL and NCC indicated to its creditors that apart from the monies claimed by them from HSPL i.e. in two separate and independent arbitrations which included the 1st arbitration proceedings, they did not have any other claim against HSPL.

61. Likewise, reliance was placed by HSPL and TAQA on NCCL's pleadings filed before the 1st Arbitral Tribunal. The stand taken was that despite NCCL amending its counterclaims, not once, but twice, it chose not to make a claim for incentive payments. Reference was also made to certain specific paragraphs (to which I have alluded to hereinabove) in NCCL's SOD filed in the 1st arbitration proceedings.

62. Besides this, the stand of NCCL, which, according to HSPL and TAQA, was rejected by the 1st Arbitral Tribunal was also brought to fore. In particular, it was emphasized that HSPL and TAQA had indicated in no uncertain terms that its liability qua cost overrun payments was capped under the SPA and that in ascertaining the cap amount, adjustments, *inter alia*, had to be made qua incentive payments.

63. The contention was that NCCL had quantified the adjustments at 30% of the purchase consideration and that, in fact, it had raised a counterclaim qua two out of four amounts i.e. SSL and encashed Security Bond (I); a contention which was rejected by the 1st Arbitral Tribunal.

64. In other words, the contention was that the cause of action for adjustments of SSL and encashed Security Bond (I), if at all, was the same as which pertained to incentive payments. This argument was sought to be buttressed by referring to the fact that the basis for lodging a claim for SSL was the same as that which is now sought to be projected *vis-a-vis* incentive payments.

65. The record also discloses that NCCL does not dispute the fact that it did refer to incentive payments in Appendix B annexed to its communication dated 02.08.2014 or that it did take a stand *vis-a-vis* its creditors in the communication dated 30.05.2017 that its claims *vis-à-vis* HSPL were confined to those which were the subject matter of the 1st arbitration proceedings.

66. The record also shows that the WCD, which was to be achieved by 31.03.2013, could not be achieved. As a matter of fact, there is no dispute that the Power Project did not get completed. What is also not disputed by NCCL is that it was liable to bear the burden of Cost Overrun payments beyond the threshold amount pegged at INR 890 crores, *albeit*, after adjustments being made in consonance with the provisions of the SPA.

67. Variance in the respective stands taken by parties, thus, falls in a narrow compass, which is that, according to NCCL, incentive payments were deferred consideration, which were dependent on Deemed Generation of electricity by the Power Project after the Final Completion Date had been achieved. In this behalf, NCCL places reliance on Clauses 9.0, 9.7 and 9.8.1 of the SPA. NCCL buttresses this stand by contending that since Costs Overrun payments exceeded the threshold amount, HSPL and/or TAQA was required to either return the amount or make the requisite adjustments. Since adjustments had not been made, a positive right had accrued in favour of NCCL to receive incentive payments after the Final Completion Date.

68. In this regard, it was further stated on behalf of NCCL that the claim for incentive payments could have arisen only after the 1st Arbitral Tribunal determined the WCD. The fact that this stated position was correct was sought to be demonstrated by relying upon paragraph 3.3 (e) of the plaint filed in the accompanying suit.

69. What was, thus, sought to be re-emphasized was the fact that since HSPL and TAQA had not adjusted the incentive payments, there was no occasion for NCCL to have raised the claim either in the SOD or file a counterclaim in respect of the same in the 1st arbitration proceedings.

70. With this foreground, what needs to be considered by me is whether I should grant an injunction, restraining NCCL from continuing with the 2nd arbitration proceedings.

71. The principles of law, which have been invoked by HSPL and TAQA to buttress its stand, are *res judicata*, waiver, and abandonment.

72. I must state at the outset that this is not a case of *res judicata* as there has been, in the given facts and circumstances, no determination by the 1st Arbitral Tribunal qua the issue pertaining to incentive payments. At best, what could be said in favour of HSPL and TAQA, is that, this is a case of constructive *res judicata*.

73. In order to appreciate this submission one would have to first of all briefly touch upon the doctrine of *res judicata*, as constructive *res judicata* is only a derivative of the former. The doctrine of *res judicata*, in a nutshell, gets triggered when the issue(s) raised in the subsequent proceeding are those which have been decided and have attained finality, in an earlier proceeding. The reason why the law places a bar on reopening or reagitation of issues which have attained finality is, as it does not want the affected party to be vexed twice over qua the same cause. [see *Kiran Tandon* v. *Allahabad Development Authority*, (2004) 10 SCC 745; and *Escorts Farms Ltd., Previously Known as M/s. Escorts Farms (Ramgarh) Ltd.* v. *Commissioner, Kumaon Division, Nainital,*

U.P., (2004) 4 SCC 281]

74. The doctrine has its roots in public policy. It, therefore, bars raising of an issue in a subsequent proceeding, which is directly and substantially in issue in an earlier proceeding between the same parties or between the parties claiming or litigating under the same title. Pertinently, the decision on which reliance is placed to invoke the doctrine of *res judicata* should be a decision of a Court of competent jurisdiction. It would, however, matter little if it is a Court of limited jurisdiction, that is, it is not competent to try the subsequent action or the action in which the issue has been raised subsequently. [See explanation VIII to Section 11 of the Code of Civil Procedure, 1908 (in short "CPC") - principles analogous thereto should apply in arbitration proceedings].

