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

Reserved on: February 23, 2017

Date of decision: April 13, 2017

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OMP 22/2012

BANAS SANDS TTC JV

..... Petitioner

Through: Mr. Sachin Datta, Senior Advocate with
Ms. Prity Sharma & Mr. Yatender,
Advocates.

versus

PKSS INFRASTRUCTURE PVT. LTD. & ANR.

..... Respondents

Through: Mr. Pawan Kumar Bansal, Advocate for R-
1.
Ms. Mini Pushkarna, Standing Counsel with
Ms. Namrata Mukin, Advocate for R-
2/MCD.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

13.04.2017

1. Banas Sands TTC JV, the Petitioner in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') has challenged the Award dated 12th October, 2011, passed by the sole Arbitrator. By the impugned Award the learned Arbitrator has allowed the claims of Respondent No.1, PKSS Infrastructure Private Limited ('PKSS') and directed that PKSS is entitled to recover from the Petitioner Rs.1,56,83,650 together with interest at 9% per annum from 1st June, 2008 till the date of payment on an amount of Rs.1,88,01,738. The Petitioner has also been made to pay costs of

arbitration to an extent of Rs.1,08,750 and stamp fee of Rs.18,810. Of the total sum of Rs.1,88,01,738 the Award directs the Municipal Corporation of Delhi ('MCD')/Respondent No.2 to pay PKSS Rs.31,18,088. This, according to the MCD, has already been paid by it to PKSS.

Background facts

2. The background facts are that a contract for collection of toll was allotted in favour of the Petitioner by the MCD for the period with effect from 1st May, 2004 (6 am) up to 1st May, 2007 (5:59 am), i.e., for a period of 36 months at an amount of Rs.243.57 crore pursuant to the issuance of a Notice Inviting Tenders ('NIT') dated 22nd March, 2004. MCD granted extension to the Petitioner for a period of one year and 15 days, i.e., till 16th May, 2008.

3. In January 2008, MCD had issued a fresh NIT for toll collection. On 2nd May 2008, PKSS was adjudged as the highest bidder and a letter of acceptance was issued by the MCD in favour of PKSS. On 7th May, 2008, the Petitioner wrote to the MCD stating that certain unresolved issues required to be sorted out before commencement of operations by PKSS. It is stated that a meeting between the representatives of PKSS and MCD was held in the office of the MCD on 10th May, 2008. On 12th May 2008, MCD issued a letter to PKSS directing it to commence operation for collection of toll from 6 am on 16th May, 2008.

4. Since PKSS maintained that the issues raised by it by its letter dated 7th May, 2008 remained to be resolved a meeting presided over by the Commissioner of MCD was held on 14th May, 2008. In relation to the monthly passes issued by the Petitioner for the entire month of May, 2008, it

was decided that since the details of the passes issued had not been provided despite request by the Petitioner till then if the figures provided by M/s. Banas Sands TTC JV are not found reasonable, the number of passes will be determined on the basis of average sale of passes either of preceding two months or succeeding two months and M/s. Banas Sands TTC JV will remit the 50% amount of passes to the highest bidder for period 16th May, 2008 to 31st May, 2008 and the MCD will reimburse the difference of increased rates of monthly passes of the second fortnight of May, 2008 to the highest bidder. In other words the Petitioner was to remit 50% of the amount of passes to PKSS. MCD would reimburse the difference of the increase rates, i.e., 40% of monthly passes for the second fortnight of May, 2008 to PKSS.

5. PKSS states that it furnished a security deposit/cash deposit and bank guarantee ('BG') to MCD on 16th May, 2008. It also issued post-dated cheques for the entire period of the agreement it commenced the operation of collection of toll.

6. The attempts by PKSS to ascertain from MCD the details of the printer of the Petitioner, who had printed the monthly concessional passes was not replied to. Instead on 31st July 2008, MCD informed PKSS the names of the officers of the MCD appointed to verify the data pertaining to monthly concessional passes issued by PKSS for the months of June and July, 2008. This was followed by a visit to the premises of PKSS by the officers of MCD on 6th August, 2008. The MCD officers on visiting the office of PKSS verified the data and called upon PKSS to provide additional data.

