



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

Date of decision: 24th APRIL, 2024

IN THE MATTER OF:

+ **W.P.(C) 7404/2023 & CM APPLs. 28824/2023, 47785/2023**

STATE OF KERALA

..... Petitioner

Through: Mr. Naveen R. Nath, Sr. Advocate
with Mr. Nishe Rajen Shonker, Mr.
Alim Anvar, Ms. Gayatri Virmani and
Ms. Disha Gupta, Advocates.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ANR.

..... Respondents

Through: Mr. Ankur Mittal and Mr. Ashish
Gajwani, Advocates for R-1.
Mr. Arjun Syal and Mr. Shreyan Das,
Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner/State of Kerala has approached this Court assailing the Order dated 15.03.2022 passed by the Arbitral Tribunal in Arbitration Proceedings initiated by Respondent No.2/Guruvayoor Infrastructure Pvt. Ltd against Respondent No.1/NHAI. By the Order dated 15.03.2022, the Arbitral Tribunal has allowed the application filed by Respondent No.1 to implead the Petitioner as a party to the Arbitration Proceedings.

2. The facts, in brief, leading to the filing of the instant writ petition which are necessary for disposal of the instant writ petition are as under:

- i. On 27.03.2006, a Concession Agreement was entered into between Respondent No.1 and Respondent No.2 for widening the existing 2



lane portion from Thrissur to Angamali, covering a distance about 40 kms on National Highway 47 in the State of Kerala, to 4 lanes and Improvement, Operation and Maintenance from Angamali to Edapalli through a concession on Build, Operate and Transfer (BOT) basis. The said agreement had an arbitration clause. At this juncture, it is pertinent to incorporate certain clauses of the said Concession Agreement entered into between Respondent No.1 and Respondent No.2. Clause 2 of the said Concession Agreement lays down the scope of project. Clause 2.1 of the Concession Agreement reads as under:

"2.1 The Project shall be executed on to Site which is described in Schedule 'A' of this Agreement. The scope of the Project shall include performance and execution by the Concessionaire of all design, engineering, financing, procurement, construction, completion, operation and maintenance of the Project Highway as described in Schedule 'B' and Schedule 'C' of this Agreement. It shall include widening the existing 2 lane portion from Km 270.00 (Thrissur) - Km 316.70 (Angamali) on NH-47 in the State of Kerela to 4 lanes and improvement, Opeiation and Maintenance of Km 316.70 (Angamali) to Km 342.0 (Edapalli) on NH-47 in accordance with the Specifications and Standards set forth in Schedule 'D' and operation and maintenance thereof in accordance with Schedule 'L'. It shall also include the performance and fulfilment of other obligations by the Concessionaire under this Agreement.

The Concessionaire shall undertake its obligations at its own cost and risk."



- ii. Clause 26 of the Concession Agreement provides for a State Support Agreement. Clause 26 of the Concession Agreement reads as under:

"XXVI. STATE SUPPORT AGREEMENT

26.1 The Concessionaire acknowledges that for the performance of its obligations under this Agreement, it requires support and certain services from Government of Kerela. The nature and scope of such support and services required by the Concessionaire from Government of Kerela are fully described in the draft State Support Agreement set forth at Schedule 'R'.

26.2 The Concessionaire acknowledges its obligation to enter into the State Support Agreement and accordingly the Concessionaire agrees and undertakes to enter into at its cost and expense the State Support Agreement with NHAI and Government of Kerela substantially in form and content as set forth in Schedule 'R'."

- iii. Chapter VII of the Concession Agreement deals with suspension and termination of the contract. Clause 32.4 of Chapter VII deals with termination by NHAI in the Event of Default. Clause 32.4.1 which enumerates the events of default read as under:

"32.4.1 The Concessionaire may after giving 90 (ninety) days notice in writing to NHAI terminate this Agreement upon the occurrence and continuation of any of the following events (each a "NHAH Event of Default"), unless any such NHAH Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event.

(1) NHAH is in breach of this Agreement and such breach has a Material Adverse Effect on the



Concessionaire and NHAI has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;

(2) NHAI repudiates this Agreement or otherwise evidences an irrevocable intention not to be bound by this Agreement;

(3) GoI or Government of Kerela or any Governmental Agency have by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligations by the Concessionaire and have failed to cure the same within 90 (ninety) days of receipt of notice by NHAI in this behalf from the Concessionaire;

(4) NHAI has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days."

