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

Date of decision: 14th September, 2018

+ ARB.P. 515/2018

+ OMP(T)(COMM) 93/2018

M/S EARTHCON CONSTRUCTIONS PVT LTD .. Petitioner

Through Mr.Sachin Datta, Sr.Adv. with
Mr.Farrukh Khan, Ms.Prity
Sharma, Mr.Amique Khalid
and Mr.M.Varchaswa Singh,
Advs.

versus

M/S MAHAMAYA INFRABUILD PVT. LTD..... Respondent

Through Mr.Sandeep P. Agarwal, Sr.
Adv. with Mr.Rajesh Patnaik,
Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. These petitions arise out of the same factual background and are therefore, being disposed of by this common order.
2. OMP(T)(COMM) 93/2018 has been filed by the petitioner under Section 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') *inter-alia* praying for the following reliefs:

“A. Pass appropriate orders U/S 14 (2) r/w Section 15(2) of the Arbitration and Conciliation Act, 1996,

and appoint a Fresh Arbitrator in the light of the Section 15 (2) of the Act to adjudicate all pending disputes between the parties including disputes which have arisen between the parties in the aftermath of order dated 30.03.2015 of the Arbitral Tribunal appointed vide order dated 21.04.2014 passed by passed by this Hon'ble Court, as the mandate of the said Arbitral Tribunal stood terminated;

B. Pass appropriate orders directing that all claims raised by the Petitioners are adjudicated on merits in accordance with the arbitration agreement between the parties.”

3. ARB.P. 515/2018 has been filed by the petitioner *inter alia* seeking the following relief:

“A. Appoint an Arbitrator to act as the nominee Arbitrator of the Respondent ; and issue further directions for constitution of the Arbitral Tribunal to adjudicate all pending disputes between the parties including disputes which have arisen between the parties;

B. Pass such other and further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case in the interest of justice.”

4. The facts giving rise to the present petitions have a bearing on the relief being sought and on the adjudication of the present petitions and are therefore, briefly narrated as under.

5. The parties had entered into a Memorandum of Understanding dated 10.08.2011 whereunder the respondent assigned work of

development and construction of group housing complex on the plot no.GH-B(GH-14 to GH-17) measuring 10742 sq. mtrs of land in Industrial Area, Talanagri, Ramghat Road, Aligarh, Uttar Pradesh to the petitioner for developing the Housing Project. The MOU contained an Arbitration Agreement in form of Clause 12 thereof which is reproduced herein below:

“Clause-12. ARBITRATION & JURISDICTION:

12.1. That in case of dispute, same shall be referred for arbitration under the provisions of Arbitration and Conciliation Act, 1996 subject to the jurisdiction of courts in Delhi only. The venue of arbitration shall at Delhi and language shall be English.”

6. The disputes having arisen between the parties, this Court vide order dated 21.04.2014 passed in Arb.P.149/2014, ***M/s Earthcon Construction Pvt. Ltd. v. M/s Mahamaya Infrabuild Pvt. Ltd.*** and OMP 366/2014, ***M/s Earthcon Construction Pvt. Ltd. v. M/s Mahamaya Infrabuild Pvt. Ltd.***, appointed a Sole Arbitrator for adjudicating such disputes.

7. During the course of the arbitration proceedings, the parties entered into a settlement and filed an application under Order XXIII Rule 3 of Code of Civil Procedure, 1908 (“CPC”) read with Section 30 of the Act seeking passing of an Interim Consent Award in terms of the settlement as recorded in paragraph 4 of the said application. The same is reproduced as under:

*“i. pass an interim and consensual award in terms of the aforesaid settlement entered into between the parties as stated in paragraph 4 of this Application;
ii. to keep the present arbitration proceeding alive*

till the time the parties herein duly perform their respective obligations as stated in paragraph 4 of this Application and thereafter pass the final consent award accordingly.”

8. A few terms of the settlement would have a bearing on the present petition and are therefore, reproduced hereinbelow:

“(B). The Claimant undertakes to pay the remaining/balance sum out of Rs.15.2 crores on or before 31st August, 2015.