75. Since, clearly, as indicated above, there was no decision on incentive payments, the bar, if any, which HSPL and TAQA can, if at all, claim is that NCCL could have or ought to have raised the issue of incentive payments. To my mind, what, in effect, HSPL and TAQA appear to contend is that NCCL should be estopped from raising the issue of incentive payments in the 2nd arbitration proceeding. The plea appears to be in the nature of an "estoppel by accord". [See *Bhanu Kumar Jain* v. *Archana Kumar*, (2005) 1 SCC 787/paras 29 to 32].

76. It is precisely in this context that Mr. Sethi also contended that the arbitration agreement between the parties had become inoperative or in the alternative is incapable of being performed.

77. It was Mr. Sethi's contention that if he is correct in submitting that the doctrine of *res judicata* applies, then, the arbitration agreement had become inoperative or incapable of being performed.

78. In support of this plea, Mr. Sethi had cited several judgments including the judgment of Division Bench of this Court in *McDonalds case*.

79. I shall be dealing with the judgments cited by Mr. Sethi including *McDonald's case* in the latter part of my judgment.

80. Suffice it to say, for the moment, that since the doctrine of *res judicata* simpliciter would not apply, this plea *sensu stricto*, as adverted to above, is unsustainable.

81. As to whether constructive *res judicata* would apply in this case, one would have to examine whether the issue at hand concerning incentive payments is a mixed question of fact and law and, therefore, would require, if not, a full-blown trial at least a mini-trial. If it does, then, perhaps, this Court is not the appropriate forum to deal with this plea.

82. This is, especially so, as what HSPL and TAQA, in effect, seek in terms of relief, both in the interlocutory application and the suit, is an

anti-arbitration injunction. The Courts, ordinarily, have been very slow in granting injunctions whereby arbitration proceedings are brought to a standstill. The fundamental reason for this appears to be that the parties by entering into a contract would have necessarily agreed, as in this case, that all issues connected with or arising from the agreement entered into between them, would be tried by an Arbitral Tribunal duly constituted in terms of the agreement and, therefore, any sort of injunction granted by the Court would tantamount to aiding breach of the arbitration agreement.

83. Having said so, Courts have, in certain situations, granted injunctions where proceedings are vexatious and/or oppressive.

84. As indicated above, the width and amplitude available to the Court in an anti-arbitration agreement is much narrower as against where an anti-suit injunction is sought in a matter before it. NCCL has relied upon several documents to demonstrate, as I understand, that there was uncertainty with regard to discharge data and, therefore, there was an element of deferred consideration factored in the agreement obtaining between the parties, which included the incentive payments. Thus, the contention was that only when a clearer picture emerged with regard to water flow data would a cause of action have arisen for lodging a claim for incentive payments. In support of this plea, NCCL has relied upon the following documents: (i) term sheet dated 27.12.2011, executed by TAQA, NCCL and IL&FS; (ii) draft technical due diligence report dated March, 2012, prepared by SNC Lavalin; (iii) technical due diligence report dated August, 2012, prepared by SNC Lavalin; (iv) detailed project report dated April, 2005-Chapter 5; (v) e-mail dated 12.4.2012 addressed by NCCL to TAQA; (vi) e-mail dated 27.03.2012 issued by TAQA to JSL and (vii) e-mail dated 24.01.2012 from IL&FS to, one, Ms. Padma C. Rao.

85. The moot question, which arises, is that, would I, therefore, prevent commencement of the 2nd arbitration proceeding, if a trial is required as to whether or not NCCL could have awaited the decision of the 1st Arbitral Tribunal and, then, lodged a claim for incentive payments.

86. The instant Power Project is undisputedly a hydroelectric power project. The generation of electricity would necessarily depend upon Hydrology. Significantly, NCCL, *inter alia*, relies upon the Technical Due Diligence report to demonstrate that Sorang river flows were overestimated[1]. The aspect cannot be brushed aside lightly at this stage.

87. The other submission, which has been advanced quite vigorously on behalf of NCCL, is that even according to HSPL and TAQA, NCCL and NCC would be entitled to incentive payments as per the formula given

under the SPA, once the Final Completion Date was achieved. NCCL contends that the 1st Arbitral Tribunal has arrived at a conclusion via its Award dated 24.01.2018 that the Power Project could have been completed latest by 30.06.2014 and that there was no breach of the SPA by NCCL only because of the fact that the WCD could not be achieved by 31.03.2013.

88. In order to buttress this submission, learned counsel, *inter alia*, relies upon the following:

(i) The observations made in paragraph 196 (xv) by the 1st Arbitral Tribunal in the Award dated 24.01.2018:

(ii) The assertions made by HSPL and TAQA in paragraph 3.3(e) of the plaint.