- iv. Clause 39 of the Concession Agreement lays down the process of dispute resolution. Clause 39 of the Concession Agreement reads as under:

"XXXIX DISPUTE RESOLUTION

39.1 Amicable Resolution

(a) Save where expressly stated to the contrary in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including incompleteness of the Project Highway between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably in accordance with the conciliation



procedure set forth in Sub-clause(b) below.

(b) In the event of any Dispute between the Parties, either Party may call upon the Independent Consultant to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Consultant or without the intervention of the Independent Consultant, either Party may require such Dispute to be referred to the Chairman of NHAI and the Chairman of the Board or Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the said two Authorities shall meet not later than 7 (seven) days of the date of such request to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the said period or the dispute is not amicably settled within 15 (fifteen) days of such meeting between the said, two Authorities, either Party may refer the dispute to arbitration in accordance with the provisions of Clause 39.2

(c) If the dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty) working days of the aforesaid notice in writing or such longer period as may be mutually agreed by the Parties then the provisions of Clause 39.2 shall apply.

39.2 Arbitration

39.2.1 Any Dispute, which is not resolved amicably as provided in Clause 39.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2 below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject, to, the provisions of the Arbitration Act.



39.2.2 There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

39.2.3 The arbitrators shall issue a reasoned Award.

39.2.4 The venue of such arbitration shall be New Delhi, India.

39.3 Arbitration Awards to be Binding

39.3.1 The Concessionaire and NHAI undertake to carry out any decision or award of the arbitrators (the "Award") without delay. Awards relating to any Dispute shall be final and binding on the Parties as from the date they are made.

39.3.2 The Concessionaire and NHAI agree that an Award may be enforced against the concessionaire and/or NHAI, as the case may be and their respective assets wherever situated.

39.3.3 This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder."

- v. In accordance with Clause 26 of the Concession Agreement, a separate State Support Agreement was entered into between the Petitioner, Respondent No.1 and Respondent No.2 on 14.12.2007. Clause 3 of the State Support Agreement provides for the obligations of the Petitioner/State of Kerala which is being reproduced as under:

"SUPPORT OF GOK



3.1 Upon and with effect from the date hereof GOK agrees:

(a) So long as the Concessionaire is not in breach of its obligations under this Agreement, GOK agrees to enable access to the Site to the Concessionaire for peaceful use of and operations at the site by the Concessionaire under and in accordance with the provisions of the Concession Agreement without any let or hindrance from GOK or persons claiming through or under it.

(b) Subject to the Concessionaire complying with Applicable Laws, provide to the Concessionaire Applicable permits to the extent GOK or any Government Agency of GOK is entitled to issue.

(c) Upon written request from Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services.

(d) Ensure that no barriers are erected or placed by GOK or any Governmental Agency of GOK that interrupts free flow of traffic on the project Highway except on account of any law and order situation or upon national security considerations.

(e) Provide the Concessionaire with assistance through a dedicated team against payment of prescribed fee and charges, if any, for regulation of traffic on Project Highway.



(f) Provide the Concessionaire with police assistance in the form of dedicated highway patrol parties against payment of prescribed cost and charges, if any, for patrolling and provision of security on the Project Highway.

(g) Observe and comply with its obligations set forth in this Agreement,

(h) Support, cooperate, with and facilitate NHAI and the Concessionaire in the implementation of the Project,

(i) Subject to and in accordance with the Applicable laws, assist the Concessionaire in the procurement of all Applicable permits required from any Municipal and other local authorities and bodies including Panchayats in the State of Kerala for the Implementation of the project,

(j) Ensure subject to and in accordance with the Applicable Laws, that all relevant municipal and other local authorities and bodies including Panchayats in the State of Kerala do not put any barriers or other obstructions that interrupt free flow of traffic on the Project Highway,

(k) Decline to do or omit to do any act deed or thing which may in any manner be violative of or cause the Concessionaire to violate any of the provisions of the Concession Agreement.

3.2 Notwithstanding anything to the contrary contained in the Agreement GOK may construct and operate either itself or have the same inter alia built and operated on BOT basis or otherwise any Expressway or other toll road not being a Bye pass, between inter alia, (NH-47 Highway Project) (the "Additional Toll



way") provided that such Additional Toll way shall not be opened to traffic before expiry of 8 (eight) years from the Appointed Date.

