



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

Date of decision: 22nd SEPTEMBER, 2022

IN THE MATTER OF:

+ **LPA 236/2022**

BGR MINING AND INFRA LIMITED Appellant

Through: Mr. Dayan Krishnan, Sr. Advocate
with Mr. Byropaneni Suyodhan, Mr.
G. Arun, Ms. FilzaMoonis, Advocates

versus

NTPC LIMITED & ANR. Respondents

Through: Mr. Santosh Kumar Tripathi,
Standing Counsel (Civil) GNCTD
with Mr. Arun Panwar, Mr. Siddharth
Krishna Dwivedi, Mr. Aditya S.
Jadhav, Mr. Pradyumn Rao, Ms.
Savita Sethi, Advocates

Ms. Maninder Acharya, Sr. Advocate
with Mr. Puneet Taneja, Ms. Laxmi
Kumari, Mr. Manmohan Singh
Narula, Mr. Sai Shashank, Mr. Viplav
Acharya, Advocates

+ **LPA 237/2022 & CM APPLs. 16711/2022 & 16713/2022**

BGR MINING AND INFRA LIMITED Appellant

Through: Mr. Dayan Krishnan, Sr. Advocate
with Mr. Byropaneni Suyodhan, Mr.
G. Arun, Ms. Filza Moonis,
Advocates

versus



NTPC LIMITED & ANR.

..... Respondents

Through: Ms. Maninder Acharya, Sr. Advocate
with Mr. Puneet Taneja, Ms. Laxmi
Kumari, Mr. Manmohan Singh
Narula, Mr. Sai Shashank, Mr. Viplav
Acharya, Advocates

+ **LPA 241/2022**

NCC BGR CONSORTIUM & ANR.

..... Appellants

Through: Mr. Byropaneni Suyodhan, Mr. D.
Narender Reddy, Ms. Filza Moonis,
Advocates

versus

NTPC LIMITED & ANR.

..... Respondents

Through: Ms. Maninder Acharya, Sr. Advocate
with Mr. Puneet Taneja, Ms. Laxmi
Kumari, Mr. Manmohan Singh
Narula, Mr. Sai Shashank, Mr. Viplav
Acharya, Advocates

+ **LPA 242/2022 & CM APPLs. 16952/2022 & 16954/2022**

NCC BGR CONSORTIUM & ANR.

..... Appellants

Through: Mr. Byropaneni Suyodhan, Mr. D.
Narender Reddy, Ms. Filza Moonis,
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versus

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..... Respondents

Through: Ms. Maninder Acharya, Sr. Advocate
with Mr. Puneet Taneja, Ms. Laxmi
Kumari, Mr. Manmohan Singh
Narula, Mr. Sai Shashank, Mr. Viplav
Acharya, Advocates



CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

CM APPL.16710/2022 in LPA 237/2022

CM APPL.16951/2022 in LPA 242/ 2022

1. CM APPL.16710/2022 and CM APPL.16951/2022 have been filed on behalf of the Appellants seeking condonation of delay in preferring the LPA 237/2022 and LPA 242/2022 respectively against the Impugned Common Judgment dated 08.01.2020, passed by the Ld. Single Judge in W.P.(C) 12068/2019 and W.P.(C)12077/2019. The instant appeals bearing LPA 237/2022 and LPA 242/2022 have been filed on 31.03.2022 and 01.04.2022 respectively.

2. The material on record reveals that prior to the dismissal of the Writ Petitions bearing W.P.(C) 12077/2019 and W.P.(C) 12068/2019 by the Ld. Single Judge *vide* Judgment dated 08.01.2020, the Adjudicator as envisaged under Clause 23 of the Project Agreements for resolution of disputes had been appointed by Respondent No. 1, *vide* letter dated 18.09.2019. Since the attempt to settle the dispute before the Adjudicator failed, Arbitration proceedings commenced before the Ld. Tribunal as envisaged under the Project Agreements.