7. It is stated that on 18th August 2008, PKSS deducted a sum of

Rs.3,84,76,520 from its fixed remittance for Rs.15,23,61,000. PKSS conveyed this information to MCD by its letter dated 18th August, 2008. On 22nd August, 2008, MCD issued a demand letter to PKSS to furnish the deficit amount of Rs.3,84,76,500. On 5th September, 2008, MCD sought to invoke the BG for Rs.3.84 crore. PKSS states that on 8th September 2008, it succumbed to the pressure put on it by MCD and furnished a cheque for Rs.3,84,76,520. PKSS then invoked Clause 16.4 being the arbitration clause in the agreement between PKSS and MCD. A former Judge of this Court was appointed as the sole Arbitrator and he conveyed his acceptance to act as such by a letter dated 31st January, 2009.

8. In the statement of claim ('SOC') filed by the PKSS the MCD was arrayed as Respondent No.1 and the Petitioner as Respondent No.2. The orders of the learned Arbitrator do not record any objection raised at that stage by the Petitioner about being arrayed as a party to the arbitration proceedings. The Arbitrator nevertheless while fixing the schedule of fees stated that it "shall be shared equally by the parties." The order also set out the three equal shares of PKSS, the Petitioner and MCD. On 3rd and 21st March 2009, the Arbitrator extended the time for the Petitioner to file its reply/counter claim.

9. On 21st March, 2009, the sole Arbitrator dismissed the application filed by the MCD for grant of interim relief. In its order passed on 21st March 2009, the learned Arbitrator noted that "one of the main disputes between the parties is as to whether the sum of Rs.3,84,76,520 is the correct calculation. The Respondents have sought time to file their defence/replies to the

statement of claim.” Further the learned Arbitrator noted that the main prayer in the SOC was for an award of Rs.3,84,76,520 plus interest and damages in favour of the claimant, i.e., PKSS. The learned Arbitrator observed that it was not possible to calculate the correct amount without the evidence of the parties. Therefore, the application of the MCD under Section 17 of the Act at that stage was dismissed as not having any merit.

Petitioner's application to file counter-claim

10. On 29th April, 2009, an application was filed by the Petitioner before the learned Arbitrator for liberty to file its counter claim against the MCD as well as PKSS in the very same proceedings. In para 1 of this application, the Petitioner stated as under:

“It is submitted that M/s. Banas Sands TTC JV is not a party to the said agreement at all. As such the impleadment of M/s. Banas Sands TTC JV is misconceived and no relief can be claimed against M/s. Banas Sands TTC JV in the present arbitration.”

11. In the very next paragraph the Petitioner stated that it nevertheless had certain claims against PKSS as well as MCD and that the claims arose as a result of the premature termination of the contract between the MCD and the Petitioner and the “illegal induction” of PKSS. Further it was claimed that the value of the assets, equipment and other infrastructure developed and deployed by the Petitioner pursuant to its contract with MCD was liable to be refunded. It was mentioned therein that the Petitioner had already written to MCD for making a reference of the said claims to arbitration. Since various claims of the Petitioner against the MCD and PKSS were related to the issues involved in the arbitration (between PKSS and MCD) the Petitioner stated that it had “no objection, and seeks even liberty of this

Hon'ble Tribunal to raise the said claims before this Hon'ble Tribunal, and include the same within the scope of the present arbitration.”

12. The learned Arbitrator on 29th April, 2009 noted that the above application had, in fact, been filed by the Petitioner and also noted that copies thereof had been given to MCD and PKSS. It was directed that replies be filed within ten days.

13. On the same day an application filed by PKSS seeking review of the order dated 21st March, 2009 was heard and two weeks' time was granted to the Petitioner to file its reply. The order then recorded as under:

“Mr. Nawal Singh Ratnawat – General Manager of Banas Sands TTC JV has given a statement that M/s. Banas Sands has no objection if the sum of Rs.82,91,350 mentioned in paras 5/6 of the reply filed by MCD to the application for review of the order dated 21.3.2009 is deducted by the MCD from the security deposit of M/s. Banas Sands TTC JV and is paid to M/s. PK Hospitality. This statement has been separately recorded and is without prejudice to the rights & contentions of the parties.”