3.3 GOK agrees and undertakes that it shall not levy any additional toll, fee, charge or tax on the use of whole or any part of the Project Highway. GOK acknowledges the rights of Senior Lenders and NHAI under the substitution agreement and hereby covenants that upon substitution of the Concessionaire by the Selectee pursuant to the Substitution Agreement, it shall be deemed for the purpose of this Agreement that as if Selectee is a party here to and the Selectee shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of Substitution of the Concessionaire by the Selectee."

(emphasis supplied)

- vi. Clause 7 of the State Support Agreement lays down the liabilities in case of breach on the part of the Petitioner/State of Kerala. Clause 7 of the State Support Agreement reads as under:

"7.0 BREACH AND COMPENSATION

7.1 In case GOK is in breach of any of its obligations under this Agreement which breach is not cured within 30 days of receipt of a notice in writing from the Concessionaire to GOK and NHAI and which has not occurred as a result of Concessionaire's breach of its obligations under this Agreement or the Concession Agreement, GOK shall pay to the Concessionaire, all direct additional costs suffered or incurred by the Concessionaire, determined by NHAI, as arising out of such material default by GOK.

7.2 In case of any dispute by GOK on admissibility of the claim or extent of compensation determined by



NHAI, the claim shall be settled as per provisions of the Dispute Settlement mechanism provided in Article IX of this Agreement.

7.3 Any such compensation payable shall be paid to the Concessionaire in one lump sum within 90 days of receiving NHAI's determination of compensation."

- vii. Clause 8 of the State Support Agreement provides for indemnity to the State of Kerala. Clause 8 deals with indemnity under which the Respondent No.2 was to indemnify, defend and hold Government of Kerala harmless against any proceedings and it also provides for reciprocal obligations on the part of Government of Kerala to indemnify, defend and hold Respondent No.2 harmless against any proceedings initiated by any third party.
- viii. Clause 9 of the State Support Agreement provides for Governing Law and Dispute Settlement between the parties. Clause 9 of the State Support Agreement reads as under:

"9.0 GOVERNING LAW AND DISPUTE SETTLEMENT

9.1 This Agreement shall be governed by and construed and interpreted in accordance with the laws of India. The provisions contained in Clause 8 shall survive the termination of this Agreement.

9.2 Any dispute, difference or claim arising out of or in connection with or in relation to this Agreement, which is not resolved amicably, shall be decided finally by reference to arbitration to a Board or Arbitrators comprising of one nominee of each party to the dispute. Such arbitration shall be held in accordance with the



Rules of Arbitration of the Indian Counsel of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The Arbitrators shall issue a reasoned award. The venue of such arbitration shall be New Delhi, India. The Award shall be final and binding on the Parties."

- ix. The facts of the case, therefore, disclose that two separate and distinct agreements have been entered into between the parties one being the Concession Agreement entered into between Respondent No.1 and Respondent No.2 and the other one being the State Support Agreement entered into between the Petitioner, Respondent No.1 and Respondent No.2. The Concession Agreement does not lay down any responsibilities or obligations to be performed by the Petitioner/State of Kerala. The duties and responsibilities of the State of Kerala have only been laid down in Clause 3 of the State Support Agreement which does not form part of the Concession Agreement entered into between Respondent No.1 and Respondent No.2.
- x. A dispute arose between the parties. On 18.03.2019, Respondent No.2 issued a notice to the Petitioner and Respondent No.1 invoking arbitration under Clause 9.2 of the State Support Agreement calling upon the Petitioner and Respondent No.1 to nominate an Arbitrator within 30 days from the receipt of the notice. Material on record does not disclose anything as to what transpired pursuant to issuance of the said notice by Respondent No.2 invoking arbitration under Clause 9.2 of the State Support Agreement. On the very same day i.e., on 18.03.2019, the Respondent No.2 issued a separate notice to