3. After dismissal of the Writ Petitions bearing W.P.(C) 12077/2019 and W.P.(C) 12068/2019 by the Ld. Single Judge *vide* Judgment dated 08.01.2020, the Respondents filed an application under Section 16 of the



Arbitration and Conciliation Act, 1996 before the Ld. Arbitral Tribunal contending that the banning order which was a subject matter of the proceedings before this Court, it cannot be adjudicated before the Tribunal too. The banning order was the subject matter of challenge in W.P.(C) 12077/2019 and W.P.(C) 12068/2019 which has been dismissed by the Ld. Single Judge *vide* Judgment dated 08.01.2020. The Tribunal *vide* its Order dated 29.10.2021 rejected the application filed under Section 16 of the Arbitration and Conciliation Act, 1996. Pursuant to the dismissal of the application under Section 16 of the Arbitration and Conciliation Act, 1996, the Appellants filed review petitions bearing Review Petition No. 212 of 2021 in W.P. (C) No. 12077/ 2019 and Review Petition No. 211 of 2021 in W.P. (C) No. 12068/ 2019 before this Court, these were rejected by the Ld. Single Judge *vide* Order dated 17.12.2021.

4. No reason has been given by the Appellants as to why the instant appeals were not filed within 30 days from the judgment dated 08.01.2020 passed by the Ld. Single Judge, which has been challenged in the present appeals. The fact that the Respondents had filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 was no ground for not challenging the Order dated 08.01.2020 passed by the Ld. Single Judge by filing appeal. The fact that the delay in filing the review petitions was condoned by the Ld. Single Judge will not inure to the benefit of the Appellants. The review petitions were also dismissed by the Ld. Single Judge *vide* Order dated 17.12.2021.

5. In view of the fact that the delay has not been properly explained, this Court does not find any reason to condone the delay in preferring the instant appeals against the Impugned Judgment dated 08.01.2020, passed by the Ld. Single Judge in W.P.(C) 12068/2019 and W.P.(C) 12077/2019.



6. The applications are dismissed accordingly.

LPA 237/2022 & CM APPLs. 16711/2022 & 16713/2022

LPA 242/2022 & CM APPLs. 16952/2022 & 16954/2022

In view of the order passed in CM APPL.16710/2022 and CM APPL.16951/2022, the instant Appeals are dismissed accordingly, along with any pending applications therein.

LPA 236/2022 & LPA 241/2022

1. LPA No. 236/ 2022 has been filed against the Order dated 17.12.2021, passed by the Ld. Single Judge in Review Petition No. 212 of 2021 in W.P. (C) No. 12077/ 2019 whereby the Ld. Single Judge dismissed the Review Petition filed by the Appellant.

2. LPA No. 241/2022 has been filed against the Order dated 17.12.2021, passed by the Ld. Single Judge in Review Petition No. 211 of 2021 in W.P. (C) No. 12068/ 2019 whereby the Ld. Single Judge dismissed the Review Petition filed by the Appellant.

3. The Appellant in LPA No. 241/ 2022 is a consortium of NCC Ltd. and the Appellant in LPA No. 236/ 2022. The Appellants herein are in the business of coal mining.

4. As common questions of facts and law are raised in both the Appeals, they are being disposed of by this Common Judgement. Shorn of details, the brief facts pertinent to adjudicating this instant dispute and leading to the present Appeals are as under:

- a) The Respondent No. 1 had issued an Online Bid Invitation for selecting a Mine Operator cum Developer for developing and operating the Chatti Bariatu Coal Block in State of Jharkhand vide online Bid invitation No. 40053695 dated 05.03.2016, and for the Talaipalli Coal Block in the State of Chhattisgarh, on 31.12.2015, vide online bid



invitation No. 40050292 (“coal blocks”).