14. Orders were reserved on the application filed by PKSS. On 16th May 2009, the application filed by PKSS was disposed of. It was noted that there was no mistake in the said order dated 21st March, 2009 but there was a change in the mind of PKSS who after repeatedly rejecting the offered amount was demanding the sum on second thoughts. This refers to the sum of Rs.82,91,350 offered by the Petitioner to PKSS and Rs.64,71,912 by the MCD. It was agreed at the hearing that a sum of Rs.82,91,350 can be deducted by MCD from the security amount paid to the Petitioner but “without prejudice to the rights and contentions of the parties” to be paid to

PKSS. It was further directed that after adding their own offered amount, the total sum of Rs.1,47,63,262 should be paid to PKSS without prejudice to the rights and contentions of the parties. The Arbitrator noted that MCD made a statement to the effect that the claimed amount would stand reduced by Rs.1,47,63,262.

15. Nothing was mentioned of the Petitioner's application in the above order. It appears that without waiting for an order on its application filed on 29th April, 2009 the Petitioner filed its counter claim against MCD. There were four counter claims in the aggregate sum of Rs.36,89,98,587 and further future interest at 24% per annum from 1st May, 2009 till the date of payment.

Separate arbitration proceedings between the Petitioner and MCD

16. A separate notice dated 24th July 2009 was sent by the Petitioner to the MCD invoking Clause 38 of the contract between the Petitioner and the MCD. In para 14 of this notice, the Petitioner stated as under:

“14. That the aforesaid claims are liable to be adjudicated by an Arbitrator duly appointed in terms of the Arbitration Clause in the Agreement between the parties and this Arbitration Notice is being served on you calling upon you to immediately take steps in this regard. Further, since the various claims of my clients against the Municipal Corporation are related to some of the issues involved in an arbitration (initiated at the behest of and M/s. P.K. Hospitality Services Pvt. Ltd.) already pending before the sole arbitrator, Justice J.P. Singh (Retd.), it would be appropriate to refer my client's claims also to be same learned arbitrator. It is pertinent to note that in the proceedings pending before Justice J.P. Singh (Retd.), the MCD has acquiesced to impleadment of my client as a Respondent therein. Accordingly, my client is entitled, as a matter of right conferred under the Arbitration & Conciliation Act, 1996, to file its counter claims in

the said arbitration, which it has done.”

17. However, by its letter dated 24th September 2009, MCD declined the request, defending its action as being consistent with the terms and conditions of the agreement. MCD took the stand that “there is no dispute which can be referred to an Arbitrator.” MCD further contended that the request had been made beyond the limitation of 120 days “which has already expired long back.”

18. This led to the Petitioner filing Arbitration Petition No.477 of 2009 in this Court under Section 11(6) of the Act in which an order was passed on 16th April, 2010 recording an agreement reached between the parties that the disputes raised by the Petitioner would be referred to a sole Arbitrator.

19. The above fact has been noted in para 18 of the impugned Award by observing that the counter-claim of the Petitioner against the MCD has been assigned to another Arbitrator and "is not the subject matter of the present proceedings.”

The present arbitration proceedings

20. Meanwhile in the present arbitration the Petitioner appears to have continued to participate in the proceedings as is evident from the proceedings before the learned Arbitrator which have been placed on record. At every hearing even after the reference of disputes between the Petitioner and the MCD to a separate Arbitrator the Petitioner participated in the proceedings. What is significant, however, is that although the application by the Petitioner seeking permission to file its counter claim was not

formally disposed of, the said application had already been rendered infructuous since the counter claims of the Petitioner were only against the MCD and that already stood referred to a separate Arbitrator.

21. As recorded in the proceedings dated 18th January, 2010, the Petitioner also paid its share of the arbitration fees and expenses. Between 19th May 2010 and 20th August 2010, the statement of Mr. Arun Jain (CW-2) on behalf of PKSS was recorded and he was also cross-examined not only by the counsel for the MCD but also on behalf of the Petitioner. This is recorded in the proceedings dated 20th August, 2010. Throughout at every hearing thereafter the Petitioner continued to participate till the passing of the impugned Award on 12th October, 2011.