Respondent No.1 invoking arbitration under Clause 39.2 of the Concession Agreement. Respondent No.1 and Respondent No.2 nominated their respective Arbitrator and subsequently a Presiding Arbitrator was also appointed and the Tribunal was constituted. The statement of claim was filed by Respondent No.2 on 03.10.2019, wherein Respondent No.2 made a claim for a sum of Rs.6,80,48,30,450/- along with interest. It is pertinent to mention here that neither the Respondent No.2 nor Respondent No.1 chose to invoke the arbitration clause under the State Support Agreement and have not made any specific monetary claims against the Petitioner/State of Kerala, for its obligations as stated in the State Support Agreement, under the Arbitration Agreement that exists in the tripartite agreement. Reply was filed by Respondent No.1. It is also pertinent to mention here that both Respondent No.1 and Respondent No.2 have made allegations on the Petitioner/State of Kerala for its inaction, however, both the Respondent No.1 and Respondent No.2 consciously decided not to invoke arbitration clause against the Petitioner/State of Kerala under the State Support Agreement.

- xi. The Arbitral Tribunal started hearing the dispute arising under the Concession Agreement. Points for determination were finalized. The Schedule for recording the arguments were finalized and Respondent No.2/claimant was to commence leading its evidence. Just before the date scheduled for leading evidence by the Respondent No.2, the Respondent No.1 filed an application under Order 1 Rule 10 before



the Arbitral Tribunal seeking impleadment of the Petitioner/State of Kerala. Notice was issued in the application for appearance of Petitioner/State of Kerala. The Petitioner/State of Kerala objected to its impleadment by contending that it is not a party to the Concession Agreement. The Arbitral Tribunal by the Impugned Order dated 15.03.2022 impleaded the Petitioner/State of Kerala. The Tribunal held that that having regard to the stipulations in the Concession Agreement whereunder the State Support Agreement came to be executed between the Petitioner/State of Kerala, Respondent No.1 and Respondent No.2, the State Support Agreement is intrinsically linked with the Concession Agreement and since the claims are based on the allegations of inaction on the part of the Petitioner/State of Kerala, the Petitioner/State of Kerala should be impleaded as a party to the proceedings. The said Order dated 15.03.2022 was challenged before the High Court of Kerala which was withdrawn on the ground that the High Court of Kerala did not have the territorial jurisdiction to entertain the matter.

xii. The Petitioner/State of Kerala has, therefore, approached this Court by filing the instant writ petition.

xiii. Notice was issued in the writ petition on 26.05.2023. Pleadings are complete.

3. Learned Senior Counsel appearing for the Petitioner/State of Kerala contends that the Petitioner is not a part to the Concession Agreement entered into between the Respondent No.1 and Respondent No.2 and its obligations are primarily contained only in the State Support Agreement



which has a separate arbitration clause. He states that it is always open for the Respondent No.1 and Respondent No.2 to invoke the arbitration clause under the State Support Agreement for enforcing any claims against the Petitioner. He states that obligations of the Petitioner and any claim against the Petitioner can only be made under the State Support Agreement and, therefore, the Petitioner cannot be roped in as a party to the proceedings arising out of the Concession Agreement in which the Petitioner is not a signatory.

4. Learned Senior Counsel for the Petitioner further contends that the State Support Agreement has been entered into on behalf of the Petitioner in the name of Governor under Article 229 read with Article 298 of the Constitution of India. He states that the National Highways fall under List I of the 7th Schedule (Entry 23) and any liabilities arising out in relation thereto cannot be fostered on the State, except in accordance with the procedure mandated by Articles 257 and 258 of the Constitution of India. He, therefore, states that the Petitioner cannot be made liable for any dispute arising out of the maintenance of National Highways. He draws attention of this Court to Clause 9.1 of the State Support Agreement which specifically refers to the fact that the State Support Agreement must be interpreted in accordance with the laws of India. He also draws attention of this Court to Clause 9.2 of the State Support Agreement to contend that it refers only to disputes, differences or claims arising out of the State Support Agreement and not the Concession Agreement and therefore, the Petitioner cannot be made liable for any clause under the Concession Agreement. He states that similarly Clause 39 of the Concession Agreement refers to disputes arising out of the Concession Agreement. He, therefore, states that both the



Concession Agreement and the State Support Agreement are distinct and separate from each other and the same cannot be clubbed.

5. Learned Senior Counsel for the Petitioner further states that the Arbitration Law is based on party autonomy and the right of the party to appoint its own Arbitrator. He states that the Arbitral Tribunal has taken away the autonomy of the Petitioner to appoint its own arbitrator for adjudication of dispute and, therefore, the Impugned Order is contrary to the fundamentals of the Arbitration Laws. He states that the Impugned Order is contrary to the Principles of Arbitration Laws wherein non-signatories should not be made a party and similarly a party having its own independent agreement cannot be deprived of its right to appoint its own arbitrator for adjudication of dispute.