(C) If the Claimant fails or neglects to pay the entire remaining amount that remains unpaid in terms of Para A above out of Rs.15.2 crores payable to the Respondent pursuant to this agreement by 31.8.2015; the Claimant shall be liable to pay interest at the rate of 18% p.a. on the remaining dues payable latest by 30.11.2015. The said interest shall be computable w.e.f.1.9.2015 till the date of payment.

(D) If the Claimant does not make the payment of entire sum of Rs.15.2 crores and the amount paid to UPSIDC pursuant to this agreement as stated above to the Respondent by 30.11.2015; all amount given by the Claimant shall stand forfeited by the Respondent and the present proceeding shall be reinitiated from the stage prior to filing of this application. It is clarified that the sum of Rs 15.2 Crores mentioned herein includes the amount that remains with the Respondent after making payments to the UPSIDC in terms of Para A above.”

9. A reading of the above terms would show that incase the petitioner fails to pay the agreed amount on or before 30.11.2015, the arbitration proceedings were to be re-initiated from the stage prior to the filing of the application.

10. The Arbitrator, passed a consent Award based on this application on 30.03.2015 with the following directions:

“Thus, the Application under O23R23 CPC dated 12.01.2015 is allowed and the dispute stands disposed of in terms of the settlement terms recorded in the Application dated 12.01.2015 and an award is passed in terms of the said Application which shall form a part of this Award as Appendix ‘A’.”

11. Admittedly, the petitioner did not make the payment of entire Rs.15.2 crores and had paid only Rs.3 crores of the same to the respondent by 30.11.2015 and therefore, filed an application seeking extension of time for making of the payment of the balance amount. On the said application being filed, the Arbitrator vide his order dated 30.11.2015, extended the time for making of the payment till 31.12.2015, subject to the payment of interest @ 18% p.a. He further directed that “the interim award and the schedule stands amended accordingly”.

12. As the payment was not made even as per this revised schedule, the Arbitrator, by a further order dated 05.01.2016, on an application filed by the petitioner, extended last date of payment till 31.01.2016 and modified the Award accordingly.

13. Even this order was not complied with and on a further application being filed by the petitioner, the Sole Arbitrator by an order dated 24.02.2016, extended the time further till 31.03.2016 and modified the Award accordingly.

14. The above orders are being referred only to show that even after the passing of the Consent Award dated 30.03.2015, it was the

petitioner who approached the Arbitrator seeking further extension of time for making of the payment of the balance amount in terms of the Consent Award and for seeking modification of the said Award.

15. Finally, as the payment was still not made by the petitioner, relying upon the proceedings before the Company Law Board, the petitioner filed two applications before the Arbitrator; one seeking setting aside the Consent Award dated 30.03.2015 on account of alleged fraud being committed by the respondent and; second seeking amendment in its Statement of Claim so as to raise additional claims on the basis of the facts allegedly subsequent to the passing of the Consent Award.

16. The Arbitrator dismissed both the above applications by two separate orders of same date, that is, 31.01.2018.

17. While dismissing the application of the petitioner for seeking to set aside the Consent Award, the Arbitrator passed a detail order rejecting the plea of the petitioner that the Consent Award was obtained through fraud.

18. By the second order of the same date, while dismissing the application seeking amendment in the Statement of Claim filed by the petitioner, the Arbitrator observed as under:

“4. In view of the above pleas and the arguments advanced by the learned counsel for the parties I am of the view that the amendment seeks to enlarge the scope of the reference made by the Hon’ble High Court to this Tribunal. In the accompanying order I have also dealt with the pleas raised by the parties seeking the setting aside of the consent award dated 30.03.2015 which reasoning is to be read as part of this order

also.”

19. The petitioner taking benefit of the observation of the Arbitrator that the amendment seeks to enlarge the scope of reference, filed an application under Section 11 of the Act before this Court being Arb.P.351/2018, however, the same was dismissed as withdrawn as the petitioner had not invoked the Arbitration Agreement before filing of the said petition.

20. The petitioner thereafter invoked the Arbitration Agreement as contained in the MOU dated 10.08.2011 by its notice dated 12.05.2018 and produced a copy of the said notice before the Arbitrator in the proceedings held on 17.05.2018.

