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

% *Date of Decision: 30.01.2024*

+ **FAO(OS) (COMM) 98/2019 and CM Nos.20964/2019 & 7233/2020**

M/S EARTHCON CONSTRUCTIONS PVT. LTD. Appellant

Through: Mr Sanjeev Kumar Dubey, Sr.
Advocate with Mr Mukesh Gupta, Mr
Suyash Gupta, Mr Asif Inam and Mr
Puspam Arya, Advocates

Versus

M/S MAHAMAYA INFRABUILD PVT. LTD. Respondent

Through: Mr Srinivasan Ramaswamy, Mr
Shikhar Khare and Mr Rajesh Pathak,
Advocates

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J.

INTRODUCTION

1. The appellant – M/s Earthcon Constructions Pvt. Ltd. (hereafter ‘ECPL’) has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 01.02.2019 (hereafter *the impugned order*) in O.M.P.(COMM.)51/2019 captioned *Earthcon Constructions Pvt. Ltd. v. Mahamaya Infrabuild Pvt. Ltd.*

2. ECPL had filed the aforesaid application [O.M.P.(COMM.)51/2019] under Section 34 of the A&C Act praying that the “consent award dated

FAO(OS) (COMM) 98/2019

Page 1 of 24



30.03.2015 and the order of conclusion of the proceedings dated 17.05.2018 passed by the Arbitral Tribunal” be set aside. The award dated 30.03.2015 (hereafter *the consent award*) was delivered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*) on the basis of settlement arrived at between the parties and pursuant to a joint application dated 13.01.2015 styled as an application under Order XXIII Rule 3 of the Code of Civil Procedure, 1908 (hereafter *the CPC*).

3. ECPL’s application under Section 34 of the A&C Act, OMP (COMM) 51/2019 was filed much beyond the period of three months as stipulated under Section 34(3) of the A&C Act. Accordingly, ECPL filed an accompanying application [IA No.1586/2019 in OMP(COMM) No.51/2019] seeking exclusion of a period of 141 days – the period between 23.07.2018 and 10.12.2018 – for computing the period of limitation in filing the application. EPCL claimed that the period between 23.07.2018 and 10.12.2018 was liable to be excluded under Section 14 of the Limitation Act, 1963 (hereafter *the Limitation Act*) as during the said period ECPL was pursuing its petition [ARB.P.515/2018] under Section 11 of the A&C Act and a petition [OMP(T)(COMM) 93/2018] under Sections 14 and 15 of the A&C Act. The said petition under Section 11 of the A&C Act was listed on 23.07.2018 and the petition under Sections 14 and 15 of the A&C Act was filed subsequently. The said petitions [ARB.P.515/2018 and OMP(T)(COMM) 93/2018] were dismissed by an order dated 14.09.2018. ECPL filed two Special Leave Petitions (Civil) No.31822/2018 and 31826/2018 impugning the order dated 14.09.2018. However, the Supreme Court dismissed the same on 10.12.2018. Since ECPL had moved the



aforementioned petition under Section 11 of the A&C Act (ARB. P 515/2018) on 23.07.2018, it has taken the same as the date of commencement of the period to be excluded for computation of the period of limitation. ECPL claimed that it had pursued the aforesaid proceedings with due diligence and in good faith, therefore the time spent in pursuing the said proceeding was liable to be excluded under Section 14 of the Limitation Act.

4. The learned Single Judge found that ECPL had not prosecuted its petitions in this Court in good faith or with due diligence. It also found that the stands taken by ECPL in various proceedings were contradictory and accordingly dismissed the said application. Consequently, ECPL's application under Section 34 of the A&C Act was also dismissed.

FACTUAL CONTEXT

5. The respondent – M/s Mahamaya Infrabuild Pvt. Ltd. (hereafter 'MIPL') was allotted a plot bearing No. GH-B(GH-14 TO GH-17) measuring 10742 sq. mtr. in Housing Sector I.A Talanagri, Aligarh, Uttar Pradesh (hereafter *the plot in question*) by the Uttar Pradesh State Industrial Development Corporation Ltd. (hereafter *UPSIDC*) on the lease hold basis for 90 years.