6. *Per contra*, learned Counsel appearing for Respondent No.1/NHAI argues that the State Support Agreement has been entered into only because of the clause under the Concession Agreement and that the State Support Agreement is intrinsically linked with the Concession Agreement and the responsibilities of the State Government has, therefore, to be read into the Concession Agreement. He states that both the Concession Agreement and the State Support Agreement have been primarily entered into for the same purpose i.e., for road widening activities and since the aim of both the agreements being common, the Impugned Order does not suffer from any infirmity. He draws attention of this Court to a Judgment passed by the Apex Court in Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706 to contend that the scope of interference by the High Court under Article 227 of the Constitution of India is extremely narrow.

7. Learned Counsel appearing for Respondent No.2 states that its claims



are being delayed. He states that Respondent No.2 is only keen on getting its dispute resolved at the earliest and the matter ought not be delayed further.

8. Heard learned Counsel appearing for the Parties and perused the material on record.

9. It is well settled that the jurisdiction of the High Courts to entertain petitions under Article 227 of the Constitution of India while interfering with the Orders passed by the Appellate Tribunal is very limited [Refer: SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 and Deep Industries Limited v. Oil & Natural Gas Corporation Limited, (2020) 15 SCC 706]. However, in the facts of the present case, this Court is of the opinion that valuable rights of the Petitioner, inasmuch as, the Petitioner's right to appoint its own Arbitrator, has been taken away warranting interference under Article 227 of the Constitution of India.

10. The facts of the case reveal that the Respondent No.1 entered into a Concession Agreement with Respondent No.2. The purpose of the said Concession Agreement was for widening the existing 2 lane portion from Thrissur to Angamali covering a distance about 40 kms on National Highway 47 in the State of Kerala, to 4 lanes and Improvement, Operation and Maintenance from Angamali to Edapalli through a concession on Build, Operate and Transfer (BOT) basis. Material on record discloses that a proposal was brought out by Respondent No.1 by its Notification No.465(E) dated 26.04.2022 issued pursuant to Section 11 of the National Highways Authority of India Act, 1988. The Respondent No.1 had invited proposals under a single stage process from bidders for qualification and after the bidding process, a Concession Agreement was entered into between the Respondent No.1 and Respondent No.2 on 27.03.2006.



11. Under Clause 26 of the Concession Agreement, the Respondent No.2 acknowledged that for performance of its obligations under the Agreement, it requires support and certain services from Government of Kerala and the nature and scope of such support and services required by the Respondent No.2 from Government of Kerala are described in the draft State Support Agreement which forms part of the Concession Agreement. The Respondent No.2 also acknowledged its obligation to enter into the State Support Agreement and agreed to enter into at its cost and expense the State Support Agreement with Respondent No.1 and Government of Kerala substantially in form and content as set forth in the Concession Agreement itself. It is also pertinent to mention that Clause 32.4.1 of the Concession Agreement provided that Respondent No.2 ought to have given 90 days notice in writing to Respondent No.1 to terminate the Agreement upon the occurrence and continuation of any of the events as mentioned in Clause 32.4.1 which included inaction on the part of the Petitioner. In accordance with the Concession Agreement, the State Support Agreement was entered into between the Petitioner, Respondent No.1 and Respondent No.2. The State Support Agreement delineated the obligations of the Petitioner under the State Support Agreement having its own separate arbitration clause. A perusal of the two agreements shows that though the Concession Agreement does stipulate the State Support Agreement but it does not in its ambit include the obligations of the Petitioner under the Concession Agreement. Obligation of the Petitioner has been delineated in the separate agreement i.e., in the State Support Agreement having its own arbitration clause for adjudication of dispute. The State Support Agreement does not make the Concession Agreement as a part of the State Support Agreement and



similarly the Concession Agreement does not make the State Support Agreement as a part of the Concession Agreement. These two agreements are, therefore, independent and separate agreements entered into between the parties.