- b) In response to the same, the Appellants had submitted their Techno-Commercial and Price Proposal for the Chatti Bariatu Coal Block vide Online Bid No. 60159530 on 02.05.2016 and for the Talaipalli Coal Block through Online Bid No. 60142426 on 06.05.2016.
- c) Subsequent to participating in the reverse auctions, the Appellants were declared the successful bidders and their Letters of Acceptance (“LOA”) were issued on 13.11.2017 by Respondent No. 1 for both the coal blocks. The LOAs were accepted by the Appellants on the same date which brought into force Project Agreement No. CS-7014-602-9 for the Talaipalli Coal Block and Project Agreement No. CS-7011-602-9-CS-PA-6613 for the Chatti Bariatu Coal Block (“Project Agreements”).
- d) A ‘kick-off’ meeting took place on 28.11.2017 in the office of the Respondent No. 1 whereby the Appellants apprised the Respondents of all the mobilization work being carried out by them, subsequent to acceptance of LOA.
- e) The Central Bureau of Investigation (“CBI”) on 07.12.2017 registered an FIR bearing No. RC AC1 2017 A 0007 (“CBI FIR”) under Sections 11 & 12 of the Prevention of Corruption Act, 1988 (“PC Act”) and Section 120-B of the Indian Penal Code, 1860 (“IPC”) against Shri Kulamani Biswal, Director (Finance) of Respondent No. 1, Shri B. Rohit Reddy, Director of Appellant in LPA 236/ 2022 and Shri T. Prabhat Kumar, employee of Appellant in LPA 236/ 2022. It was alleged that the aforesaid accused entered into a criminal conspiracy for obtaining a legal gratification of USD equivalent to Rs.5 lacs cash for



Mr. Biswal, to be arranged through hawala transaction and delivered by Mr. Prabhat Kumar.

- f) The Respondent No. 1 issued a letter on 12.12.2017 to the Appellant BGR Mining & Infra Ltd., seeking an explanation as to why suitable action under the provisions of the Project Agreement should not be taken against it in view of registration of CBI FIR.
- g) A reply to the letter dated 12.12.2017 was issued on 14.12.2017 stating that it was too premature to comment on the CBI FIR as the case was under investigations and that the officials of the Appellants were cooperating with CBI for the same. Subsequent to this, a clarificatory response dated 24.12.2017 was also issued.
- h) The Appellant in LPA 236/ 2022 received a letter dated 16.12.2017 from Secretariat of Independent External Monitors (“IEM’s”) seeking an explanation of the CBI FIR and the Appellants were directed to produce themselves on 26.12.2017 for further clarification. Thereafter, the case was referred to the IEMs.
- i) It is stated that it was only on 18.12.2017 vide email that the Respondent No. 1 informed the Appellants in LPA 241/ 2022 that in view of the CBI FIR, their case was being referred to IEMs and that the Appellant No. 2 therein is required to produce necessary facts, documents and evidence before them.
- j) The Respondent No. 1 vide letters dated 20.12.2017, relying upon Clause 24 (c) – ‘Suspension and Termination’ of the respective Project Agreements, directed suspension of all Mining Services till further notice, in accordance with Clause 24.1 of Project Agreement to the Appellants (“Suspension Notice”).
- k) The Appellant in LPA No. 236/2022 vide letter dated 22.12.2017



represented against the Suspension Notice submitting that there is nothing within the CBI FIR and it does not make out any allegations against the company. The Appellant in 241/2022, vide letter dated 25.12.2017 represented against the suspension dated 20.12.2017 *inter alia* contending that the matter has been referred to the Independent External Monitors (“IEMs”) and was being investigated by them, and the Respondent No. 1 could not have suspended Mining Operations without any prior notice to the Appellant.

- l) Referring to the CBI FIR, on 29.12.2017 the Respondent No. 1 issued a Show Cause Notice to the Appellants asking it to Show Cause as to why the actions of the Appellant should not be construed as an event of default as under Clause 24.3 (b) (xi) of their Project Agreement and why the same should not be terminated (“Termination SCN”).
- m) After several rounds of inconclusive discussions with regards to the Termination SCN and execution of the Project Agreement for the Talaipalli Coal Block being kept in abeyance by the Respondent No. 1 on account of Suspension Notice and Termination SCN, the Appellant in LPA No. 241/2022 issued a Dispute Notice under Clause 23.1 of the Project Agreement vide letter dated 17.01.2018 whereas the Appellant in LPA 236/ 2022 issued a Dispute Notice as envisaged under its Project Agreement on 06.01.2018. One main contention in the Dispute Notices for resolution was for the interpretation of the phrase ‘reasonable judgement’ of the Respondent No. 1.
- n) The Respondent replied to the letter dated 06.01.2018 on 10.01.2018 stating that good faith discussions will be held under Clause 24.4 (c) for termination of contract and not under Clause 23.1 of the Project Agreement for interpretation of reasonable judgement, as requested by