21. The Arbitrator, on 17.05.2018 passed the following order:

“The learned Counsel for the Claimant, Mr. Datta states that the Claimant had moved an application under Order 11 Rule 6 CPC before the Hon 'ble Delhi High Court. As stated in the Para III, the mandate of this Tribunal stood terminated and consequently, the Claimant had sought the appointment of an Arbitrator to adjudicate the fresh disputes which had arisen post reference order dated 21.04.2014 in Arbitration Petition No.149 of 2014 passed by the Hon'ble Delhi High Court.

2. The order of the Learned Single Judge of the Hon'ble Delhi High Court dated 09.05.2018 reads as under:-

“Learned counsel for the petitioner seeks leave to withdraw present petition without prejudice to the rights and contentions of the petitioner.

The petition is dismissed as withdrawn, however, the same shall not prejudice the petitioner in any other proceedings.”

3. *Mr. Agarwal, Learned Counsel for the Respondent states that since the application the Claimant before the Hon'ble Delhi High Court was founded on the premise that the mandate of this Tribunal was over, he will be moving an execution petition in respect of the Award dated 30.03.2015.*

4. *Since the Senior Counsel for both the parties have stated that nothing further survives before this Tribunal, these proceedings stand concluded. (Emphasis supplied) ”*

22. It is based on this order that the present petition has been filed under Section 14 read with Section 15 of the Act.

23. Learned senior counsel for the petitioner submits that the Arbitrator had become *functus officio* and unable to perform his functions upon passing of the Consent Award dated 30.03.2015 for the following reasons:

- a. There was no formal application seeking revival of the proceedings filed by any party before him;
- b. In any case, as the Arbitrator, by his order dated 31.01.2018 had held that the additional claims being raised by the petitioner were beyond the reference and therefore, as the new claims were inextricably linked with the earlier claims, it has become impossible for the Arbitrator to adjudicate the disputes within the scope of the earlier reference;
- c. The order dated 17.05.2018 passed by the Arbitrator would, in fact, amount to the Arbitrator withdrawing from his office making the present petition under Section 14 of the Act maintainable.

24. The learned senior counsel for the petitioner places reliance on the contents of the paragraph 10 of the petition in support of his arguments, which is reproduced herein below:

“10. In the present case the present Petitioner has no option but to file the instant Petition under Section 14(2) and 15(2) of the Act for the following reasons:

(i) All the claims raised by the present Petitioner are required to be adjudicated in accordance with law. Admittedly, there is an arbitration clause for adjudicating all the disputes between the parties. Admittedly, the claims raised by the Claimant/Petitioner have not culminated in an award after due adjudication. The Petitioner/Claimant cannot be left remediless on account of miscellaneous orders passed by the Arbitral Tribunal and on account of the confusion with regard to scope of jurisdiction of the Arbitrator earlier appointed by this Hon'ble Court.

(ii) It has been the consistent stand of the Petitioner/Claimant that all its claims, including claims that arose in the aftermath of 30.3.2015, are required to be adjudicated comprehensively. It is the further case of the Petitioner/Claimant that the earlier Arbitrator appointed by this Hon'ble Court grossly erred in assuming jurisdiction after 30.3.2015 and also grossly erred in holding that the Petitioner/Claimant could not be permitted to raise further claim on account of development subsequent to 30.3.2015. It was on account of this that the Petitioner/Claimant gave a fresh Arbitration Notice for the purpose of getting a comprehensive reference for adjudication of all its claims. It was in this backdrop that on 17.5.2018, the previous Arbitrator was apprised of all these developments and subsequently Order dated 17.5.2018 was communicated by the said Arbitrator. However, the

order dated 17.5.2018 (apart from containing other errors) does not record the stand of the Petitioner/ Claimant that all its claims are required to be comprehensively and collectively adjudicated by a duly constituted Arbitral Tribunal. The said position is duly reflected in the Arbitration Notice dated 12.05.2018 served by the Petitioner/Claimant upon the Respondent and the Ld. Arbitrator was duly appraised in respect thereof.

