Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 485 OF 2022

WITH

INTERIM APPLICATION (L) NO. 15618 OF 2023

WITH

INTERIM APPLICATION NO. 2298 OF 2019

WITH

INTERIM APPLICATION NO. 2297 OF 2019

Hotel Horizon Pvt. Ltd. …**Petitioner**

Versus

Palladian Hotels Pvt. Ltd. …**Respondent**

Mr. Mayur Khandeparkar a/w Ms. Komal Khushalani and Shivam Bhagwati i/by Crawford Baylay & Co. for the Petitioners.

Mr. J.P. Sen, Senior Counsel a/w Mr. Aditya Thakkar i/by Amardev J. Uniyal and B.L. Mangale for the Respondent.

CORAM : R.I. CHAGLA J

DATE : 12 June 2023

ORDER :

1. After the arguments on behalf of the Petitioner on the two issues which had been framed by order dated 5th February 2020 were complete, Mr. J.P. Sen, learned Senior Counsel appearing for the

Respondent has applied for the matter to be remanded back to the learned Arbitrator and/or an opportunity be given to the learned Arbitrator to resume the arbitral proceedings to eliminate the grounds for setting aside the impugned Award under Section 34(4) of the Arbitration and Conciliation Act, 1996 ("**the Act**"). By a separate order leave has been granted to the Respondent to have the Interim Application seeking relief under Section 34(4) of the Act to be filed and registered. In view of arguments of both sides on the Application, the same is addressed in this order.

2. Mr. Sen has referred to Section 34(4) of the Act which provides for an Application to be made to the Court by any party and on request of any party, the Court may adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. Mr. Sen has submitted that in the context of the Application now made under Section 34(4) of the Act, certain dates are relevant to be considered by this Court.

3. On 24th October 2018 and 25th October 2018, the

matter had been fixed by the learned Arbitrator for final arguments. The Petitioner had commenced the final arguments and on the next date i.e. 25th October 2018, the Petitioner made an application for adjournment. The Application for adjournment was granted subject to payment of costs and the matter was fixed on 27th November 2018. One day prior to the rescheduled date of final hearing, the Advocate for the Petitioner filed an Application to withdraw his appearance.

4. On 27th November 2018, there are detailed minutes of meeting recorded by the learned Arbitrator and arguments were closed and the Award was reserved. However, on 14th December 2018, though the reference was closed for Award, fresh arguments were permitted by the learned Arbitrator. The arguments were concluded by both sides and the Award reserved by the learned Arbitrator.

5. The NCLT by an order dated 29th January 2019 admitted a Section 7 Petition against the Petitioner. Mr. Sen has submitted that neither the Arbitrator nor the Respondent was informed by any of the representatives of the Petitioner that the NCLT

had passed the said order. Not only the Petitioner Company but its lawyers as well continued to correspond with the learned Arbitrator as if they were the Directors of the Company and its lawyers. There was an email dated 14th March 2019 sent by the Accounts Department of the Petitioner furnishing the schedule of costs incurred for the arbitration. This email was addressed in response to the email sent by the learned Arbitrator which was marked to one Mr. Vishal of the Petitioner.

6. Thereafter, in the proceedings before the NCLAT, an order dated 15th March 2019 came to be passed permitting the suspended Board of Directors of the Petitioner to assist the IRP to ensure that the Company remains a going concern. The paid Directors were directed to continue working and performing their duties.

7. The impugned Award was pronounced by the learned Arbitrator on 22nd March 2019 allowing the claim of the Respondent and rejecting the counter-claim of the Petitioner.

8. Mr. Sen has then referred to the events in connection

with the passing of/pronouncement of the impugned Award. He has referred to an email dated 20th March 2019 addressed by the learned Arbitrator to the parties to attend the meeting on 22nd March 2019, where the Award would be handed over and at which time a representative of the parties was required to be present. He has also referred to email bearing same date i.e. 20th March 2019, when the present Deponent of the Arbitration Petition, Vishal Sharma responded to the email confirming that the Petitioner's representative shall attend the meeting. Thereafter, Mr. Vishal Sharma attended the meeting and accepted the Award. He also raised a plea for stay in his capacity as Director of the Petitioner company which was rejected and there is a noting to that effect at the foot of the Award.