Paragraph 196(xv) of the Award dated 24.01.2018

> *"(xv) The undertaking by NCCIHL to achieve WCD by 31 March 2013 under Clause 10.2.1 is subject to the condition 'unless otherwise permitted by the purchaser'. If WCD is not achieved by 31 March 2013 and TAQA permits NCCIHL to continue in control of the construction and commissioning of the project as provided in Clause 10.2.1, there is no breach of warranty or covenant by NCCIHL, by reason of not achieving the WCD by 31 March 2013. When TAQA opts to take over control of the construction and commissioning of the Project, the liability of NCCIHL to achieve wet commissioning would cease and replaced by its liability to bear the expense incurred for TAQA/HSPL for achieving final completion."*

Plaint Paragraph 3.3(e)

> *"3.3 (e) For the purpose of this suit, it is important to note that (only) if the Defendant achieved Wet Commissioning Date of the Project by 31 March 2013 (amongst fulfillment of other obligations under the SPA) and after achievement of Final Completion Date, if the Project generated more than 400 million kWh annually (none of which were, in fact, achieved), the Defendant would be entitled to Incentive Payment as per a formula provided under the SPA."*

89. The aforesaid assertion made in the plaint and the observations of the 1st Arbitral Tribunal would show that the failure of NCCL to achieve the WCD by 31.03.2013 would only entail that it would have to indemnify TAQA for consequential losses caused under Clause 11.5 of the SPA. This aspect is also borne out upon reading the findings returned by the 1st Arbitral Tribunal in paragraph 310[2] read with its summary of the result against claim (d)[3] recorded in paragraph 390 of the Award dated 24.01.2018.

90. Therefore, NCCL appears to have pitched its case for a 2nd arbitration proceedings on its interpretation of Clauses 8 and 9 of the

SPA read with observations made in paragraph 254(3) and 255 of the 1st Arbitral Tribunal's Award dated 24.01.2018.

91. Briefly put, NCCL's case appears to be that since the Final Completion Date could not be achieved, the incentive payments could be worked out on the basis of the Annual Deemed Generation, which in turn, is ascertainable solely on the basis of water discharge as set out in Schedule 3 of the SPA.

92. According to NCCL, in terms of Clause 3.1 of Schedule 3, TAQA was required to measure the water level data w.e.f. 28.02.2013. It is NCCL's case that TAQA proceeded on the basis that annual generation of electricity would be approximately 400 million kWh and therefore went on to reduce the purchase price from INR 480 crores to INR 360 crores with the balance amount to be paid as incentive payments in accordance with Clause 8 of the SPA.

93. Thus, as per NCCL, since the 1st Arbitral Tribunal has returned a finding that the WCD could have been achieved at the very earliest in April, 2014, it was entitled to incentive payments in the event of water being available to sustain Annual Deemed Generation of electricity of more than 400 million kWh. The payments, according to NCCL, were required to be made for a period of five (5) years.

94. In the alternative, NCCL takes the stand that if the WCD is taken as 30.06.2014 then the period of five (5) years will have to be taken from that date.

95. It is in this context that NCCL says that via its communication dated 01.10.2018, sent to HSPL and TAQA, while claiming incentive payments under Clause 8 of the SPA, it had requested them to furnish information concerning the Annual Deemed Generation and Metered Generation, if any, of the Power Project for each year commencing from April, 2014. NCCL claims that the actual measurement data, having not being supplied by HSPL and TAQA, it was unable to calculate the exact amount of its claim. However, NCCL appears to have now, based on historical data of 30 years, made an estimate, which is that, for the relevant period, Annual Deemed Generation of electricity would be in excess of 535 million kWh and, therefore, it would be entitled to claim monies in excess of INR 180 crores.

96. Given the aforesaid broad stand taken by the parties, I would be slow in holding, at this juncture, that the commencement of 2nd arbitration proceedings ought to be injuncted. The submission advanced on behalf of HSPL and TAQA that NCCL had, in fact, made a claim for incentive payments, as reflected in its communication dated 02.08.2014 (which was addressed to TAQA with a copy to HSPL), would not have me hold that since it was not followed through, it necessarily fell within the ambit of constructive *res judicata*. At times, initial

bravado or, should I say, exuberance with regard to a possible claim that one party wishes to raise against another gets scaled down or excluded or excised upon sober cogitation in the matter.

97. Therefore, the fact that incentive payments were not included, though, counterclaims were amended twice over, would also not carry much weight in determining as to whether or not I should permit continuation of 2nd arbitration proceedings. My approach with regard to the contents of letter dated 30.05.2017 would, thus, be the same.

98. The reason that I take this line is on account of the provisions made in Rules 28.2 and 29.1 of the SIAC Rules. Briefly, Rule 28.2 enables an Arbitral Tribunal to rule, *inter alia*, not only on its own jurisdiction but also with regard to existence, validity or scope of the arbitration agreement.