6. The parties had entered into a Memorandum of Understanding (hereafter *the MoU*), for the development, construction and sale of a group housing complex, to be executed on the plot in question (the date of the MoU is stated to be 10.08.2011 in the pleadings but it is mentioned as 02.08.2011 in the Agreement dated 09.01.2013, which was entered into



subsequently).

7. Subsequent to the execution of the MoU, the parties additionally agreed to enter into an agreement dated 09.01.2013 (hereafter *the Agreement*). As stated in Clause 1 of the Agreement, it was agreed that a consideration of ₹17.40 crores (Rupees Seventeen Crores and Forty Lacs) would be paid by ECPL to MIPL. And, in case ECPL fails to pay the aforesaid sum, MIPL would have the right to forthwith terminate the MoU, take over the assignment and forfeit the sum of money received from ECPL.

8. In terms of Clause 2 of the Agreement, ECPL agreed to pay a sum of ₹1 crore (Rupees One Crore) by cheques dated 09.01.2013 and 14.01.2013 to MIPL. It was further agreed that the sum of ₹1 crore would be paid by ECPL, within 30 days of the receipt of permission from UPSIDC to mortgage the plot in question in favour of ECPL. Further, ECPL claims that the despite several requests and reminders, MIPL failed to fulfil its obligation according to the terms of the Agreement.

9. On 28.06.2013, ECPL served a legal notice on MIPL calling upon MIPL to specifically perform the MoU; refund of the amount paid to MIPL and; to obtain requisite permission to mortgage the plot in question from UPSIDC in the name of ECPL in order to enable the customers to apply for financial assistance to purchase the developed units in the project being developed on the plot in question. MIPL responded to the said legal notice by a letter dated 07.08.2013 whereby, MIPL denied the issues raised by the ECPL.

10. ECPL, thereafter, invoked arbitration clause in terms of Clause 12 of



the MoU by serving a notice dated 28.01.2014 on MIPL. MIPL responded to the notice dated 28.01.2014 by a letter dated 25.02.2014 denying the allegations made by ECPL. Thereafter, by its letter dated 05.03.2014, MIPL terminated the Agreement and the MoU between the parties.

11. ECPL replied to MIPL's letter by the letter dated 07.03.2014 and simultaneously filed a petition [being ARB. P. 149/2014] under Section 11(6) of the A&C Act, in this Court, for appointment of an Arbitrator to adjudicate the disputes that had arisen. This Court had allowed the said petition by an order dated 21.04.2014 and a Sole Arbitrator was appointed to adjudicate the dispute between EPCL and MIPL.

12. During the course of the arbitral proceedings, the Arbitral Tribunal (learned Sole Arbitrator) encouraged the parties to amicably settle their disputes.

13. On 06.01.2015, both ECPL and MIPL submitted a draft of the terms of the settlement and thereafter, on 13.01.2015, moved a joint application styled as an application under Order XXIII Rule 3 of the CPC read with Section 30 of the A&C Act, praying for an award in terms of their settlement. The said application was duly signed and supported by affidavit of both the parties.

14. In terms of the settlement, ECPL agreed to pay a sum of ₹15.20 crores (Rupees Fifteen Crores and Twenty Lacs) to MIPL along with the remaining dues and interest as payable to UPSIDC in respect of the plot in question. ECPL agreed to pay the first tranche of ₹2,00,00,000/- (Rupees Two Crores) on or before 31.01.2015. MIPL agreed that on receipt of the said amount, it



would clear the dues of UPSIDC and adjust the remaining amount towards ECPL's liability of ₹15.20 crores (Rupees Fifteen Crores and Twenty Lacs). MIPL also agreed that on payment of the entire sum (₹15.20 crores plus dues of UPSIDC along with interest), MIPL would cease to have any right or interest in the plot in question. ECPL agreed to pay the entire amount on or before 31.08.2015. It was further agreed between the parties that if ECPL did not pay the entire amount before the said date, it could do so by 30.11.2015 along with interest at the rate of 18% per annum, which would be computed with effect from 01.09.2015 till the date of payment. However, if ECPL failed to pay the entire amount of ₹15.20 crores by 30.11.2015, all amounts paid by ECPL would be forfeited and the proceedings would be reinstated from the stage as obtained prior to the filing of the application. Paragraph no. III(D) of the terms of the said settlement, as set out in the application¹, is relevant and set out below:

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

15. It is relevant to note that after the draft of the settlement terms was placed before the Arbitral Tribunal on 06.01.2015, certain suggestions were made and the matter was listed on 13.01.2015 by the Arbitral Tribunal. Although, the order dated 13.01.2015 is not on record, however, it is

¹ Paragraph no.4 of the application.



apparent from the subsequent proceedings that on the said date it was discussed that ECPL would pay the sum of ₹2,00,00,000/- (Rupees Two Crores) as mentioned in the joint application filed by the parties and MIPL would clear the entire dues of UPSIDC as agreed. The orders also indicate that the hearing was held before the Arbitral Tribunal on 09.03.2015 where it was recorded that ECPL had paid the sum of ₹2,00,00,000/- and MIPL had paid an amount of ₹1,27,20,370/- (Rupees One Crore Twenty Seven Lacs Twenty Thousand Three Hundred Seventy) against full and final payment due against the plot in question and the matter was directed to be listed on 30.03.2015 for final disposal of the arbitration proceedings as per the terms of the settlement between the parties.

16. On 30.03.2015, both the parties had appeared and jointly stated that “the dispute is finally settled and no part of the dispute survived”. Accordingly, the Arbitral Tribunal recorded the same and allowed the application, styled as application under Order XXIII Rule 3 of the CPC, filed by the parties. The consent award dated 30.03.2015 is set out below:

“AWARD

“The order of 9th March, 2015 reads as follows:

“As per the order dated 13.01.2015, the Claimant has paid Rs.2 Crores to the Respondent and the Respondent has paid Rs.1,27,20,370/- as full and final payment against Plot No.GH-B (GH-14 to GH-17) at Industrial Area, Tala Nagar, Ramghat Road, Aligarh by RTGS on 03.03.2015.

Accordingly the matter will be listed on 30.03.2015 at 4.00 p.m. for final disposal of arbitration proceedings as per the terms of settlement between the parties.”



Both the parties have appeared pursuant to the above order and jointly state that the dispute is finally settled and no part of the dispute survives.

Accordingly, Application under O23R23 CPC dated 12.01.2015 which is signed by both the parties and their Counsel and supported by affidavits of both the parties have been perused by me and is found to be lawful, just and reasonable.

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

Proceedings before the Arbitral Tribunal after the consent award

17. ECPL failed to pay the remaining amount as agreed in terms of the settlement and filed an application seeking extension of further one month's time [from 30.11.2015 to 31.12.2015] for payment of the remaining amount of ₹14,47,20,370/-, and, sought modification of the award in the aforesaid terms. The said application was allowed by the Arbitral Tribunal by the consent of the parties and by an order dated 30.11.2015, the interim award and the schedule thereto was amended.

18. ECPL filed another application dated 28.12.2015 seeking further extension of time till 31.01.2016 to pay the balance amount.

19. Although, MIPL was not agreeable to further extension of time till 31.01.2016, the Arbitral Tribunal passed an order dated 05.01.2016 granting a last and the final opportunity to ECPL to make the payment as agreed failing which the proceedings would stand revived from 30.03.2015 in terms of the settlement terms. The Arbitral Tribunal also stated that no further



application for extension of time would be entertained.

20. ECPL failed to pay the entire dues during the extended period as well and once again moved an application to amend the award by extending the time for making the remaining payment to 31.03.2016. ECPL also tendered an amount of ₹1,00,00,000/- (Rupees One Crore) at the hearing held on 24.02.2016 and once again assured the Arbitral Tribunal that the balance payment would be made along with interest. The Arbitral Tribunal acceded to the said request and passed an order dated 24.02.2016 extending the time for making the payment to 31.03.2016 and re-listed the proceedings on 07.04.2016. However, ECPL failed to make the payment within the time as extended.