the Appellant vide Dispute Notice. The aforesaid letter was replied to on the very same date by the Appellant in LPA No. 236/2022 stating that good faith discussions under Clause 24.4 (c) are not acceptable and the same can only be held as per terms of letter dated 06.01.2018.

- o) It is the case of the Appellants that due to several rounds of inconclusive discussions and the actions of the Respondent No. 1 reflecting a prejudged mind, the Appellants were constrained to invoke the Writ Jurisdiction of this Court vide W.P. (C) No. 702 of 2018 and W.P. (C) 463 of 2018.
- p) Vide Orders dated 17.01.2018 & 24.01.2018 in W.P.(C) 463 of 2018 & W.P.(C) No. 702 of 2018 respectively, the Respondent No. 1 was directed to not take any coercive steps against the Appellants.
- q) Vide Orders dated 21.01.2019 of the Ld. Single Judge of this Hon'ble Court in W.P. (C) No. 702 of 2018 & W.P. (C) 463 of 2018, the Respondent No. 1 was directed to hold good faith discussions with the Appellants in terms of Clause 23.1 (b) of the Project Agreements and clarified that the same shall also be construed as a compliance of Clause 24.4 (c) of the Project Agreements.
- r) Aggrieved against Orders dated 21.01.2019, the Respondent No. 1 challenged the same vide LPA No. 57/2019 & LPA No. 61/2019. These were dismissed *vide* Judgments dated 15.02.2019.
- s) Still Aggrieved, the Respondent No. 1 challenged the Order of the Division Bench of this Court vide Special Leave (C) Nos. 9324-25/2019 and 9229-9300 of 2019. These were dismissed by the Hon'ble Apex Court vide Order dated 26.04.2019.
- t) In view of the aforesaid, the Respondent No. 1 issued an email on 29.04.2019 intimating good faith discussions to be held between the



parties herein. Subsequently, several rounds of good faith discussions were held between the parties which did not reach any conclusion. Thereafter, on 04.07.2019, the Respondent No. 1 terminated the Project Agreements of the Appellants and invoked the Performance Bank Guarantees submitted to them.

- u) On 07.08.2019 the Respondent No. 1 issued a Show Cause Notice to the Appellants herein asking them to Show Cause as to why they should not be banned from business dealings with the Respondent No. 1 herein for a period of 3 years in terms of the 'Policy & Procedure for Withholding and Banning of Business Dealings' of the Respondent No. 1 which was replied to by the Appellants ("Blacklisting SCN").
 - v) On 17.09.2019 & 30.09.2019 the Respondent No. 1 issued a notice to the Appellants thereby banning business dealings with the Respondent No. 1 for a period of 3 years ("Banning Orders").
 - w) Aggrieved against the Banning Orders, the Appellants herein filed W.P. (C) No. 12077/2019 and W.P. (C) No. 12068/2019 which were dismissed by the Ld. Single Judge of this Court.
4. The Ld Single Judge *vide* Order dated 08.01.2020 passed in W.P. (C) No. 12077/2019 and W.P. (C) No. 12068/2019 dismissed the said Writ Petitions by holding that the Orders dated 17.09.2019 and 30.09.2019 passed by the Respondents banning the Appellants from doing any business with the Respondent No. 1 for a period of three years does not suffer from any vice of arbitrariness or unreasonableness. Further, it was held by the Ld. Single Judge that since the allegations against the Appellants are grave in nature and have serious ramifications, it cannot be said that the Respondents must await the outcome of the entirety of the Alternative Dispute Resolution Mechanism as envisaged under the Project Agreements before passing the Banning Orders.