99. Likewise, under Rule 29.1, a party can apply to an Arbitral Tribunal for early dismissal of a claim on the ground that it is manifest that the claim is without merit and/or is outside the jurisdiction of the Arbitral Tribunal. If, as is contended before me on behalf of HSPL and TAQA that the 1st Arbitral Tribunal, while adjudicating upon the claim and counterclaims raised has gone over the very same set of facts and grounds which are now sought to be trotted out by NCCL in support of the claim for incentive payments, it could seek a decision in terms of Rule 28.2 and/or Rule 29 of the SIAC Rules.

100. It would be, in my view, for the 2nd Arbitral Tribunal to fix the kind of hearing it wishes to have based on its sense of the nature and scope of the controversy at hand.

101. Insofar as this Court is concerned, a decision cannot be taken as to whether the second action would be barred on the ground of constructive *res judicata* without a trial. To my mind, it is undoubtedly a mixed question of fact and law. Thus, at this stage, to say that the arbitration agreement is inoperative and/or incapable of being performed would be, metaphorically speaking, putting the cart before the horse.

102. The other ground which was taken was that this was a case of waiver or abandonment also does not impress me. Waiver, as is ordinarily understood, occurs when a party gives up a claim, privilege, or right voluntarily i.e. consciously with knowledge of relevant facts. Abandonment, likewise, occurs when there is a relinquishment of a right or interest with the intention of the party concerned to never claim the same. (See: Black's Law Dictionary, 7th Edition, pages 1574 and 1). 52.1 In the instant case, the facts, as set out above, would show that it is NCCL's case that since it is still unaware of the actual data with regard to water flow (and at the commencement of the 1st

arbitration with regard to when the WCD could have been achieved), it could not have waived or abandoned its right and/or interest.

103. *Prima facie*, these pleas, at this juncture, have merit.

104. For the same reason, I would be disinclined to accept the submission made on behalf of HSPL and TAQA that NCCL's claim was barred by limitation since TAQA had exercised its right of step-in on 05.03.2014. If the stand taken by NCCL before me is accepted in the 2nd arbitration proceedings, the fact that TAQA stepped in qua the Power Project on 05.03.2014 may not have much significance.

105. At this juncture, I may refer to judgment of the High Court of Justice Queen's Bench Division Commercial Court in the matter of *Nomihold Securities Inc and Mobile Telesystems Finance SA*, [2012] EWHC 130 (Comm.).

106. The facts obtaining in *Nomihold*'s case are somewhat *pari materia* to the instant case. In that case, the learned Judge was called upon to rule on two applications. First application was filed by the claimant— Nomihold to injunct the defendant (referred to in the judgment as MTSF) to discontinue or take all steps within its power to discontinue two arbitrations which had been triggered before the London Court of International Arbitration ('LCIA'). Second, to rule upon a counter-application filed by the defendant/MTSF to stay Nomihold's application. Nomihold's case for injunction was pivoted on the fact that there had been a prior arbitration, which had resulted in an Award, and, therefore, the new arbitration triggered by the defendant/MTSF was barred by *res judicata* or at least on that basis the defendant/MTSF was precluded from raising a fresh claim on the ground of issue estoppel.

107. In that light, the learned Judge also considered the argument of the claimant— Nomihold, which was also, incidentally, an argument advanced by Mr. Sethi, that the second arbitration was initiated to avoid enforcement of the Award. On the other hand, the defendant/MTSF's stand before the Court was that it had complaints with regard to money laundering which required adjudication in the second or new Arbitration.

108. The following observations, being opposite, are extracted hereafter:

> *"39. Mr. Flynn contended that in this case the "matter" is to be characterised by the fact that Nomihold's essential complaints in its application are the re-arbitration complaints, and submitted that the parties agreed in the arbitration agreements that disputes and controversies about complaints of this kind should be arbitrated.*
>
> *40. I accept that, if the New Arbitrations proceed, the tribunals would have power to reject MTSF's claims on the basis that they had merged in the Award because of res judicata or on the basis that*

MTSF has been precluded by issue estoppel from arguing disputed questions upon which its claims relied. (In H.E. Daniels Ltd. *v.* Carmel Exporters and Importers Limited, *[1953] 2 Q.B. 242 Pilcher J recognised that a tribunal might reject a claim that is debarred by the rule in* Conquer *v.* Boot.) *The application of the principle in* Henderson *v.* Henderson *to the circumstances of this case needs more consideration, although it was not disputed before me that, in proper cases, an arbitral tribunal could apply the principle or an analogous one to dispose of a case before it.*

41. The principle of Henderson *v.* Henderson *applies typically when a litigant in court proceedings complains about matters that could and should have been raised in earlier litigation. During and after the hearing before me there emerged an issue between the parties about whether MTSF's money laundering complaint could have been determined in the First Option Agreement Arbitration. Mr. Flynn submitted that it was only by agreement between the parties that the Tribunal took it upon itself to determine the SPA issue and it did not encompass the money laundering complaint: that complaint could not have been determined in the First Option Agreement Arbitration unless both parties and the Tribunal had so agreed. Nomihold argued that MTSF knew before the SPA Arbitration was brought the evidential basis for its money laundering complaint and could have raised it, had it wished to do so, in the SPA Arbitration from the start; that the First Option Arbitration included all disputes between the parties about whether the SPA was invalid and not performed; and that, had MTSF raised the money laundering complaint, the Tribunal would certainly have decided it. I do not need to decide this difference, I do not have all relevant material about any agreement between the parties that led to the Tribunal assuming the burden of deciding the SPA Issue, and in view of my decisions on the applications, I do not comment upon the merits of it: it might fall to be determined in the New Arbitrations and I should not trample upon such questions. However, in these circumstances I shall say something about the principle of* Henderson *v.* Henderson *in the context of arbitral proceedings.*