21. The arbitral proceedings of 07.04.2016 are neither on record nor the contents of the same are mentioned in the appeal. However, ECPL claims that a public notice was published on 28.04.2016 referring to an order dated 29.10.2015 passed by the Company Law Board (hereafter *the CLB*) in Company Petition No.106/2015 captioned *Anil Dwarka Prasad Agarwal v. Mahamaya Infrabuild Pvt. Ltd.*, whereby MIPL and its directors were directed to maintain *status quo* with regard to their assets as on 29.10.2015. The order passed by the Arbitral Tribunal on 29.04.2016 indicates that a request was made by the counsel for ECPL for further extension of time “*in order to get the said order of CLB vacated / set aside / modified*”. The learned counsel also stated that the funds were available and therefore, no interest should be levied from the said date. The Arbitral Tribunal deferred consideration of the said application pending furnishing of proof of readiness and willingness to pay the balance amount. Thus, on the pretext of



getting the CLB's order vacated/modified, ECPL sought further time to make the payment.

22. Thereafter, ECPL filed an application before the Arbitral Tribunal for setting aside the consent award referring to same as an interim award dated 30.03.2015. ECPL in its application claimed that it had arranged the funds for payment of the dues. However, before the amount could be paid, ECPL had come across the public notice and had become aware of the order dated 29.10.2015 of CLB directing, *inter alia*, that *status quo* of MIPL's assets be maintained. ECPL alleged that MIPL had concealed the disputes *inter se* its directors / shareholders which were pending before the CLB and thus, had committed fraud. ECPL prayed that the award, as amended from time to time, be set aside and MIPL be directed to refund the amount of ₹3,00,00,000/- (Rupees Three Crores) along with interest at the rate of 18% per annum.

23. MIPL also filed an application before the Arbitral Tribunal praying that directions be issued for payment of the outstanding amount in terms of the consent award dated 30.03.2015, as modified without any delay.

24. It appears that the Arbitral Tribunal continued to encourage the parties to resolve their disputes and differences. However, there was no further consensus between the parties. Accordingly, on 19.09.2017, the Arbitral Tribunal passed an order, which indicates that the Arbitral Tribunal decided to resume the proceedings in terms of Clause III(D) of the settlement terms as included in the settlement agreement filed by the parties under Order XXIII Rule 3 of the CPC. In terms of the settlement agreement, the parties



had agreed that on failure of ECPL to pay the amounts as agreed, the amount already paid would be forfeited and the proceedings would be revived from the stage as obtained prior to filing of the application for consent award.

25. ECPL also filed an application seeking to amend its Statement of Claims. MIPL filed a response to the said application to contest the same.

26. ECPL's applications for setting aside the consent award and for amendment of its Statement of Claims, were rejected by the Arbitral Tribunal by an order dated 31.01.2018. The Arbitral Tribunal found that there was no merit in ECPL's application for setting aside the award. According to MIPL the litigation in the CLB was sponsored by ECPL. Further, the CLB by an order dated 19.07.2016 had modified its earlier order and granted liberty to proceed with the enforcement and execution of the consent award with the condition that the amounts received by MIPL would be invested in terms of its directions.

27. The matter was again listed before the Arbitral Tribunal on 17.05.2018. On that date the counsel for ECPL referred to an application filed in this Court, whereby ECPL claimed that the mandate of the Arbitral Tribunal stood terminated and sought appointment of an arbitrator to adjudicate "*fresh disputes which had arisen post reference order dated 21.04.2014 passed in Arbitration Petition No.149/2014*". The learned senior counsel appearing for MIPL submitted that since it was ECPL's stand that the mandate of the Arbitral Tribunal was over, MIPL would file a petition for executing the award dated 30.03.2015. The counsel for both the parties stated that nothing further survived before the Arbitral Tribunal.



Accordingly, the Arbitral Tribunal passed the order recording that the arbitral proceedings stood concluded.

Other proceedings initiated prior to 17.05.2018.

28. After the Arbitral Tribunal had rejected ECPL's application for setting aside the award and amendment of the Statement of Claim by an order dated 31.01.2018, ECPL filed a petition [ARB.P. 351/2018 captioned *Earthcon Constructions Pvt. Ltd. v. Mahamaya Infrabuild Pvt. Ltd.*] under Section 11(6) of the A&C Act and was listed before this Court on 09.05.2018. The said petition was dismissed as withdrawn. However, the Court clarified that the same would not prejudice ECPL in any other proceedings.