The Ld. Single Judge further held that the decision of the Respondents in passing the Banning Orders dated 17.09.2019 and 30.09.2019 has to be tested on the limited grounds of judicial review while adjudicating the same under Article 226 of the Constitution of India. It was pertinently noted by the Ld. Single Judge that the order dismissing the Writ Petitions shall not, however, prejudice the Appellants herein from pursuing their Alternative Dispute Resolution Mechanism under Clause 23 of the Project Agreements.

5. The material on record reveals that pursuant to the dismissal of the Writ Petitions, the Respondents filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the Ld. Arbitral Tribunal contending that since the issue regarding the Banning Orders stands concluded by this Court *vide* Order dated 08.01.2020 dismissing the Writ Petitions, the challenge to the Banning Order dated 30.09.2019 is hit by the principle of *res judicata*. The Ld. Arbitrator did not accept the said challenge to the proceedings by the Respondents and observed as under:

“21. Before dealing the arguments on merits, it would be necessary to find out as to whether these grounds come within the scope of Section 16 of the Act. The law in this behalf is authoritatively pronounced by the Hon'ble Supreme Court in various judgments. Our purpose would be served by referring to the judgment in Indian Farmers Fertilizer Cooperative Ltd v. Bhadra Products (2018) 2 SCC 534, where the law is discussed as under:

20. These sections make it clear that the Kompetenz principle, which is also followed by the English Arbitration Act of 1996, is that the “jurisdiction” mentioned in Section 16 has reference to three things: (1) as to whether there is the existence of a valid arbitration agreement; (2) whether the Arbitral Tribunal is properly constituted; and (3) matters submitted to arbitration



should be in accordance with the arbitration agreement.

21. That “jurisdiction” is a coat of many colours, and that the said word displays a certain colour depending upon the context in which it is mentioned, is well-settled. In the classic sense, in Official Trustee v. Sachindra Nath Chatterjee [Official Trustee v. Sachindra Nath Chatterjee, (1969) 3 SCR 92 : AIR 1969 SC 823] , “jurisdiction” is stated to be: (SCR p. 99 : AIR pp. 827-28, para 13)

“13. ... ‘In the order of reference to a Full Bench in Sukh Lal Sheikh v. Tara Chand Ta [Sukh Lal Sheikh v. Tara Chand Ta, 1905 SCC OnLine Cal 164 : ILR (1906) 33 Cal 68] it was stated that jurisdiction may be defined to be the power of a court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term “jurisdiction”, which has been stated to be “the power to hear and determine issues of law and fact”, “the authority by which the judicial officers take cognizance of and decide causes”; “the authority to hear and decide a legal controversy”, “the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them”; “the power to hear, determine and pronounce judgment on the issues before the court”; “the power or authority which is conferred upon a court by the legislature to hear and determine causes between parties and to carry the judgments into effect”; “the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution”.’ (Mukherjee, Acting C.J., speaking for the Full Bench of the Calcutta High



Court in Hirday Nath Roy v. Ram Chandra Barna Sarma [Hirday Nath Roy v. Ram Chandra Barna Sarma, 1920 SCC OnLine Cal 85 : ILR (1921) 48 Cal 138] , SCC OnLine Cal)
(emphasis in original)

22. A Constitution Bench of this Court in *Ittyavira Mathai v. Varkey Varkey [Ittyavira Mathai v. Varkey Varkey, (1964) 1 SCR 495 : AIR 1964 SC 907]* , made a distinction between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction in the following terms: (SCR pp. 501-03 : AIR p. 910, para 8)

“8. The first point raised by Mr Paikedy for the appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of the learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. The learned counsel,



however, referred us to the decision of the Privy Council in Maqbul Ahmad v. Onkar Pratap Narain Singh [Maqbul Ahmad v. Onkar Pratap Narain Singh, 1935 SCC OnLine PC 5 : (1934-35) 62 IA 80 : AIR 1935 PC 85] and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.”