(iii) In the present case, the Petitioner/ Claimant has not withdrawn any of its claims. The Petitioner/Claimant have not agreed to non adjudication of its claims on merits. Furthermore, as stated hereinabove, it is the stand of the Petitioner / Claimant that all its claims arising pursuant to the MOU dated 10.8.2011 and the Settlement Agreement are required to be adjudicated comprehensively and collectively. The two sets of claims viz., those that arose prior to 30.3.2015 and those that arose after 30.3.2015 cannot be isolated and segregated from each other. The order dated 17.5.2018 is required to be set aside and appropriate orders passed by this Hon'ble Court inasmuch as the same is construed to wrongly infer that the Petitioner/Claimant had given up any of its claims and/ or construed to prevent/ defeat the right of the Petitioner to get all its claims adjudicated. All that the Petitioner has been earnestly seeking is adjudication of all its claims by a single Arbitrator to be appointed by this Hon'ble Court.

(iv) The Arbitrator appointed vide order dated 21.04.2014, having terminated the proceedings without final adjudication of any claims, appropriate orders under Section 14 and 15 are required to be passed by this Hon'ble Court and a substitute Arbitrator appointed.”

25. Relying upon the Judgment of the Supreme Court in ***Lalit Kumar V. Sanghavi v. Dharamdas V. Sanghavi***, 2014 (7) SCC 255, the learned senior counsel for the petitioner submits that the present case would be covered under Section 32(2)(c) of the Act and therefore, the petition under Section 14 would be maintainable. He has further placed reliance on the Judgment of the Calcutta High Court in ***The India Trading Company v. Hindustan Petroleum Corporation Ltd.***, 2016 SCC OnLine Cal 479 to contend that an Order passed under Section 32 (2) does not amount to an Award.

26. The learned senior counsel for the petitioner further contends that the Arbitrator has erred in terminating the arbitration proceedings when the parties themselves had only agreed to the termination of the mandate of the Arbitrator awaiting the fresh reference order in application under Section 11 filed by the petitioner which, is ARB.P. 515/2018.

27. I have considered the submissions made by the learned senior counsel for the petitioner, however, I do not find merit in the same. A reading of the above sequence of events would itself show that the parties had requested the Arbitrator to pass an Interim Award in terms of the consent terms as per which the petitioner was to make the payment in future and the petitioner's failure to make such payment within the stipulated time was to result in the forfeiture of the amount paid by it to the respondent as also in revival of the arbitration proceedings from the stage that they were at before the filing of the settlement application. The Arbitrator allowed the said

application and passed the consent “Interim Award” on 30.03.2015. This Award was thereafter modified at the instance of the petitioner itself on more than one occasion by granting extension of time for making of the payment. As the petitioner failed to make the payment even within such extended time, the Arbitrator passed the following order on 07.07.2017:

“While the settlement has not been reached, the Respondent has been informed by the Claimant that an effort would be made to arrive at a settlement before 30.08.2017. In case the matter is not settled and since the Award has already been passed the parties are free to take consequential action in accordance with law.”

28. On 19.09.2017 the following order was passed by the Arbitrator:

“The dispute has still not been settled despite vigorous efforts by the parties and the Senior Counsel for the parties. Accordingly, as per the order dated 30.03.2015 read with Clause D of the application under Order 23 Rule 3 of CPC read with Section 30 of the Arbitration Act filed by the parties which led to a consent award, the matter is to revive from the stage prior to filing of the said application dated 13.01.2015. It is agreed that the Claimant has filed its Affidavit of Evidence and the Respondent is directed to file its Affidavit of Evidence on or before 03.11.2017. The application dated 30.05.2015 shall be considered after the conclusion of evidence. However, it is made clear that the revival of the proceedings shall not come in the way of parties still trying to arrive at a fresh settlement.”

(Emphasis supplied)

29. The petitioner did not object to the revival of the proceedings. On the other hand, petitioner on 05.12.2017 filed an application seeking to file additional claims and also produce additional witness in support of its claim.

30. The petitioner, therefore, having itself taken steps in the arbitration proceedings upon its revival, cannot now be heard to complain against the same and allege that all these proceedings which have been undertaken by the Arbitrator are after he had become *functus officio*. The learned senior counsel for the respondent, has rightly relied upon the Judgment of this Court in ***S.N.Malhotra & Sons v. Airport Authority of India & Ors.***, 2008 SCC OnLine Del 442 to contend that where the party has not filed its objection against the arbitration proceedings, it is stopped from challenging the same during the later proceedings. This Court has laid down the law with respect to Section 4 and Section 16 of the Act in the following words:-

“19. A conjoint reading of Section 4 and Section 16 yields the following result:

(i) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence [Section 16(2)].