29. The said petition has not been placed on record but it is apparent from the order dated 17.05.2018 passed by the Arbitral Tribunal that the petition was premised on the basis that the mandate of the Arbitral Tribunal was terminated and an Arbitrator was required to be appointed to adjudicate the disputes arising after the reference order dated 21.04.2014 passed by this Court in ARB. P. 149/2014.

30. After the said petition [ARB.P. 351/2018] was withdrawn, ECPL served another notice to MIPL nominating its arbitrator and calling upon MIPL to appoint its nominee arbitrator.

Proceedings initiated after 17.05.2018

31. MIPL filed a petition [OMP (ENF.) (COMM.) 142/2018 captioned *Mahamaya Infrabuild Pvt. Ltd. v. Earthcon Constructions Pvt. Ltd.*] for



execution of the consent award. MIPL also responded to the notice dated 04.06.2018, *inter alia*, stating that once an arbitral award had been passed, the same could not be subject matter of another arbitration.

32. On 23.07.2018, ECPL moved another application [ARB.P.515/2018] under Section 11(6) of the A&C Act seeking appointment of an arbitrator for adjudication of the disputes.

33. In the order dated 23.07.2018 passed by this Court in ARB.P.515/2018, the Court noted that on account of non-payment of the agreed amount in terms of the settlement agreement and the award, the arbitration proceedings were revived before the Arbitral Tribunal and the arbitrator had granted time to ECPL to lead evidence in support of its claim. However, before the Arbitral Tribunal, ECPL had requested that the arbitral proceedings be terminated as nothing survived before the Arbitral Tribunal. Accordingly, the Arbitral Tribunal had terminated the proceedings in terms of Section 32 of the A&C Act.

34. It was next contended on behalf of ECPL that the Arbitral Tribunal had refused to entertain the amendment application and therefore, the Arbitral Tribunal was required to be appointed. MIPL contested the said claim on the ground that further disputes sought to be raised do not fall within the arbitration agreement since the same do not arise out of the MoU. Accordingly, this Court had issued directions for completion of pleadings in ARB.P. No.515/2018 and directed that the same be listed on 04.09.2018.

35. Aggrieved by the observations of the Arbitral Tribunal, which in effect foreclosed ECPL's right to agitate claims that were covered under the



earlier reference, ECPL preferred a petition seeking a review of the order dated 23.07.2018 passed in ARB.P. No.515/2018 being Review Petition No.341/2018.

36. This Court dismissed the said review petition by an order dated 05.09.2018.

37. On 04.09.2018, ECPL filed a petition [OMP(T)(COMM) 93/2018] under Sections 14 and 15 of the A&C Act praying that orders be passed under Section 14(2) of the A&C Act and an arbitrator be appointed in terms of Section 15(2) of the A&C Act to adjudicate the disputes between the parties which have arisen in the aftermath of the order dated 30.03.2015 (consent award).

38. The petitions filed by ECPL under Section 11 of the A&C Act and under Section 14/15 of the A&C Act [ARB.P.515/2018 and OMP(T)(COMM) 93/2018] were dismissed by the learned Single Judge by a common order dated 14.09.2018.

39. ECPL sought to appeal the order dated 14.09.2018 by filing Special Leave Petitions (Civil) No.31822/2018 and 31826/2018 before the Supreme Court but the same were dismissed by an order dated 10.12.2018.

The present proceedings

40. The above-captioned appeal was listed before this Court on 03.05.2019 and with the consent of the parties, the parties were referred for mediation before Hon'ble Mr. Justice Madan B. Lokur, a former Judge of the Supreme Court of India. The mediation proceedings were unsuccessful,

FAO(OS) (COMM) 98/2019

Page 14 of 24



and the same was noted in the order dated 08.07.2019.

41. On 15.01.2020, this Court passed an order noting MIPL's contention that the possession of the plot in question remained with ECPL despite failing to pay the entire agreed consideration for the same. However, the Court had noted that ECPL had paid a sum of ₹3 crores. Accordingly, this Court had directed ECPL to deposit the sum of ₹12.20 crores with the Registry of this Court to show its *bona fide* and / or in the alternative handover the vacant physical possession of the plot in question to MIPL. The Court had also directed that in such eventuality MIPL would not create any encumbrance pending decision in the present appeal.