Applying the aforesaid principles to the present case, it can easily be said that the objections predicated on Order II Rule 2 of CPC or res judicata do not relate to the 'jurisdiction' as contemplated under Section 16 of the Act. In fact, these issues will have to be decided by the Tribunal itself and therefore, Tribunal is competent to decide these issues. Interestingly, even the Respondent wants these issues to be decided by the Tribunal. Therefore, there cannot be any quarrel that it is within the competence of the Tribunal to adjudicate upon these issues. They are the jurisdictional issues in the sense that in case these issues are decided by the Tribunal in favour of the Respondent, such claims on mer-its will not be entertained by the Tribunal. However, these grounds do not come within the ambit of Section 16 of the Act. At the appropriate stage, it would be for the Tribunal to take a call as to whether these issues need to be decided by the Tribunal as preliminary issues or they need to be decided at the final stage. That would be a different matter



altogether. Thus, once the Tribunal finds that these grounds are not available to the Respondent in an application under Section 16 of the Act, they are rejected for this reason itself without going into the merits thereof.”

(emphasis supplied)

6. Thereafter, the Appellants herein filed review petitions bearing Review Petition No. 212 of 2021 in W.P. (C) No. 12077/ 2019 and Review Petition No. 211 of 2021 in W.P. (C) No. 12068/ 2019 by contending that they have come across the extracts of the 450th Minutes of Meeting of the Board of Directors of the Respondent No. 1 held on 24.10.2017 which was not available to the Appellants during the pendency of the aforesaid Writ Petitions. Through this, it was contended that the accused Kulamani Biswal had in fact ordered for re-tendering and therefore, it cannot be said that he was instrumental in ensuring that the Appellants are allotted the tender for the coal blocks. It was contended that the abovementioned Minutes of Meeting strike at the root of the matter and the banning orders must be removed. It is pertinent to note that the Ld. Single Judge condoned the delay in filing the Review Petitions. The Ld. Single Judge dismissed the Review Petitions preferred by the Appellants and held that the Minutes of Meeting alone would not exonerate the Appellants from allegations which have been levelled against them.

7. Thereafter, the Appellants herein have approached this Court by filing the instant appeals challenging the Order dated 17.12.2021, passed by the Ld. Single Judge in Review Petitions bearing Review Petition No. 212 of 2021 and Review Petition No. 211 of 2021.

8. Mr. Dayan Krishnan, learned Senior Counsel appearing for the Appellants, has very fairly submitted that the appeals bearing LPA 237/2022



and LPA 242/2022 preferred against the Judgment dated 08.01.2020 would be hit by laches and therefore, he is not pressing the LPA 237/2022 and LPA 242/2022.

9. Mr. Krishnan further submitted that the observation of the learned Single Judge in stating that Mr. Kulamini Biswal, Director (Finance) of Respondent No. 1 had played a major role in the award of the tender in favour of the Appellants, thereby taking a *prima facie* view that the conditions of Respondent No. 1's 'Policy & Procedure for Withholding and Banning of Business Dealings' (*hereinafter referred to as 'Banning Policy'*) would be applicable to the instant case is not correct as the 450th Minutes of Meeting of the Board of Directors of Respondent No. 1 shows that Mr. Biswal in fact wanted a re-tendering of the coal blocks. It has been further submitted that Mr. Kulamini Biswal could not have been instrumental in allotting the tender to the Appellants as according to communication dated 02.03.2016 bearing Ref. No. CS-7011-602-9-EAN issued by the Respondents, it has been stated that in respect of development and operation of coal blocks allotted to the Respondents by the Ministry of Coal, it is the Managing Director and/or Director (Operations) who have authority to finalize any tender. It is further submitted that the aforesaid MoM/documents show that in fact Mr. Kulamini Biswal was not involved in the grant of tender in favour of the Appellants and that the entire process of allotment was carried out in a transparent manner.

10. Mr. Krishnan further submitted that throughout the journey of this instant dispute, it has been the case of the Respondents that Mr. Kulamini Biswal was instrumental in allotting the tender to them. It is submitted that the Review Petitions had raised several substantial issues of fraud, wilful concealment of information and relevant documents by the Respondents with



an intention to mislead this Court.