9. Mr. Sen has submitted that on 22nd March 2019 when the impugned Award was pronounced by the learned Arbitrator, the learned Arbitrator was not informed of the pendency of any insolvency proceedings or the pendency of the moratorium but in fact, an assertion was made by Vishal Sharma of being a Director of the Petitioner Company. Further, the counter part of the impugned Award is printed on the stamp paper obtained in the name of the Petitioner and which bears the Petitioner's stamp.

10. Mr. Sen has then adverted to the fact that the Company Application (L) No. 221 of 2019 moved by the Respondent for enforcement of the Bank guarantee was served on the registered office of the Petitioner and hence, would have been or must be deemed to be to the express knowledge of all concerned including the Resolution Professional.

11. By an order dated 30th September 2019, the Supreme Court stayed the admission order of the NCLT dated 29th January 2019 and remanded the matter back to the NCLAT. The present Section 34 Arbitration Petition was filed on 21st December 2019. The NCLAT by order dated 7th February 2020 set aside the admission order dated 29th January 2019 passed by the NCLT on the grounds that the original Application was barred by limitation.

12. Mr. Sen has submitted that from 7th February 2020, the Petitioner has been released from the rigours of the corporate insolvency resolution process and the admission order under Section 7, on being set aside, is wiped out from its existence.

13. Mr. Sen has submitted that the learned Arbitrator

had pronounced the impugned Award without knowledge of the pendency of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). This is in view of the learned Arbitrator not being informed by the Petitioner through the Deponent of the Arbitration Petition, viz. Vishal Sharma who had appeared before the learned Arbitrator on the day of pronouncement of the impugned Award and represented himself to be the Director of the Petitioner and in fact even applied for stay of the impugned Award which was rejected. He has accordingly submitted that it would be equitable for this Court to exercise its powers under Section 34(4) of the Act and remand the matter back to the learned Arbitrator for eliminating the purported grounds for setting aside the impugned Award as having been passed during moratorium and thus, *non est*.

14. Mr. Sen has submitted that this power to be exercised by this Court is undoubtedly discretionary. However, in the facts and circumstances of the present case and particularly, considering that the learned Arbitrator had pronounced the impugned Award without having knowledge of the moratorium, an opportunity be given to the learned Arbitrator to pass the Award now, when the moratorium has been lifted. He has submitted that in the

event, the learned Arbitrator had been informed of the pending moratorium, the learned Arbitrator would have merely stayed the proceedings and after the moratorium was lifted passed the same Award. He has submitted that setting aside of the Award would be prejudicial to the parties, considering that the arbitral proceeding had commenced in the year 2017 and which has ultimately culminated in the Award in the year 2019. He has further submitted that the present case is not a case where the impugned Award can be contended to be in breach of the principles of natural justice and therefore, *void ab initio* as noticed by this Court in the authorities relied upon on behalf of the Petitioner where this Court has not exercised its discretion under Section 34(4) of the Act. He has submitted that in the facts and circumstances of the present case, this Court exercise its discretion and remit the matter back to the learned Arbitrator, which in these circumstances, would only be fair and just.

15. Mr. Khandeparkar, learned Counsel appearing for the Petitioner has submitted that this is not a case where the provision under Section 34(4) of the Act is attracted. He has submitted that Section 34(4) of the Act applies, when there are grounds of challenge to the impugned Award viz. adequate reasons

have not been given in support of the findings of the Arbitral Tribunal and in such circumstances, this Court in exercise of its discretion may remit the matter back to the learned Arbitrator for providing adequate reasons in support of the findings. The provisions of Section 34(4) of the Act cannot apply, when the impugned Award is *non est* as in the present case.