42. The issue between the parties is whether MTSF can raise in the New Arbitrations matters that, as Nomihold asserts, it could and should have raised in the First Option Agreement Arbitration if it wished to raise them at all. The rule that a party will not be permitted to raise an issue that he could and should have raised in an earlier reference is well established and indeed ante-dates Henderson *v.* Henderson: *see* Smith *v.* Johnson, *(1812) 15 East 213. However, where the previous dispute was determined in arbitration, the principle of* Henderson *v.* Henderson *has a narrower application*

than where it was determined in court proceedings: Mustill & Boyd, Commercial Arbitration (1989) 2nd Ed. p.412. The consensual nature of arbitration means that a tribunal determines disputes referred to it by the parties. It is because of this, as Mance LJ explained in Sun Life Assurance Co. of Canada *v.* Lincoln National Life Insurance Co, *[2004] EWCA Civ 1660, that the principle of* Henderson *v.* Henderson *applies in relation to previous arbitrations only if all parties to subsequent litigation (or their privies) have also been parties to the earlier reference (whereas the principle of* Henderson *v.* Henderson *can apply where the parties to the earlier and subsequent litigation are different: see* Dexter *v.* Vieland-Boddy, *[2003] EWCA Civ 14 at para 49).*

43. Similarly, as it seems to me, in so far as the principle of Henderson *v.* Henderson *is to be regarded as an aspect of the courts' power to control abuse of process (see* Glencore International AG *v.* Exter Shipping Ltd., *[2002] CLC 1090 at para 35), there is room for debate whether the consensual nature of arbitration gives scope for a tribunal to decide that the reference agreement to which it is itself a party (together with proper consequences of the reference) is an abuse of its own process. For present purposes it suffices to say that, at least where the question is whether a complaint could and should have been raised in an earlier reference, the principle recognised in* Smith *v.* Johnson *is available to a subsequent tribunal as a basis for rejecting the complaint, because it would be entitled to reject a complaint on the basis that it had been abandoned and the* Smith *v.* Johnson *principle is an aspect of the principle of abandonment:* Excomm Limited *v.* Guan Guan Shipping (Pte) Limited *(The "Golden Bear"), (1987) 1 LLR 330, 343.*

44. I agree with Mr. Flynn's submission, therefore, that, if the New Arbitrations proceed, the arbitrators in them would be entitled to determine Nomihold's contention based upon estoppel per rem judicatam, issue estoppel and what it calls the principle of Henderson *v.* Henderson *(and might more exactly be called the doctrine of* Smith *v.* Johnson). *I cannot see, and it was not suggested, that there is any relevant difference between the ambit of the powers available to tribunals in the New Arbitrations to dispose of claims and the power that a court would have to dispose of complaints on the basis of argument such as Nomihold's re-arbitration complaints including the principle in* Henderson *v.* Henderson.

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50. As I have said, it is Nomihold's case that the New Arbitrations are part of what it calls MTSF's "enforcement war" to avoid the enforcement of the Award, and to challenge it in ways not

contemplated by either the arbitration agreements or the 1996 Act; and that they are collateral attacks on the Award (such as described by Toulson LJ). It submits that, if this is so, the challenge to the New Arbitrations falls within the purview of the court's supervisory jurisdiction to protect the Award and to support its enforcement. I agree with that submission, and so, in my judgment, to the extent that the adjudication of Nomihold's application involves determining the re-arbitration complaints, the court is not precluded by the arbitration agreements from determining them for that purpose. They are not matters "to be referred to arbitration", notwithstanding they in themselves are matters properly to be determined in a reference when raised in another context.

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In what circumstances will the court make an anti-arbitration injunction?

55. Mr. Flynn acknowledged that there are circumstances in which the court will make an anti-arbitration injunction, but he submitted that the court will not restrain a party from having a matter arbitrated before a tribunal if there is no dispute that the parties are subject to a valid and binding arbitration agreement that a tribunal should determine a matter of that kind. He analysed the authorities relied upon by Mr. Beltrami with a view to demonstrating that since the 1996 Act the court has never made an anti-arbitration injunction in these circumstances, and I accept his analysis of them. I have referred to the Sheffield United case upon which Mr. Beltrami particularly relied and I accept that in that case there was a dispute about whether the parties had agreed to arbitration before the CAS.