Issues framed by the Arbitrator

22. The learned Arbitrator formulated the following questions for determination:

- “1. Whether the claimants are entitled to recover the amount of Rs.3,84,76,520 towards the proceeds in respect of monthly passes for the period 16.5.2008 to 31.5.2008 on account of difference in the rates after 16.5.2008? OPC
2. Whether the claimants are entitled to interest from 1.6.2008 onwards? If so, at what rate? OPC
3. Whether the claimants are entitled to the damages, as prayed? OPC
4. Relief’

The impugned Award

23. In para 26 of the impugned Award the learned Arbitrator noted that PKSS had filed the affidavit of evidence of Mr. Moti Lal Bakhle (CW-1)

and MCD the affidavit of Mr. Amiya Chandra as RW-1. It is noted that the Petitioner did not adduce any evidence. The contentions of the counsel for the parties including that of the Petitioner were thereafter noted. The participation of Banas Sands (Petitioner herein) is further evident from the following paragraphs of the impugned Award:

“38. In the present case, the claimants have given the figures as 43,533 & 45,603 regarding the sale/issuance of concessional passes by them during the months of June & July 2008 respectively to arrive at a conclusion on the basis of average sale/issuance of "succeeding two months" while on the other hand as per M/s. Banas Sands TIC JV whereupon the MCD is now relying, the sale/issuance of concessional passes was 14,777 for the month of April, 2008 and 14,959 for the month of May 2008 - "the preceding two months".

39. Several letters had been issued by the MCD to M/s Banas Sands TTC JV from time to time - on 9.5.2008, 22.5.2008 & 1.9.2008 asking it to furnish the figures of the passes issued containing serial number of passes, dates of issue, pass numbers, category, registration number of the vehicle and amount collected against the passes but the information was not provided by M/s Banas Sands TTC JV except sending 'number of passes sold/issued, in tabulation forms on 15.5.2008 and 23.6.2008. These letters contain category-wise statement of passes sold/issued by M/s Banas Sands TTC JV but it failed to furnish the details of the passes in the manner asked for by the MCD.

40. Either in the pleadings or during the course of arguments, nothing has been brought on record on behalf of M/s Banas Sands TTC JV to show as to how and why the figures as furnished by it should be accepted as reasonable and justified.”

24. The learned Arbitrator noted that there was no record either in the form of statement of accounts or bank statement placed by the Petitioner to show that payment of amount for lesser number of passes to prove the amount paid was for a lesser number of passes than the number printed. Nor was there any evidence to show that the Petitioner received lesser number of

passes than the number printed. The failure by the Petitioner in providing the name and address of the printer and also not giving permission to the printer to disclose the details to the MCD created suspicion about the passes used by the Petitioner.

25. On the other hand, the record provided by M/s. U-Flex gave a more reliable figure of passes printed. It is on that basis that the learned Arbitrator held that PKSS would be entitled to 50% of the proceeds of the value of passes got printed by the Petitioner in April, 2008 for being used in May, 2008. It was accordingly that the PKSS was entitled to recover Rs.2,39,75,000 from the Petitioner and Rs.95,90,000 from the MCD, thus, totalling Rs.3,35,65,000 as against the claimed amount of Rs.3,84,76,500. Interest was awarded in the manner already indicated and consequential orders were passed even while rejecting the claim of PKSS for damages.

Contentions of the Petitioner

26. Mr. Sachin Datta, learned Senior Counsel appearing for the Petitioner, made two broad submissions on the maintainability of the claims of PKSS against it. First, he submitted that there was no arbitration agreement between the Petitioner and PKSS, which was the claimant in the arbitration. In fact, although the prayer clause and the SOC uses the phrase 'Respondents' the entire body of the SOC of PKSS showed that there was, in fact, no claim made against the Petitioner. All the claims were only against the MCD.

27. Reliance is also placed on the statement by PKSS in para 1 of the reply filed to the present petition to the effect that the learned Arbitrator was

conscious of the fact that the claim of PKSS was against the MCD and that "the Petitioner was made a formal party to the proceedings as they were a necessary party, in as much as the claim of the Respondent No.1 arose due to the default of the Petitioner, who were the erstwhile contractors/agents of the Respondent No.2 in giving the accurate data of the monthly passes sold by them for the month of May 2008." Respondent No.1 had in its SOC averred that they have no privity of contract with the Petitioner and that the liability of the payment of the amounts collected by them for the period from 15th till 31st May 2008 would be ultimately that of the Respondent No. 2.