42. ECPL filed a Special Leave Petition against the said order being SLP(C) No.7251/2020, which was disposed of by an order dated 05.09.2023. The said order is set out below:

“1. We have heard learned counsel for the parties.

2. Concededly, the award in this case was a consent award; the petitioner unsuccessfully challenged it under Section 34 of the proceeding. Aggrieved by the order rejecting the said Section 34 application, the petitioner preferred an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. That appeal was entertained, conditionally, and when petitioner was directed to deposit Rs.12.2 Crores to exhibit its *bona fides* since it sought conveyance of the property in question. The petitioner is aggrieved by the imposition of the conditions.

3. After hearing learned counsel for the parties, this Court is of the considered opinion that in the interest of justice, the condition should not be enforced for a period of one month. The Executing Court is directed to complete the proceedings pending before it within that one month.



4. The Special Leave Petition is disposed of in above-terms.

5. Pending application also stands disposed of.”

43. In the meantime, the appeal was listed on various dates but the same was deferred awaiting the decision of the Supreme Court in the aforementioned Special Leave Petition – SLP(C) No.7251/2020.

SUBMISSIONS

44. Mr Sanjeev Kumar Dubey, learned senior counsel appearing for ECPL submitted that the learned Single Judge had erred in dismissing ECPL’s application under Section 14 of the Limitation Act. He submitted that the Court had not appreciated that ECPL had not filed an application under Section 34 of the A&C Act since it was pursuing its remedies for constitution of an arbitral tribunal for adjudicating its various disputes that had arisen after 30.03.2015 (the date of the consent award) . He submitted that ECPL’s principal contention was that the consent award had been obtained by fraud as MIPL had not disclosed the disputes pending before the CLB. He further submitted that MIPL had not disclosed the order dated 29.10.2015 passed by the CLB, which prohibited MIPL from selling its assets. He submitted that ECPL was entitled to void the settlement which had resulted in the consent award since the same was obtained by fraud. However, ECPL’s claim as aforesaid had remained unadjudicated. On a pointed query of this Court as to what was the impediment in implementing the consent terms since the CLB had permitted sale of the plot in execution or enforcement of the consent award. Mr. Dubey responded that there was no impediment but ECPL did not wish to deal with the party that had



committed a fraud.

REASONS AND CONCLUSION

45. The controversy in the present appeal is of a small compass. It essentially involves two questions. First, whether Section 14 of the Limitation Act is applicable for excluding the time spent by ECPL in proceedings under Section 11 and Sections 14 and 15 of the A&C Act before this Court as well as in the Special Leave Petitions filed before the Supreme Court. And second, whether the adverse observations made by the learned Single Judge to the effect that the conduct of ECPL was *mala fide* and therefore, did not warrant grant of benefit under Section 14 of the Limitation Act, are warranted.

46. Sub-sections (1) and (2) of Section 14 of the Limitation Act are set out below:

“14. Exclusion of time of proceeding *bona fide* in court without jurisdiction. – (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, wither in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other



cause of a like nature, is unable to entertain it.”

47. Sub-section (1) of Section 14 of the Limitation Act is applicable for excluding the period of limitation for filing any suit in cases where the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a court of first instance or of appeal or revision, against the defendant provided the conditions specified in Sub-section (1) of Section 14 of the Limitation Act are satisfied. Sub-section (2) of Section 14 of the Limitation Act posits that the time spent by an applicant in prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief would be excluded for computing the period of limitation for any application. This is subject to the other conditions as mentioned in Sub-section (2) of Section 14 of the Limitation Act being satisfied.

48. An application for setting aside the arbitral award under Section 34 of the A&C Act is neither a suit nor an appellate proceeding arising from a suit. It is an application for setting aside an arbitral award if the grounds as set out in Sub-sections (2) and (2A) of Section 34 of the A&C Act are established. The Court hearing an application under Section 34 of the A&C Act does not adjudicate the disputes between the parties, which are the subject matter of the arbitration. The examination is confined to determining whether the arbitral award is required to be set aside. It does not entail a merit review of the disputes. In this view, Sub-section (1) of Section 14 of the Limitation Act is inapplicable. Sub-section (2) of Section 14 of the Limitation Act would be applicable if the given conditions are satisfied.