56. However, although the court apparently has not proceeded to make an order in the circumstances to which Mr. Flynn refers, there is authority that the court may do so. In Elektrim *v.* Vivendi Universal SA, *[2007] EWHC 571 (Comm) it was conceded that in these circumstances section 37 of the 1981 Act "constitutes a very residual power to intervene in an arbitration": see para 48(1). In his judgment Aikens J said this (at para 51):*

> *"I do not intend to explore generally the question of whether the court has any jurisdiction at all under section 37 of the SCA to grant either interim or final injunctions to restrain arbitrations that are subject to the 1996 Act. I must assume that there is such a jurisdiction, given the comments of the Court of Appeal in the cases of* Cetelem SA *v.* Roust Holdings Ltd. *[2005] 1 CLC 821 at para. 74 per Clarke LJ; and* Weissfisch *v.* Julius *[2006] CLS 424 at para. 33(v) per Lord Phillips CJ. Nonetheless, I must consider whether the jurisdiction is wide enough to provide a base on which an injunction might be granted on the facts of this case."*

57. On the basis of Aikens J's judgment and Intermet FCZO *v.* Ansol Limited, *[2007] EWHC 226 in which Gloster J assumed that the court has power to grant an order to restrain the continuance of an arbitration, Jackson J said this in* J. Jarvis & Sons Ltd. *v.* Blue Circle Dartford Estates Ltd, *[2007] EWHC 1262 (TCC) at para 39: "It is clear from two decisions of the Commercial Court (with which I respectfully agree) that the jurisdiction does survive [the enactment of the 1996 Act], but its exercise will be even more sparing than before".*

58. I do not, I think, need to set out the observations of Clarke LJ and Lord Phillips CJ to which Aikens J referred. Aikens J recognised that in view of them he should assume that the court may in proper circumstances restrain a party from having a matter arbitrated before a tribunal despite there being no dispute that the parties are subject to a valid and binding arbitration agreement that the tribunal should determine such matters. In view of the decisions of Aikens J, Gloster J and Jackson J, a fortiori I should so assume. However, the authorities emphasise the caution with which the court should intervene to restrain arbitral proceedings, and this is also emphasised by section 1 of the 1996 Act: see above.

59. Reference was made before me to the doctrine of Kompetenz-Kompetenz, the general principle that every court is entitled to examine its own jurisdiction (West Tankers Inc *v.* Allianz Spa *(Case C-185/07) (2009) 1 ECR 663, [2009] A.C. 1138 at para 57), and the similar principle recognised with regard to the powers of arbitral tribunals* (Dallah Co. *v.* Ministry of Religious Affairs of Pakistan, *[2010] UKSC 46 at paras 84-85). It does not necessarily mean that tribunals have exclusive power or jurisdiction to do so, but, given the consensual nature of arbitration, its application is necessarily subject to the parties' agreement. Under the 1996 Act, the tribunal's jurisdiction to rule upon its own substantive jurisdiction is enshrined in section 30 and the court's power to determine it circumscribed by section 32, but these sections are not directly relevant for present purposes. Here the parties agreed to references under the rules of the LCIA, including rule 23.4 to which I have referred. It suffices to say that Mr. Flynn did not argue that it would be a breach of rule 23.4 or contravene that doctrine of Kompetenz-Kompetenz to grant Nomihold's application.*

Is an anti-arbitration order just and convenient, and should the court exercise its discretion?

60. This leads to the question whether it is just and convenient to grant the order sought by Nomihold and whether I should exercise my discretion to grant it.

61. Nomihold argues that its application should be granted

because it achieved the Award after a thorough and extensive arbitral process; because it is clear that MTSF has acted in breach of contract and threatens to do so, and it is starkly obvious that the New Arbitrations are an abuse; because damages are an inadequate remedy given that MTSF is not, as it accepts, in a position to satisfy the Award; and because the New Arbitrations are merely a device deployed by MTSF in the so-called enforcement war.

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63. I must ask myself whether in these circumstances it would be right to restrain MTSF from pursuing the New Arbitrations. They raise the money laundering complaint that was not considered in the Award because it was not an issue presented to the Tribunal. On its face it is a complaint of the kind that the parties agreed should be determined by LCIA arbitration. If the New Arbitrations proceed, the tribunals appointed to them will have adequate powers to determine the re-arbitration complaints. I say no more about the complaints themselves other than that they do not seem to me as straightforward as Mr. Beltrami submitted, but the tribunals could adopt procedures to deal with the re-arbitration complaint as a preliminary issue. It is for them to decide whether to do so.

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65. I do not overlook the costs that will be incurred in the New Arbitrations, even if Nomihold seeks and obtains a preliminary determination of its re-arbitration complaints, but this concern is to be assessed in the context of the sums involved in this dispute and its history.

66. I have said enough to make it clear that the court would make an order of the kind sought by Nomihold only in unusual circumstances. I am not persuaded that the facts of this case justify the exceptional order sought. I do not consider that it would be just or convenient to make it, and I would decline to exercise my discretion to do so."