11. Mr. Krishnan submits that the Order dated 17.12.2021, passed by the Ld. Single Judge in the Review Petitions bearing Review Petition No. 212 of 2021 in W.P. (C) No. 12077/ 2019 and Review Petition No. 211 of 2021 in W.P. (C) No. 12068/ 2019 stating that the Minutes of 450th Meeting of the Board of Directors of the Respondents does not exonerate the Appellants from allegations would adversely affect the Appellants in the Arbitration Proceedings inasmuch as the Ld. Arbitrator might find himself precluded from taking into account the said Minutes of Meeting and applying his mind independently as to whether the Minutes of Meeting exonerate the Appellants from allegations or not.

12. *Per Contra*, Ms. Maninder Acharya, learned Senior Counsel appearing for the Respondents, submitted that that the CBI FIR had sufficient material to determine in the Respondent's reasonable judgement that the Appellants had indulged in corrupt practises which constituted an event of default under the provisions of the Project Agreement. Further, *vide* Order dated 30.05.2019 the learned Special Judge, CBI Court decided to take cognizance of the offences duly taking into account that there are transcripts of telephone conversation between the accused indicative of the attempt to obtain bribe and willingness to bribe. That the aforesaid was the genesis of the coal blocks which were awarded to the Appellants. It is submitted that the CBI Court further observed that necessary inference of the same seems to be in the shape of demand of bribe either as reward or motive for future smooth sailing.

13. Ms. Acharya further submitted that that due opportunity for filing the detailed reply to the Banning SCN and a personal hearing was also afforded to the Appellants as per clause 5 of the Banning Policy of the Respondents. Further, the Respondents duly considered the aforesaid facts and established



the indulgence of the Appellants in unlawful activities. It is submitted that the aforesaid was reason enough for the Respondents to not carry out any business dealings with the Appellants.

14. Ms. Acharya submitted that the delay of the Appellants in filing the instant LPAs amounted to acceptance of the Impugned Order and the Appellants are guilty of forum shopping as they have assailed the Banning Order before the Ld. Arbitral Tribunal too. Further, the Appellants have already chosen the forum for challenging the Banning Orders by invoking the Writ Jurisdiction of this Court. Thus, in light of the Impugned Order passed by this Court dated 08.01.2020, the challenge of the Appellants against the Banning Orders would be barred by the operation of doctrine of *res judicata*. In fact, the Application under Section 17 of the Arbitration and Conciliation Act, 1996 preferred by the Appellants before the Ld. Arbitral Tribunal seeking stay of the Banning Order dated 30.09.2019 was rejected by the Ld. Tribunal *vide* Order dated 07.12.2020. It is further submitted that the Respondents had also preferred an Application before the Ld. Tribunal under Section 16 of the Arbitration and Conciliation Act, 1996 stating the aforesaid, i.e., that the Ld. Arbitral Tribunal cannot adjudicate upon the challenge to the Banning Orders made by the Appellants before it, as the Ld. Arbitral Tribunal lacks jurisdiction to try the same on account of operation of the doctrine of *res judicata*. The Ld. Arbitral Tribunal passed an Order dated 29.10.2021 rejecting the plea of the Respondents on the ground that the plea of *res judicata* would be decided either as a preliminary or primary issue by the Ld. Tribunal at an appropriate stage.

15. Ms. Acharya without prejudice submitted that the Impugned Order of the learned Single Judge dated 08.01.2020 has considered all the facts and circumstances of the case and thereafter, passed a reasoned order. The



Hon'ble Court has held that the principles of natural justice have duly been complied with and that the state can decline from entering into a contractual relationship with any person or party in accordance with settled law. Further, the Ld. Single Judge came to the conclusion that in view of the grave allegations against the Appellants, it cannot be stated that the Respondents would have to await the outcome of the procedure of Alternate Dispute Resolution Mechanism envisaged under Clause 23 of the Project Agreement before passing the disputed Banning Orders.