49. A plain reading of Sub-section (2) of Section 14 of the Limitation Act
FAO(OS) (COMM) 98/2019



indicates that the same would be applicable if three conditions are satisfied. First, that the applicant has been prosecuting with due diligence another civil proceeding against the same party for the same relief. Second, the applicant ought to have been prosecuting the proceedings in good faith in a Court. And third, that the Court on account of defect in the jurisdiction or a cause of like nature, is unable to entertain it.

50. ECPL had filed the petition under Section 11 of the A&C Act [ARB.P.515/2018] for appointment of an arbitrator. It had also filed an application [OMP(T)(COMM) 93/2018] for declaring that the mandate of the arbitrator stood terminated and an arbitrator was required to be appointed under Section 15 of the A&C Act.

51. It is at once clear that none of these petitions were for the “*same relief*” as sought by ECPL in its application under Section 34 of the A&C Act. ECPL’s application under Section 34 of the A&C Act was for setting aside the consent award and the order dated 17.05.2018 concluding the arbitral proceedings; it was not for seeking appointment of an arbitrator for adjudication of any disputes. We are unable to accept that the reliefs sought by ECPL in its petitions under Section 11 of the A&C Act and, under Sections 14 and 15 of the A&C Act [ARB.P.515/2018 and OMP(T)(COMM) 93/2018] could be construed as the same relief as sought by ECPL in O.M.P.(COMM.) 51/2019.

52. It is, thus, apparent that ECPL’s application to seek exclusion of the period of 141 days (between 23.07.2018 to 10.12.2018) under Section 14 of the Limitation Act, is misconceived and is liable to be rejected on this



ground alone.

53. In view of the above, it is not necessary for this Court to examine the question whether the learned Single Judge's findings to the effect that ECPL's prosecution of the proceedings was *mala fide*, is justified. However, for the sake of completeness, this Court considers it apposite to address the said question as well. As observed above, the provisions of Section 14 of the Limitation Act are applicable only if the applicant has been pursuing its relief in another civil proceedings in good faith and with due diligence but the Court cannot entertain the same on account of any defect in jurisdiction or other cause of like nature.

54. In the present case, it is apparent that ECPL's recourse to proceedings in ARB.P.515/2018 and OMP(T)(COMM) 93/2018 is not *bona fide*. ECPL had entered into a settlement agreement before the Arbitral Tribunal. In terms of the settlement, ECPL was required to acquire the MIPL's right in respect of the plot for a consideration of ₹15.20 crores in addition to the dues payable to UPSIDC. The parties had jointly invited the Arbitral Tribunal to deliver the consent award. Since, ECPL failed to pay the consideration as agreed within the stipulated time, the amounts paid by it were liable to be forfeited and the parties were to be restored to the same position as obtained on the date prior to filing of the application for the consent award (styled as application under Order XXIII Rule 3 of the CPC). Notwithstanding the same, ECPL approached the Arbitral Tribunal for extension of time to pay the agreed consideration and for modification of the award. At the instance of ECPL, the Arbitral Tribunal extended the time for payment of the consideration till 31.12.2015. The time for payment of the



balance consideration was once again extended by the Arbitral Tribunal at the instance of ECPL, to 31.01.2016. The time for making the payment was yet again extended by the Arbitral Tribunal till 31.03.2016 but ECPL failed to discharge its obligation.

55. The record clearly reflects that the proceedings were resumed by the Arbitral Tribunal at the instance of ECPL. However, in its petition under Sections 14 and 15 of the A&C Act [OMP(T)(COMM)93/2018] filed for appointment of an arbitrator, ECPL took a contrary stand and claimed that the Arbitral Tribunal had become *functus officio* after the delivery of the consent award on 30.03.2015.