(ii) A plea that the arbitral tribunal is exceeding the scope of its jurisdiction shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings [sub-section (3)].

(iii) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or in sub-section (3) [Section 16(5)].

(iv) The arbitral tribunal if it takes a decision rejecting the plea shall continue with the arbitral proceedings and make an arbitral award, in which case the party aggrieved by such an arbitral award may apply for setting aside the same in accordance with Section 34 read with Section 16(6).

(v) A party who knows that (a) any provision of the statute from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with by the opposite party, and yet proceeds with the arbitration without stating his objection to such non-compliance, without undue delay, shall be deemed to have waived his right to so object. (Section 4).

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33. We, therefore, hold that the respondent must be deemed to have waived any objection to the jurisdiction of the arbitral tribunal when it chose not to raise the plea now being raised by it, though it was fully aware of the terms of the agreement entered into between the parties. Section 34(iv) cannot come to the rescue of the respondent as the said section cannot be read in isolation and allowed to render otiose the provisions of Sections 4, 5 and 16 of the Act which, in a sense, are the high points of the Act. Any other interpretation of the aforesaid provisions of the statute would not only deprive the winning party of the fruit of its hard earned labour at the end of a long drawn out battle, but, in our considered opinion, would be opposed to public policy, as it would inevitably result in colossal waste of time, money and energy, all of which are necessarily expended in the arbitral process. This apart, it would frustrate the object of the Act itself

viz., to provide for expeditious disposal of a dispute by recourse to arbitration.”

31. As far as the contention raised by the learned senior counsel for the petitioner on the basis of the additional claims being raised by the petitioner, I may only note that all such additional claims are based and premised on the contention that the consent award was vitiated by the respondent's fraud. This submission of the petitioner has been rejected by the Arbitrator by a detailed order dated 31.01.2018, which remains unchallenged. As far as the observation of the Arbitrator that the additional claims would be beyond the terms of reference, the petitioner has filed ARB.P. 515/2018, which I shall be dealing with separately. The same, however, cannot be a ground to infer the ineligibility of the Arbitrator to proceed with the reference already made to him and which he was proceeding with, with the consent of the party.

32. As far as the reliance of the petitioner on the order dated 17.05.2018 passed by the Arbitrator is concerned, the same is infact, a termination of the arbitration proceedings and not the mandate of the Arbitrator.

33. Section 32 of the Act is reproduced hereinbelow:-

“32. Termination of proceedings-(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final

settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.”

34. In the present case, the order dated 17.05.2018 terminates the arbitral proceedings under Section 32(2) (b) and not Section 32(2) (c) as contended by the learned senior counsel for the petitioner. Therefore, the judgment of Supreme Court in ***Lalit Kumar V. Sanghavi*** (*supra*) shall have no application. That said, on the face of the record, the abovementioned order is based on the consent and on the submissions of the learned senior counsels appearing for the parties, including the petitioner. The learned senior counsel for the petitioner contends that such consent had been wrongly recorded. The present proceeding is not the right proceeding for making such correction. Once the arbitration proceedings had been terminated, the petitioner cannot, relying upon Sections 14 and 15 of the Act seek the revival of the same.

35. The judgment of Calcutta High Court in ***India Trading Company*** (*supra*) is in fact, contrary to proposition canvassed by the learned senior counsel for the petitioner. It holds that where the arbitrator puts an end to the arbitral proceedings as in the present case, the claimant cannot pursue his claims. Paragraphs 13 and 14

of the judgment are quoted hereinbelow:

“13. There is a difference between a decision which puts an end to the arbitral proceedings and a decision whereby the arbitrator withdraw from the proceedings. Where the arbitrator withdraws from the proceedings, a substitute arbitrator may be appointed in accordance with the procedure, applicable to the appointment of the arbitrator who is replaced, but where the arbitrator puts an end to the arbitral proceedings, the claimant cannot pursue his claim.

14. The decision of the arbitral tribunal to put an end to the proceedings is a final award which can only challenged by way of an application for setting aside under Section 34 Sub-section (2) of the 1996 Act. Once the arbitral proceedings are terminated, the claimant cannot re-agitate the same claim by initiation of fresh proceedings since the claim would be hit by principles of constructive resjudicata.”