16. Mr. Khandeparkar has submitted that the impugned Award has been pronounced at a time when the moratorium was imposed by the NCLT vide order dated 29th January 2019. This was upon admitting the insolvency proceedings under Section 7 of the IBC against the Petitioner. Subsequent to the passing of the said order dated 29th January 2019, the Interim Resolution Professional ("**IRP**) who had been appointed, made a public announcement under Section 15 of the IBC inviting claims from creditors of the Corporate Debtor. Thus, this was deemed public notice and assuming, whilst denying, that the Petitioner had not given notice of the said order dated 29th January 2019 to the learned Arbitrator, the pending moratorium under Section 14 of the IBC operates in law and is in rem, apart from the fact that public announcement had been given by the IRP of the said Award. Thus,

the impugned Award passed by the learned Arbitrator on 22nd March 2019 is *non est* and cannot be subsequently validated.

17. Mr. Khandeparkar has submitted that the Supreme Court in **Alchemist Asset Reconstruction Company Limited Vs. Hotel Gaudavan Private Limited**[1] at paragraphs 4 and 5 held that the moratorium that comes into effect under Section 14(1)(a) of the IBC expressly interdicts institution or continuation of pending Suits or proceedings against corporate Debtors. The Supreme Court in the said decision has expressed surprise that an arbitration proceeding has been purported to be stated after the imposition of the said moratorium and appeals under Section 37 of the Act are being entertained. The Supreme Court accordingly, set aside the order of the District Judge and stated that the effect of Section 14(1)(a) is that the arbitration has been instituted after the aforesaid moratorium is *non est* in law.

18. Mr. Khandeparkar has referred to the decision of the Supreme Court in **P. Mohanraj Vs. Shah Brothers Ispat Private**

1 **(2018)16 SCC 94**

Limited[2], wherein the Supreme Court has construed the word "*proceedings*" against a Corporate Debtor in Section 14(1)(a) of the IBC to be a separate category from that of "*institution of Suits or continuation of Suits*". The Supreme Court further considered that what throws light on the width of the expression "*proceedings*" is the expression "*any judgment, decree or order*" and the expression "*any court of law, tribunal, arbitration panel or other authority*". He has accordingly, submitted that arbitral proceedings would fall within the expression "*proceedings*" under Section 14 of IBC.

19. Mr. Khandeparkar has in the context of the Application now made on behalf of the Petitioner to remand the matter back to the learned Arbitrator under Section 34(4) of the Act relied upon the decision of this Court in **Bharat Petroleum Corporation Limited Vs. B.P.T. Structural (I) Pvt.Ltd.**[3]. In the said decision, the Division Bench of this Court has held that the provision of Section 34(4) is to confer a discretion on the Court before which an Application for setting aside an arbitral Award has been filed under Section 34(1) of the Act. It is not mandatory in all such cases

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2 **(2021) 6 SCC 258**

3 **Appeal 412/12 in Arbitration Petition No. 442/10 dated 10.06.2013**

for the Court to take recourse to the said provision. This Court has held that the said provision can have no application to a case where the Award is in clear breach of the principles of natural justice and is therefore, *void ab initio*.

20. Mr. Khandeparkar has submitted that in the present case, particularly considering the decision of the Supreme Court in **Alchemist Asset Reconstruction Company Limited** (supra), the impugned Award is *non est* having been passed during the pendency of a moratorium under Section 14 of the IBC and thus, Section 34(4) of the Act would have no application. He has accordingly, submitted that the impugned Award be set aside.

21. I have considered the rival submissions. The two points of determination, which this Court has accepted as the only two points to be argued are as under :-

(a) Whether the fact that there is an order of 29th January 2019 of the NCLT, Mumbai under the Insolvency and Bankruptcy Code 2016 declaring a moratorium within the meaning of that statute will render the Award of 22nd March 2019 non est?

(b) Whether the petition is filed within time or whether there is a permissible exclusion of any period for the purposes of limitation within the meaning of Section 34 read with Section 36 of the Arbitration and Conciliation Act 1996?