28. Mr. Datta submitted that the above admission by PKSS ruled out the applicability of Section 7(4) of the Act. In other words, no inference could be drawn about the existence of an arbitration agreement between the Petitioner and PKSS even from the correspondence, if any, exchanged. Reference was made to para 5 of the reply filed by PKSS where it is again stated that the claim of PKSS was ultimately payable by MCD which in turn had the option to recover amount from the Petitioner. It is further submitted that there could not be any Award against a party, which was not a party to the arbitration agreement and with its application for permission to file the counter claim having been denied, it would not be permissible to construe that the said application has created a jurisdiction for the learned Arbitrator to pass an Award against the Petitioner. The mere participation of the Petitioner in the arbitration proceedings despite the above application and despite reference of the claims of the Petitioner against the MCD to a separate arbitration should not be construed as an acceptance by the Petitioner that it was a proper party to the arbitration proceedings.

29. Reliance is placed on the decisions in *Indowind Energy Ltd. v. Wescare (I) Ltd.* (2010) 5 SCR 284; *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar* (2011) 11 SCC 375 and *S.N. Prasad, Hitek Industries (Bihar) Ltd. v. Monnet Finance Ltd.* (2011) 1 SCC 320. It is further submitted that there is no finding in the impugned Award that there was any breach of any part of the contract by the Petitioner. It provides no contractual basis for directing the Petitioner to make payments to PKSS.

Submissions of PKSS

30. Countering the above submissions, Mr. Pawan Kumar Bansal, learned counsel appearing for PKSS submitted that with the Petitioner having throughout participated in the arbitration proceedings cannot turn around and question its validity qua the Petitioner after the impugned Award has been passed. At no stage did the Petitioner question the jurisdiction of the Arbitrator. He referred to the orders of the learned Arbitrator recording the statement of the representative of the Petitioner about deduction of monies from the security deposit to satisfy the claim of the Petitioner.

31. Reference was made to the decision in *CREF Finance Ltd. v. Puri Construction Ltd.* 2000 (3) Arb. LR 331 (Delhi). Reference is also made to the order dated 3rd March, 2009 passed by the learned Arbitrator recording the statement of the General Manager of the Petitioner that it would file “reply and counter claim.” The fact is that no reply as such was filed by the Petitioner.

32. On merits it was submitted that the learned Arbitrator rightly found that the data regarding the printing of passes for the month of May, 2008 as

provided by the Petitioner was unreliable. No reply was filed before the Arbitrator by the Petitioner to deny any of the claims of PKSS. Therefore, the impugned Award did not call for interference.

Submissions of MCD

33. Ms. Mini Pushkarna, appearing on behalf of the MCD [now North Delhi Municipal Corporation ('North DMC')] submitted that in para 3 of the application dated 29th April 2009, the Petitioner did give its categorical no objection to the arbitration proceedings and even admitted that the claims of the Petitioner against MCD and PKSS were related to some of the issues in the present arbitration. The Petitioner did not pray that the arbitration proceedings against it be dropped. The only prayer was to grant it liberty to file counter claims against the MCD and PKSS. Having actively participated in the arbitration proceedings it must be taken note of that the Petitioner submitted to the jurisdiction of the Arbitrator and acquiesced.

34. Ms. Pushkarna relied upon the decisions in *Prasun Roy v. Calcutta Metropolitan Development Authority* (1987) 4 SCC 217; *Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy* (2007) 2 SCC 720; *Punjab State Electricity Board v. Ludhiana Steels Pvt. Ltd.* (1993) 1 SCC 205 and *Hindustan Vegetable Oils Corporation v. A.P. Paracer* (2000) 10 SCC 41.

Analysis and reasons

35. The central issue is whether an Award could have been passed against the Petitioner without it being a party to the arbitration agreement?

36. On the face of it, it does appear that in the absence of any specific

contract between the Petitioner and PKSS, the Petitioner did have a defence against participation in the arbitration proceedings. This legal position is clear from the *Indowind Energy Ltd. v. Wescare (I) Ltd.* (*supra*) where on facts it was found that Wescare itself had not entered into an agreement with Indowind or had referred to agreement dated 24th February, 2006, which contained the arbitration clause. In other words on the facts of that case it was held that none of the sub-clauses of Section 7 of the Act were attracted in order to infer the existence of an arbitration agreement. This was also the line of reasoning in *S.N. Prasad, Hitek Industries (Bihar) Ltd. v. Monnet Finance Ltd.* (*supra*), where it was held that words “statements of claim and defence” occurring in Section 7(4)(c) of the Act were not restricted to the statements of claim and defence filed before the Arbitrator. It was further held that if in an application filed under Section 11 of the Act, the applicant asserts the existence of the arbitration agreement with each of the Respondents and if they did not deny the assertion in the statement of defence, the Court has to proceed on the basis that there was an arbitration agreement between the parties.