12. Material on record indicates that Respondent No.2 had invoked the arbitration by issuing a notice under clause 9.2 of the State Support Agreement calling upon the Petitioner and Respondent No.1 to appoint their respective arbitrators. However, material on record does not disclose any further steps that have been taken in furtherance of that notice. On the other hand, consciously knowing that the Petitioner was not party to the Concession Agreement, Respondent No.2 invoked the arbitration under the Concession Agreement. Respondent No.1 also with his open eyes at the initial stage did not take any steps to contend that both agreements are composite agreements and that the Petitioner must be made a part of the Concession Agreement and also did not choose to invoke arbitration under the State Support Agreement and rather it only filed its reply to the claims raised by the Respondent No.2 against it. It was open for Respondent No.1 and Respondent No.2 to invoke arbitration against the Petitioner if it was their case that the Petitioner did not act in accordance with its obligations under the State Support Agreement. They always had the remedy to invoke the arbitration clause under the State Support Agreement if they had to make the Petitioner liable for any inaction on its part. After two years of the invocation of the arbitration and after the pleadings were complete and before the evidence could be led, the Respondent No.1 filed an application for impleadment of the Petitioner.

13. At this juncture, it is apposite to place reliance upon the Judgment of



the Apex Court in P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594 wherein the Apex Court has held as under:

"18. In this case, the first respondent had a claim for Rs 36,98,354.73 jointly against the second respondent and the appellant. According to the first respondent, it entered into the transaction with the second respondent on the instructions of the appellant and on the understanding that the appellant will also be liable and in fact, the appellant accepting its liability, had also paid Rs 13 lakhs as part-payment. It is not disputed that the appellant and the second respondent were closely held family companies managed by the same person (Ms Kanan C. Sheth). According to the appellant the share holdings in the appellant was Kanan C. Seth: 1,05,000 shares, Chetan M. Sheth: 45,000 shares and Jasumati P. Shah: 1,50,000 shares and the shareholdings in the second respondent Company was Kanan C. Sheth: 100 shares and Chetan M. Sheth: 100 shares.

19. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such



a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration.

20. In this case though the arbitration in respect of a non-member is under Bye-law 248 and arbitration in respect of the members is under Bye-law 282, as the Exchange has permitted a single arbitration against both, there could be no impediment for a single arbitration. It is this principle that has been applied by the learned Single Judge, and affirmed by the Division Bench. As the first respondent had a single claim against the second respondent and the appellant and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it is not possible to accept the contention of the appellant that there could not be a common arbitration against the appellant and the second respondent."

14. A perusal of the above paragraphs shows that if there were claims against the Petitioner then the correct course of action would have been to invoke the arbitration under the State Support Agreement and pursue that simultaneously with the Concession Agreement. Arbitration Clauses in both the agreements ought to have been invoked simultaneously and Single Tribunal could have been constituted for adjudicating the claims. Having kept quiet, it was not open for Respondent No.1 to implead the Petitioner in the Concession Agreement, to which the Petitioner is not a signatory, at a



belated stage by trying to invoke the obligations of the Petitioner which has been delineated in a separate agreement having its own arbitration clause. The contention of the learned Senior Counsel for the Petitioner that the Petitioner has been deprived of appointing its own arbitrator has merit and the same deserves to be accepted.

15. A Seven Judge Bench of the Apex Court in In Re : Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, **2023 SCC OnLine SC 1666** while dealing with the principle of arbitral autonomy has observed as under:

"71. In medieval England, recourse to arbitration was commonplace among merchants and traders. During the seventeenth and the eighteenth century, settlement of commercial disputes by arbitration was encouraged by both Chancery and the courts. In light of the widespread use of arbitration, coupled with a rapid decline in court litigation, the English courts began to actively discourage arbitration as a dispute resolution mechanism. Judicial scepticism towards arbitration proceedings mainly stemmed from the attitude of judges that "every activity that occurred within a jurisdiction should be within the purview of state law and court."

72. As cross-border commerce and transactions proliferated, companies and businesses sought different ways to resolve their commercial disputes. The formality, customs, and legal traditions of national courts were at variance with the intention of the parties to achieve a speedy and efficient resolution of their disputes. The internationalization of trade and commerce in the middle of the nineteenth century necessitated the regulation and institutionalization of arbitration. In the process, arbitration was also detached from the national legal systems, with the



growth of arbitral institutions such as the London Chamber of Arbitration and International Chamber of Commerce. This new regime of arbitration law paved the way for greater recognition of the mutual intention of parties and the authority of arbitral tribunals to resolve disputes without being bogged down by the intricacies of national legal systems. This was commended and reflected in various international instruments such as the New York Convention and the UNCITRAL Model Law. Accordingly, national laws were changed to reflect the principle of judicial non-interference in arbitration proceedings. The demands of commerce and business efficiency meant that control by national courts became subordinate to the intention of the parties and the authority of the arbitral tribunal.