36. This judgment was followed by this Court in ***Angelique International Ltd. v. SSJV Projects Pvt. Ltd. & Anr.***, 2018 SCC OnLine Del 8287, holding as under:

“30. Counsel for the respondents has rightly contended that in the present case as the Arbitrator has terminated the proceedings with respect to the claim filed by the petitioner, it would in fact, amount to an Arbitral Award which can be challenged only by way of a petition under Section 34 of the Act. He places reliance on the judgment of this Court in The India Trading Company v. Hindustan Petroleum Corporation Ltd., 2016 SCC OnLine Cal 479, wherein the Division Bench of this Court held as under:—

“13. There is a difference between a decision which puts an end to the arbitral proceedings and a decision whereby the arbitrator withdraws from the proceedings. Where the arbitrator withdraws from the proceedings, a

substitute arbitrator may be appointed in accordance with the procedure, applicable to the appointment of the arbitrator who is replaced, but where the arbitrator puts an end to the arbitral proceedings, the claimant cannot pursue his claim.

14. The decision of the arbitral tribunal to put an end to the proceedings is a final award which can only challenged by way of an application for settling aside under Section 34 Sub-section (2) of the 1996 Act. Once the arbitral proceedings are terminated, the claimant cannot re-agitate the same claim by initiation of fresh proceedings since the claim would be hit by principles of constructive res judicata.”

31. In Joginder Singh Dhaiya v. M.A. Tarde Thr LRs, 2017 SCC OnLine Del 12559, this Court while dealing with an award dismissing the claim filed by the claimant on the ground of the proceeding having abated, rejected the contention that the order of abatement would not be an award within the meaning of Section 2(1)(c) and Section 31 of the Act.

32. I must of course while referring to the above judgments also mention that the Supreme Court in Srei Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd., 2017 SCC OnLine SC 1210, has held that where the Arbitrator terminates the proceedings due to failure of the claimant to file his Statement of Claim, the aggrieved party can approach the Arbitral Tribunal and on sufficient cause been shown, the Arbitral Tribunal can recall the order and recommence the proceedings. The Supreme Court, however, did not answer the issue as to whether the order passed under Section 25(a) of the Act terminating the proceedings is an award under the 1996 Act so as to be amenable to

the remedy under Section 34 of the Act. In the present case, though Section 25(a) of the Act would not apply, a reading of the impugned order shows that the Arbitrator has terminated the proceedings with respect to the claims of the petitioner on the ground that the petitioner is not proceeding with the arbitration proceeding. Such order would be akin to the dismissal of a suit, on a technical ground may be, of non-prosecution and, therefore, could have been challenged only in an application under Section 34 of the Act and can be assailed only on the limited grounds that are available to the aggrieved party under the said provision.

33. Reliance of the petitioner on the judgment of the Supreme Court in Lalit Kumar V. Sanghavi (D) Th. LRs Neeta Lalit Kumar Sanghavi v. Dharamdas V. Sanghavi, (2014) 7 SCC 255, is ill-founded. In the said case, the Supreme Court, was dealing with a situation where the Arbitrator had terminated the arbitration proceedings due to non payment of fees. The aggrieved party had even moved an application before the Arbitral Tribunal seeking recall of the said order and thereafter, filed an application under Section 11 of the Act before the High Court, seeking appointment of an Arbitral Tribunal. The said application was dismissed holding that the remedy of the applicant was by way of filing of a Writ Petition and not an application under Section 11 of the Act. The Supreme Court, in the above judgment, held that neither Section 11 of the Act nor a petition under Article 226 of the Constitution of India was maintainable against the order passed by the Arbitral Tribunal. The Supreme Court held that the order passed by the Arbitral Tribunal would in fact fall under Section 32(2)(c) of the Act and the remedy of the aggrieved party would be under Section 14(2) of the Act. In the present case, the Arbitrator has not terminated the proceedings due to non-payment of fee

by the petitioner but for the reason that the petitioner has not been proceeding with diligence in the arbitration proceedings and, its conduct clearly showed that it is not interested in the continuation of the arbitration proceedings at all.