37. In *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar & Anr.* (*supra*), there was no arbitration agreement between the Developer and the Appellant. The first Respondent there invoked the arbitration agreement in the construction agreement between the first Respondent and the Developer. It was held that the existence of an arbitration agreement between the Appellant and the first Respondent (in that case) would not enable the first Respondent to implead the Appellant as a party in the arbitration with regard to his disputes with the Developer. The broad principle that without being a

party to the arbitration agreement, no Award can be passed against a party is, therefore, unexceptionable.

38. However, as pointed out in *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. (2013) 1 SCC 641*, certain other facts have to be examined before coming to a definite conclusion that no Award can be passed against a third party. It was explained by the Court in para 73 as under:

“73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and - collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.”

39. In other words the Court has to carefully examine whether a composite reference would serve the ends of justice. The further observations of the Court in this regard are contained in para 107, which reads as under:

“107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such

third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.”

40. But the matter does not end with merely examining the agreement involved. The present case must be seen as constituting yet another species of such matters involving more than two parties where all of them are not parties to the same agreement containing the arbitration clause but their claims and counter claims arise from the same set of facts. In such a case the conduct of the party is another factor that will have to be considered.

41. In ***Prasun Roy v. Calcutta Metropolitan Development Authority*** (*supra*), the Court observed that “even in a case where initial order was not passed by consent of the parties a party by participation and acquiescence can preclude future challenges.” In ***Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy*** (*supra*) the fact that Section 16 of the Act was not invoked to challenge the competence of the AT was taken to be a submission to the jurisdiction of the AT. Importantly the plea of “no arbitration clause” was not taken in the statement filed before the learned Arbitrator. In ***Punjab State Electricity Board v. Ludhiana Steels Pvt. Ltd.*** (*supra*), the continued participation in the proceedings precluded the party so participated from so challenging the Award on the ground that it was not a party to the arbitration agreement. In ***Hindustan Vegetable Oils Corporation v. A.P. Paracer*** (*supra*), a similar approach is adopted when the appellant appeared before the Arbitrator on eleven different occasions without demur and it was found that it had acquiesced in the arbitration proceedings. It was, therefore, on the facts of that case precluded from

challenging the Arbitrator's appointment. The principle of waiver that governs Section 4 of the Act, explains the decisions in the above cases. That would apply in the present case as well.

42. The conduct of the Petitioner in the present case reveals that it did acquiesced in the arbitration proceedings although there was no privity of contract between it and PKSS. In the first place it never filed a reply to the SOC filed by PKSS. It only filed an application on 29th April, 2009 but there again it made a categorical statement that it would have no objection being made party to the arbitral proceedings and for its counter claims to be accepted. The prayer clause in that application makes its position clear. Therefore, that application dated 29th April, 2009 was not an application under Section 16 of the Act which questioned the jurisdiction of the Arbitrator qua the Petitioner. What is even stranger is that even after the reference of its disputes with MCD to a separate Arbitrator, the Petitioner did not cease to participate in the present arbitration proceedings. Not only did it appear at every stage but even cross-examined the witnesses of the claimant as has been recorded in the proceedings by the Arbitrator. This cannot but be taken as an acquiescence by the Petitioner that it was a proper party in the arbitration notwithstanding that there may have been no contract between the Petitioner and PKSS. Further the statements made before the learned Arbitrator on the deductions to be made from the security deposit placed by the Petitioner with MCD is yet another indication that the Petitioner accepted that it was a necessary and property party.

43. There appears to be some ambivalence as regards position of the PKSS

qua the plea of the Petitioner. It is suggested by PKSS that this Court can exercise its 'inherent power' to modify the impugned Award to direct that MCD will bear the liability that has been fastened on the Petitioner by the impugned Award.

44. The Court is not prepared to accept the above submission of PKSS given the limited scope of its powers under Section 34 of the Act. In any event, the claims by the Petitioner against MCD should be understood as having been covered by the reference of their *inter se* disputes to a separate Arbitrator.

Conclusion

45. The Court, therefore, declines to interfere with the impugned Award in exercise of its powers under Section 34 of the Act.

46. The petition is accordingly dismissed but in the circumstances with no orders as to costs.

APRIL 13, 2017

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S.MURALIDHAR, J