(emphasis is mine)

109. [Also see another judgment of High Court of Justice Queen's Bench Division Commercial Court in the matter of *Amtrust Europe Limited* V. *Trust Risk Group SpA*, [2015] EWHC 1927 (Comm.)].

110. This brings me to the judgments cited on behalf of HSPL and TAQA. The judgment in *McDonald's case* and the judgment of Single Judge in *Ramasamy*'s case were cited to demonstrate that injunction could be granted where the doctrine of *res judicata* applied or arbitration agreement had become incapable of being performed. I must indicate herein that the Division Bench of this Court in *McDonald's case*, while adverting to this aspect of the matter, does state in so

many words that the principles governing anti-suit injunction may not necessarily apply to anti-arbitration injunction (See paragraphs 37 and 48 of the judgment). Furthermore, the Division Bench while adverting to the decision rendered in *Excalibur Venture LLC* v. *Texas Keystone Inc.*, 2011 EWHC 1624 (Comm.) made the following observations; which is also a judgment cited by Mr. Seth:

> *"48. It is pertinent to note that this case, that is, Excalibur (supra) stresses upon the difference of approach between a normal anti-suit injunction and an injunction restraining arbitration proceedings. We are also in agreement with this view. There must be a distinction between an anti-suit injunction and an anti-arbitration injunction. The principles which apply to an anti-suit injunction will not necessarily apply to an anti-arbitration injunction. It is further important to note that the exceptional cases where arbitrations could be injuncted upon holding that the arbitration proceedings would be oppressive or unconscionable were regarded as those circumstances which would include the situation where the very issue was whether or not the parties had consented to the arbitration or where there was an allegation that the arbitration agreement was a forgery just as in the case of* Albon *(supra). It is clear that none of these exceptional circumstances arise in the present case."*
>
> (emphasis is mine)

111. In *Ramasamy's case*, the learned Single Judge granted an injunction for the reason that defendants No. 6 and 10 in that case, against whom injunction was sought by the plaintiffs, had instead of invoking the arbitration agreement, had taken recourse to multiple forums, which included institution of half a dozen police complaints and, therefore, had made the arbitration agreement inoperative.

112. It is this judgment which was upheld by the Division Bench of Madras High Court in *C.G. Holdings Private Limited's case*.

113. To my mind, these cases are clearly distinguishable.

114. Insofar as the judgment in *Satish's case* is concerned, the same also would have no application. Briefly, the question before the Court was whether an Award given under the Arbitration Act, 1940, which, in effect, brought about partition of immovable property of value exceeding Rs. 100/- required registration under Section 17 (1)(b) of the Indian Registration Act, 1908 (in short "Registration Act"). This question was considered by the Supreme Court in the context of two full Bench decisions rendered by the Patna High Court and Punjab and Haryana High Court. There, High Courts took the view that an Award did not require registration under the scheme of Arbitration Act, 1940 unless a decree was passed in terms of the Award. In other words, the Award, according to these judgments, had no legal effect till a decree was passed in terms of the Award. Thus, according to the Full benches

of the Patna High Court and the Punjab and Haryana High Court, the Award simpliciter would not require registration as it fell within the ambit of the exception mentioned in Section 17(2)(vi) of the Registration Act.

115. The Supreme Court, however, based on its own judgment in the matter of *Uttam Singh Dugal & Co.* v. *Union of India* (where it held that the Award, once drawn up, has some legal force and was not a mere waste paper and if that be so, if it purports to or affects property within the meaning of Section 17(1)(b) of the Registration Act), held that an Award even before it morphed into a decree required to be registered.

116. It is in this context that the Court observed that, once, an Award is passed, the rights and liabilities of the parties in respect of the claims raised, can be determined only on the basis of the Award. To my mind, this judgment can have no application to the facts obtaining in the instant case for the reasons given hereinabove.

117. The judgment in the case of *National Insurance Company* would also have no application to the facts obtaining in the present case as that case dealt with the aspect of discharge of a contract on account of issuance of a full and final settlement receipt and/or accord and satisfaction. Clearly, that situation does not obtain in the instant case.

118. The judgment in *Republic of India through Ministry of Defence* v. *Agusta Westland International Ltd.'s case* was placed on record only to highlight the fact that a suit for anti-arbitration injunction was maintainable. This judgment emphasized the fact that while this power is available, it is to be exercised sparingly. One can hardly quibble with this proposition of law, which is also the observation made by me in the foregoing paragraphs of my judgment.

119. Likewise, the Supreme Court in its judgment rendered in *World Sports Group*'s case, *inter alia*, came to the same conclusion, which is that the Court is not emasculated of its power to grant injunction wherever it deems fit.

120. Insofar as the judgment rendered by the Supreme Court in *Chloro Controls India Pvt. Ltd.* was concerned, reliance was placed on paragraph 131 which notices the principles statutorily set forth in Section 45 of the 1996 Act. The Court observes that one has to keep in mind, the provisions of Section 45 (where it applies), if one were to permit continuation of arbitration proceedings.

121. The judgment in *Vodafone* was cited for the same reason. Reliance was placed on paragraphs 110 and 111 of the judgment.