16. Ms. Acharya relying on the Impugned Order without prejudice submitted that the arguments of the Appellants that the chargesheet had only been filed against its Directors, who are officers of the Company, has been rightly rejected by the learned Single Judge by stating that the Director of the Company cannot be said to be a stranger acting at his own behest for individual benefit.

17. Ms. Acharya further submitted that as on the date of passing of Banning Order dated 30.09.2019, the Project Agreement already stood terminated and the Appellants had invoked the Dispute Resolution Mechanism envisaged under Clause 23 of the Project Agreement. The same has reached the stage of arbitration at present. Thus, taking note of the issues emanating between the parties having been referred to arbitration, the learned Single Judge observed as under:

“47. In view of the above, I find no merit in the present petition(s). The present order shall not however, prejudice the petitioners from pursuing their Alternative Dispute Resolution Mechanism. The observations made herein are confined to the present Writ only.”



18. Ms. Acharya submitted that considering the aforesaid, the Impugned Order has protected the Appellants herein and that in light of the Appellants having challenged the Banning Orders before this Court, the claim of the Appellants regarding the Banning Orders cannot be adjudicated before the Ld. Arbitral Tribunal too, which the Appellants have done. Thus, no liberty/observation should be granted to the Appellants regarding the same by this Court.

19. Ms. Acharya submitted that the Appellants have approached this Court with unclean hands. It is further submitted that instead of coming to this Court immediately, the Appellants first awaited the adjudication of the application filed under Section 16 of the Arbitration and Conciliation Act, 1996 and then chose to file the review petitions. Therefore, this Court should not make any observations regarding the validity of the Minutes of Meeting dated 24.10.2017.

20. Heard learned counsels appearing for the Parties and perused the material on record.

21. This Court is not entering into the question as to whether finding of the Ld. Single Judge on the banning orders will act as *res judicata* before the Ld. Tribunal or not. The very same issue has already been taken up by the Ld. Arbitrator in the proceedings dated 29.10.2021 which is not the subject matter of the challenge in the instant Appeals. All the arguments sought to be raised by Ms. Maninder Acharya, learned Senior Counsel for the Respondents, on the question of *res judicata* before this Court has been dealt with by the Ld. Arbitrator.

22. The short question, therefore, which arises for consideration before this Court is whether the 450th Minutes of Meeting of the Board of Directors of the Respondent No. 1 held on 24.10.2017 is a complete answer to the



banning orders or not. The Ld. Single Judge has taken a view that mere Minutes of Meeting alone would not completely exonerate the Appellants from allegations and therefore, on the basis of that Minutes of Meeting the Appellants cannot be said to be completely innocent. More so when the accused are facing criminal proceedings under the PC Act and IPC. The issue as to under what circumstances the Minutes of Meeting dated 24.10.2017 were drawn up are all questions of facts which have to be proved by leading oral evidence and therefore, it cannot be the subject matter of adjudication in the Writ Proceedings or in the appeals before us.

23. Further in paragraph No.47 of the Order dated 08.01.2020, the Ld. Single Judge has categorically stated that the Order 08.01.2020 shall not prejudice the Appellants from pursuing the Alternative Dispute Resolution Mechanism as envisaged under the Project Agreements. The Ld. Single Judge in the same paragraph has further held that the observations made in the Writ Petitions are confined to itself only. The import of the said paragraph will be taken into account by the Ld. Tribunal in its proceedings.

24. In view of the above this Court is not inclined to interfere with the Order dated 17.12.2021, passed by the Ld. Single Judge in Review Petition No. 212 of 2021 in W.P. (C) No. 12077/ 2019 and Review Petition No. 211 of 2021 in W.P. (C) No. 12068/ 2019, especially in light of the observations made by the Ld. Single Judge that the Order dated 08.01.2020 would not prejudice the Appellants from pursuing the Alternative Dispute Resolution Mechanism under the Project Agreements. It is for the Tribunal to take an independent view regarding the findings of the Ld. Single Judge in the Arbitral Proceedings and this Court is not making any observations on the same.



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25. With these observations, the instant appeals are disposed of, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

SEPTEMBER 22, 2022

S. Zakir.