73. The principle of arbitral autonomy is an integral element of the ever-evolving domain of arbitration law. Arbitral autonomy means that the parties to an arbitration agreement can exercise their contractual freedom to bestow the arbitral tribunal with the authority to decide disputes that may arise between them. The basis of arbitral autonomy is to give effect to the true intention of parties to distance themselves from the “risk of domestic judicial parochialism.”

74. The principle of judicial non-interference reflects the autonomy of arbitral tribunals. Arbitral tribunals are autonomous in the sense that they are constituted to give effect to the mutual intention of the parties to settle their disputes through a neutral and expert authority of their choice. Moreover, the competence of an arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, also indicates that the arbitral tribunal enjoys sufficient autonomy from the national courts.”



(emphasis supplied)

16. The Apex Court in Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 has observed as under:

"72. Recently, the Supreme Court of Canada in TELUS Communications Inc. v. Avraham Wellman [TELUS Communications Inc. v. Avraham Wellman, 2019 SCC OnLine Can SC 25 : 2019 SCC 19] , while conceding that arbitration as a method of dispute resolution was met with "overt hostility" for a long time on public policy grounds as it ousts jurisdiction of courts, observed that the new legislation, the Arbitration Act of 1991, marks a departure as it encourages parties to adopt arbitration in commercial and other matters. By putting party autonomy on a high pedestal, the Act mandates that the parties to a valid arbitration agreement must abide by the consensual and agreed mode of dispute resolution. The courts must show due respect to arbitration agreements particularly in commercial settings by staying the court proceedings, unless the legislative language is to the contrary. The principle of party autonomy goes hand in hand with the principle of limited court intervention, this being the fundamental principle underlying modern arbitration law. Party autonomy is weaker in non-negotiated "take it or leave it" contracts and, therefore, the legislature can through statutes shield the weakest and vulnerable contracting parties like consumers. This is not so in negotiated agreements or even in adhesion contracts having an arbitration clause in commercial settings. Virtues of commercial and civil arbitration have been recognised and accepted and the courts even encourage the use of arbitration."

17. The Apex Court in Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228 has observed as under:



Party autonomy

“38. Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 : (2016) 2 SCC (Civ) 580, Hon'ble Judges/Coram : Anil R. Dave, Kurian Joseph and Amitava Roy, JJ.] this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In para 5 of the Report, it was observed : (SCC p. 130)

“5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract— (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as “curial law”. The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., [Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305] which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance Industries Ltd. v. Union of India [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] .”

Later in para 10 of the Report, it was held : (SCC pp. 131-32)

“10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative



drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement.”

39. *In Union of India v. U.P. State Bridge Corpn. Ltd. [Union of India v. U.P. State Bridge Corpn. Ltd., (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732] this Court accepted the view [O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms Indu Malhotra, Senior Advocate)] that the A&C Act has four foundational pillars and then observed in para 16 of the Report that : (SCC p. 64)*



“16. First and paramount principle of the first pillar is ‘fair, speedy and inexpensive trial by an Arbitral Tribunal’. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to.”

40. This is also the view taken in Law and Practice of International Commercial Arbitration [Chapter 6. Conduct of the Proceedings in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration [Sixth Edn., © Kluwer Law International, Oxford University Press 2015] pp. 353-414, Para 6.07] wherein it is said:

“Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”

18. The autonomy of the Petitioner to appoint its own arbitrator to adjudicate the dispute in an agreement entered into between the parties wherein the obligations of the Petitioner has been properly delineated cannot be taken away by making the Petitioner to a party to an agreement to which it is not a signatory.

19. The concept of Group of Companies Doctrine is not applicable to the



facts of the present case. The Petitioner, Respondent No.1 and Respondent No.2 are independent entities having their own obligations to be performed under separate agreements. The Apex Court in Cox and Kings Ltd. vs. SAP India Pvt. Ltd. and Another, **2023 SCC OnLine SC 1634** has observed as under:

"120. In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator. An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.