122. In the instant case, I have not been able to come to a conclusion that the arbitration agreement has been rendered null and

void, inoperative or incapable of being performed. These expressions were used by Mr. Sethi in the context of very same facts which were put forth to expound the bar of *res judicata*, waiver, and abandonment. Since, I have held that a trial would be required the same reasoning would hold *vis-à-vis* this submission as well. Therefore, these judgments would have no applicability to the instant case.

123. The judgment of the Supreme Court in *K.K. Modi*'s case would also not be applicable to the facts obtaining in the instant case. Observations made in paragraph 44 of this judgment, on which reliance was placed, *inter alia*, advert to re-agitation of issues which have already been decided. The Court, *inter alia*, observes that disputes which fall within the ambit of doctrine of *res judicata*, their re-agitation would amount to abuse of the process of the Court.

124. The question raised is whether at this juncture it is just and convenient to injunct the 2nd Arbitration proceeding by labeling it as an abuse of process, which clearly is a mixed question of law and fact and would require trial.

125. Since I have come to the conclusion that under the relevant SIAC Rules, the 2nd Arbitral Tribunal could adjudicate upon this aspect, it cannot be said at this stage, especially, in the context of arbitration proceedings that triggering of 2nd arbitration proceedings is an abuse of process.

126. The jurisdiction, to my mind, as alluded to above, with regard to constructive *res judicata* and other legal pleas could justly and conveniently be adjudicated upon by the 2nd Arbitral Tribunal. Therefore, in my opinion, no case is made out for injunction by this Court.

Parameters for grant of anti-arbitration injunctions

127. Thus, if I were to attempt an encapsulation of the broad parameters governing anti-arbitration injunctions, they would be the following:

i) The principles governing anti-suit injunction are not identical to those that govern an anti-arbitration injunction.

ii) Court's are slow in granting an anti-arbitration injunction unless it comes to the conclusion that the proceeding initiated is vexatious and/or oppressive.

iii) The Court which has supervisory jurisdiction or even personal jurisdiction over parties has the power to disallow commencement of fresh proceedings on the ground of *res judicata* or constructive *res judicata*. If persuaded to do so the Court could hold such proceeding to be vexatious and/or oppressive. This bar could obtain in respect of an issue of law or fact or even a mixed

question of law and fact.

iv) The fact that in the assessment of the Court a trial would be required would be a factor which would weigh against grant of anti-arbitration injunction.

v) The aggrieved should be encouraged to approach either the Arbitral Tribunal or the Court which has the supervisory jurisdiction in the matter. An endeavour should be made to support and aid arbitration rather than allow parties to move away from the chosen adjudicatory process.

vi) The arbitral tribunal could adopt a procedure to deal with "re-arbitration complaint" (depending on the rules or procedure which govern the proceeding) as a preliminary issue.

128. Therefore, for the foregoing reasons, I find no merit in the captioned application. It is, accordingly, dismissed.

129. It, however, goes without saying that the nothing stated hereinabove, would impact the decision on merits by the 2nd Arbitration Tribunal. The 2nd Arbitral Tribunal would be free to consider all pleas raised before it by the parties, including those raised before me, in the mode and manner deemed fit.

130. There shall, however, be no order as to costs.

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[1] 2 HYDROLOGY

Although stream gauging of Sorang Khad is being done since 1996, the quality of the available discharge data is questionable. The observed discharge data shows an average run-off depth of around 3500mm which does not correlate with the precipitation characteristics of the project area. Incidentally, similar rivulets exist on either side of Sorang with almost parallel disposition. These streams are Babha Khad on the upstream of Ghanvi Khad on the downstream. These streams have been gauged for several years and hydro power stations exist on both of them. Analysis of the available data shows run-off depths of 2179 mm on Ghanvi 1861mm on Bhaba. In contrast, the measured discharge in Sorang khad yield a runoff of 3614 mm for the concurrent period. It is apparent that Sorang flows have been overestimated.

[2] 310. Clause 9.1.1 of the SPA sets out one of the assumptions made by the Parties. Clause 9.1.1 is not a provision which requires performance of any obligation by NCCIHL. Therefore, the question of 'breach' of 9.1.1 as such does not arise. However, Clause 10.2.1 contains a covenant by NCCIHL undertaking to achieve WCD by 31 March 2013 and therefore, failure of NCCIHL to achieve WCD by 31 March 2013 would entitle TAQA to be indemnified for the losses caused as a consequence, under Clause 11.5 of the SPA.

[3] 390. The Tribunal awards the Claimants as follows:

Claim (d) Nil Relief Sought: Declaration that the Respondents are in breach of Clause 9.1.1

read with Clause 10.2.1 of the SPA.

Award: It is declared that NCCIHL failed to achieve Wet Commissioning by 31.3.2013, and therefore TAQA is entitled to be indemnified for the losses under Clause 10.2.1 read with Clause 11.5. [vide paragraph 310 of the Award]. It is declared that NCC is not liable to indemnify HSPL under Clause 10.2.1 of the SPA [vide paragraph 127 of the Award].