34. Recently, in Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products, (2018) 2 SCC 534, the Supreme Court, has held that an order dismissing the claim of the Claimant on the ground of limitation is an Award and can be challenged only under Section 34 of the Act and not under Section 37(2)(a) of the Act.

35. In my view, therefore, the present application under Section 14 and 15 of the Act would not be maintainable where the challenge is to an order passed by the Arbitrator terminating the arbitration proceedings due to the Claimant not prosecuting its claims.”

37. ARB.P. 515/2018 is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the ‘Act’) purportedly relying upon Clause 12.1 of the Memorandum of Understanding (MOU) dated 10.08.2011, which is the Arbitration Agreement between the parties and which reads as under:-

“12. ARBITRATION & JURISDICTION

12.1. That in case of dispute, same shall be referred for arbitration under the provisions of Arbitration and Conciliation Act, 1996 subject to the jurisdiction of courts in Delhi only. The venue of arbitration shall at Delhi and language shall be English.”

38. As the order dated 17.05.2018 has been passed on the submissions made by the counsels appearing for the parties and

terminates the arbitration proceedings, a fresh arbitration proceeding on the same cause of action is not maintainable. If the petitioner is aggrieved of the said order, its remedy is not in form of filing of an application under Section 11 of the Act.

39. While issuing notice on this petition, this Court vide its order dated 23.07.2018 had issued only a limited notice confined to the so-called subsequent claims of the petitioner. Review Petition against this order was also dismissed by this Court vide order dated 05.09.2018.

40. As far as the claims which are allegedly based on the events that transpired post the passing of the consent award or based thereon, the Arbitral Tribunal had rejected the application seeking setting aside of the consent award in order dated 31.01.2018. The said order is not in challenge before this Court nor there is any challenge to the consent award passed by the Arbitrator on 30.03.2015. The said award and the order dated 31.01.2018 have therefore, attained finality and cannot be reopened by filing of an application under Section 11 of the Act. The said consent award/consent terms record that the parties have amicably settled their disputes. Paragraph 4(III)(D) of the application under Order 23 Rule 3 CPC merely records that incase the petitioner fails to make the payment of the agreed amount by 30.11.2015 (as extended by the modifications passed thereafter by the Arbitrator), “the present proceeding shall be reinitiated from the stage prior to filing of this application.”

41. The so called subsequent claims now raised by the petitioner

and as stated by it in the application seeking amendment of claims before the Sole Arbitrator are as under :-

“7. Direct the Respondent to refund Rs. 3 (Three) Crores paid by the Claimant, pursuant to the settlement/interim award dated 30.03.2015;

8. Direct the Respondent to pay a sum of Rs. 10 (Ten) Crores as damages for the loss of goodwill and business loss due to concealment of pending litigation and consequent status quo order and its publication in the local newspaper on 28.04.2016.”

42. The said claims, therefore, arose out of the submissions of the petitioner that the consent award/consent terms are not enforceable because they were vitiated by fraud perpetrated by the respondent on the petitioner and also on the basis of the proceedings before the Company Law Board. The Arbitrator by his orders dated 31.01.2018, while rejecting the application of the petitioner to set aside the Interim Award dated 30.03.2015 has rejected the amendment application and arguments raised on the above basis and has held that there was no case of fraud made out against the respondent and the order passed by the Company Law Board had no effect on the breach of the terms of the consent award by the petitioner. As noted above, the said order(s) remain unchallenged by the petitioner.

43. In any case, the claims now raised by the petitioner would be beyond the scope of the Memorandum of Understanding dated 10.08.2011 between the parties and the Arbitration Agreement contained in the said Memorandum of Understanding cannot be put in service for seeking appointment of an Arbitrator for adjudicating such disputes. Of course in the order dated 31.01.2018 dismissing

the application seeking amendment of the Statement of Claim, the Arbitrator observes that the amendment seeks to enlarge the scope of reference, however, it does not lead to the conclusion that for such additional claims the Arbitration Agreement in the Memorandum of Understanding would become applicable.

44. In view of the above, I do not find any merit in the present petitions and the same are accordingly dismissed, with no order as to cost.

NAVIN CHAWLA, J

SEPTEMBER 14, 2018/Arya/rv