121. In case of a composite transaction involving multiple agreements, it would be incumbent for the courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in Canara Bank (supra) observed that a composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.



122. *The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences “in connection with” the main agreement and also disputes “connected with” the subject-matter of the principal agreement. In Chloro Controls (supra), this Court clarified that the principle of “composite performance” would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the signatory and nonsignatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement. Thus, the application of the group of companies doctrine in case of composite transactions ensures accountability of all parties who have materially participated in the negotiation and performance of the transaction and by doing so have evinced a mutual intent to be bound by the agreement to arbitrate.*

123. *The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the courts and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement. The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the nonsignatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle of International Commercial Contract, 2016 provides that the subjective intention of*



the parties could be ascertained by having regard to the following circumstances:

- (a) preliminary negotiations between the parties;*
- (b) practices which the parties have established between themselves;*
- (c) the conduct of the parties subsequent to the conclusion of the contract;*
- (d) the nature and purpose of the contract;*
- (e) the meaning commonly given to terms and expressions in the trade concerned; and*
- (f) usages."*

(emphasis supplied)

20. A perusal of the above shows that the Petitioner was not a party to any negotiation between Respondent No.1 and Respondent No.2. The Petitioner was bound only by the State Support Agreement in providing certain base support to Respondent No.2. The obligations of the Petitioner are not a part of the Concession Agreement entered into between Respondent No.1 and Respondent No.2. The nature and purpose of the agreement was primarily for the purpose of widening a National Highway for which the Petitioner has no connection. The support from the Petitioner can be only for law and order. The Petitioner has, therefore, no role in the nature and purpose of the Concession Agreement entered into between Respondent No.1 and Respondent No.2. As stated above, the Petitioner, therefore, other than providing law and order and certain other support as delineated in the State Support Agreement had no role at all in the effective implementation or performance of the Concession Agreement entered into between Respondent



No.1 and Respondent No.2. The obligation of the Petitioner which is delineated in Clause 3 of the State Support Agreement was primarily for traffic management which was not the main purpose of the Concession Agreement and, therefore, the Petitioner could have only at best be a witness but not a party to ascertain the claims between Respondent No.1 and Respondent No.2 having its own defaulting terms and having its own separate termination clauses.

21. Clause 7 of the State Support Agreement specifies the liabilities in case of breach on the part of the State of Kerala and that State Support Agreement has its own arbitration clause. Since Respondent No.2 has not proceeded further by invoking the arbitration clause and Respondent No.2 has also chosen not to invoke the arbitration clause, the State of Kerala cannot be made a party to the dispute between Respondent No.1 and Respondent No.2 which does not stipulate any liability on the part of the State of Kerala. Even though Chapter VII stipulates that if the State of Kerala by any act of omission or commission creates circumstances that have material adverse effect on the performance of its obligations by the Concessionaire and have failed to cure the same within 90 days of receipt of notice by NHAI in this behalf from the Concessionaire would amount to default, there is nothing on record to show that the State of Kerala was in any way responsible in the preparation of the agreement between Respondent No.1 and Respondent No.2. It also cannot be stated that the State of Kerala at any point of time has given any intention to be bound by the agreement entered into between Respondent No.1 and Respondent No.2. The circumstances do not indicate the participation of the State of Kerala in the negotiation of the contract between Respondent No.1 and Respondent



No.2.

22. In view of the above, this Court is of the opinion that the Petitioner's right to appoint its own Arbitrator cannot be taken away. The Concession Agreement and the State Support Agreement have been entered into between the parties entirely for different purposes. The Petitioner is neither necessary nor a proper party in the Concession Agreement entered into between Respondent No.1 and Respondent No.2 and the Petitioner's role being only one for providing certain ancillary support for smooth functioning of the National Highway.

23. It is always open for the Parties to start arbitration *de novo* by taking steps invoking arbitration clauses and by having a composite Arbitration/Arbitration Tribunal covering both the agreements.

24. Resultantly, the writ petition is allowed. The Impugned Order dated 15.03.2022 passed by the Arbitral Tribunal is set aside. Pending applications, if any, stand disposed of.

SUBRAMONIUM PRASAD, J

APRIL 24, 2024

S. Zakir