22. It is necessary to consider the submissions in light of the above points for determination.

23. Mr. Sen has at the outset submitted that the Respondent has preferred an Application under Section 34(4) of the Act, in view of there being no issue insofar as the position of law is concerned as laid down by the Supreme Court in **Alchemist Asset Reconstruction Company Limited** (supra) that arbitral proceedings which are continued and/or an arbitral Award passed during the pendency of a moratorium under Section 14 of the IBC would be *non est*. The contention on behalf of the Respondent appears to be that in view of the learned Arbitrator not being informed by the Petitioner of the pending moratorium under Section 14 of the IBC, an opportunity

be given to the learned Arbitrator to pass the Award, in view of the moratorium having now been lifted.

24. Section 34(4) of the Act reads thus:-

> "*34(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.*"

25. Having perused this provision, in my view, there is much merit in the submission of Mr. Khandeparkar that this provision may be attracted where this Court upon considering the ground of challenge for setting aside the arbitral Award finds that the reasons which have been provided by the arbitral tribunal are not adequate for bringing clarity as to the findings. This would certainly not apply to a case where the impugned Award is *non est* in law.

26. The Supreme Court in **Alchemist Asset Reconstruction Company Limited** (supra) has held that arbitral proceedings which are continued after a moratorium has come into effect under Section 14(1)(a) of IBC is *non est* in law. The mandate of the new Insolvency Code (IBC) is that the moment an Insolvency Petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending Suits or proceedings against corporate Debtors. The Supreme Court has thrown light on the width of the expression "*or proceedings*" in **P. Mohanraj** (supra) from the expression "*any judgment, decree or order*" and the expression *"any court of law, tribunal, arbitration panel or other authority".* Thus, the expression "*proceedings*" would include arbitral proceedings.

27. In light of the admitted facts namely that the impugned Award was passed by the Arbitral tribunal after the moratorium was imposed under Section 14(1)(a) of IBC i.e. on 29th January 2019 the impugned Award is *non est*.

28. Further, the period during which the moratorium was in operation is required to be excluded and in view thereof, the

Arbitration Petition has been filed within the statutory period of 90 days i.e. from the stay of the order imposing moratorium on 30th September 2019, the Arbitration Petition having been filed on 21st December 2019. This has also not been disputed by Mr. Sen on behalf of the Respondent.

29. Having considered the law laid down by this Court in **Bharat Petroleum Corporation Limited** (supra), wherein the Division Bench of this Court has held that Section 34(4) of the Act has no application when the impugned Award is *void ab initio* and/or *non est*, in my view, in the present case, as the impugned Award has been held to be *non est* in law, Section 34(4) of the Act will have no application. The distinction sought to be drawn by Mr. Sen on **Bharat Petroleum Corporation Limited** (supra) viz. that the facts in that case were different, as there had been a clear breach of the principles of natural justice and therefore, the impugned Award was held to be *void ab initio* would make no difference. In the present case, the impugned Award having been passed during the pendency of a moratorium under Section 14 of the IBC would equally be *non est* and thus, Section 34(4) of the Act would have no application.

30. Having so held, the present case is very unfortunate, particularly considering that the entire arbitral proceeding had concluded. It is only the pronouncement of the Award which took place during the pendency of the moratorium has rendered the impugned Award *non est*. Undoubtedly, the parties would be put through hardship on that account, but that in itself will not be sufficient to allow the Application under Section 34(4) of the Act. The impugned Award is required to be set aside. Accordingly, following order is passed:-

(i) The impugned Award dated 22nd March 2019 passed by the learned Sole Arbitrator, in the matter of arbitration between the Petitioner and the Respondent is quashed and set aside.

(ii) In view of the impugned Award being set aside, the awarded amount which was deposited by the Petitioner with the Prothonotary & Senior Master of this Court and allowed to be released by order dated 2nd January 2022 upon encashment of bank guarantee is required to be returned to the Petitioner.

Accordingly, the Respondent shall return the amount to the Petitioner with interest at the rate of 6 percent per annum within a period of four weeks from the date of this order.

(iii) Arbitration Petition is accordingly, disposed of.

(iv) In view of disposal of the Arbitration Petition, all pending Interim Applications do not survive and are disposed of accordingly.

[R.I. CHAGLA J.]