56. It is also material to note that ECPL filed an application seeking recall of the award dated 30.03.2015 and also attempted to raise two additional claims. The first being refund of an amount of ₹3,00,00,000/- along with interest at the rate of 18% per annum and second, for damages quantified at ₹10,00,00,000/- for loss of goodwill and business loss on account of alleged concealment of pending litigation by MIPL. ECPL's claim in this regard rests on CLB's order dated 29.10.2015, *inter alia*, directing MIPL to maintain *status quo* as to its assets. Undisputedly, the said order was modified by a subsequent order dated 19.07.2016. Admittedly, ECPL was aware of the order when the matter was listed before the Arbitral Tribunal on 29.04.2016. It is important to note that on the said date, ECPL did not make any allegation that the consent award was procured by fraudulent misrepresentation or suppression of facts. It was not ECPL's stand that it desired to void the terms of the settlement. On the contrary, ECPL sought further extension of time in order to get the CLB's order vacated, set aside



or modified and to make the balance payment. As noted above, the order dated 29.10.2015 passed by the CLB was modified. However, ECPL failed to make the balance payment. Inconsistent with its earlier stand that it required time for vacation/modification of the order dated 29.10.2015 in order to make payment to MIPL, ECPL now turned around and claimed that the consent award was voidable as it was secured by suppressing the litigation *inter-se* the directors/shareholders of MIPL pending before the CLB.

57. It is apparent that ECPL's change in stand is an afterthought to avoid its obligation under the consent award and the consequences for failure to perform the same. Accordingly, we concur with the finding of the learned Single Judge that the circumstances clearly show that ECPL was not prosecuting its petitions in this Court with good faith and due diligence.

58. ECPL's petition under Section 11(6) of the A&C Act (ARB.P. 515/2018) for appointment of an arbitrator was premised on the basis that ECPL had additional claims, which were not covered under the earlier reference and therefore, an arbitral tribunal was required to be constituted for adjudication of the said claims. ECPL withdrew its first application for appointment of an arbitrator [being ARB. P. 351/2018]. ECPL contends that the said petition was withdrawn because ECPL had not issued a notice under Section 21 of the A&C Act. ECPL once again filed a petition under Section 11(6) of the A&C Act [ARB.P.515/2018] claiming that the additional claims were not covered under the earlier reference and a fresh arbitration had commenced pursuant to its notice. While the said petition was pending, ECPL also filed a petition under Sections 14 and 15 of the A&C Act which



was premised on the basis that the mandate of the arbitrator stood terminated and an arbitrator was required to be appointed under Section 15 of the A&C Act. ECPL claimed that its additional claims were interlinked with the earlier reference and therefore sought substitution of the Sole Arbitrator under Section 15 of the A&C Act

59. Relief under Section 15 of the A&C Act would be available only if the arbitral proceedings had continued. Thus, on one hand ECPL sought appointment of an arbitrator by claiming that it had additional claims, which were not subject matter of the earlier reference (arbitration before the Arbitral Tribunal) and, on the other hand, sought appointment of an arbitrator under Section 15 of the A&C Act (which provides for appointment of a substitute arbitrator where the mandate of an arbitrator terminates). Although, ECPL has sought to cover the inherent inconsistencies by clever drafting but it is difficult to reconcile the two proceedings – one premised on the basis that the subject disputes are not covered by the earlier arbitration and the other that the earlier reference covers the disputes but the mandate of the arbitrator is terminated.

60. The learned Single Judge had rejected the said petitions. ECPL availed of its recourse by approaching the Supreme Court by filing Special Leave Petitions, which too were rejected.

61. It is also relevant to note that the Arbitral Tribunal had terminated the arbitration proceedings on a joint request by the learned senior counsels for the parties and ECPL now seeks to challenge the said consent order as well as the consent award dated 30.03.2015.



62. Even if we accept that ECPL could maintain a challenge to the consent award (which we do not) and that the period of 141 days between 23.07.2018 and 10.12.2018 is liable to be excluded under Section 14 of the Limitation Act (a claim that we reject), the application [OMP(COMM) 51/2019] to challenge the consent award would be barred by limitation as the same was not filed within the period of three months from the date of the consent award.

63. The present appeal is unmerited and dismissed with costs quantified at ₹1,00,000/- payable to MIPL. All pending applications are also disposed of.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

JANUARY 30, 2024
‘gsr’