

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMM. ARBITRATION APPLICATION NO.155 OF 2024

Mudhit Madanlal Gupta

...Petitioner

Versus

Emgee Enclave LLP and Ors.

...Respondents

Mr. Rohan Cama a/w. Ms. Minal Chandnani, Annie Cardoz i/b Minal Chandnani for the Petitioner.

Mr. Dharam Jumanani a/w. Mr. Mihir Nerurkar, Mr. Rickin Dang i/b M/s. Ganesh & Co. for Respondent No.2.

Mr. Nirav Shah i/b Little & Co for Respondent No.3.

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE : JANUARY 23, 2025

ORAL JUDGEMENT (*Per. Somasekhar Sundaresan J.*)

Context and Background:

1. This is an Application under Section 11 of the Arbitration and Conciliation Act, 1996 (*"the Act"*) seeking appointment of an arbitrator to refer the disputes and differences being raised by the Applicant which essentially relate to a Loan Agreement dated April 2, 2018, which admittedly contains an arbitration agreement.

2. The facts of the case present a unique situation inasmuch as none of the Respondents contest the existence of an arbitration agreement, but one of them asserts an element of constructive *res judicata*, and also invokes the Fifth Schedule of the Act, while others submit that the application for a reference to arbitration is premature.

3. Learned Counsel on behalf of Respondent No.2 submits that disputes and differences between the parties relate to very same Loan Agreement that had already been referred by a Learned Single Judge of this Court to arbitration, by an order dated March 15, 2022, which culminated in an Arbitral Award dated March 2, 2023. The Arbitral Award, essentially rejected the declaratory relief sought by Respondent No. 2 (the Claimant in that arbitration) that the guarantee issued by him stood extinguished.

4. Respondent No.2, among others, is a guarantor of a loan of Rs.6.95 crores given by the Petitioner to the Respondent No.1, a Limited Liability Partnership, where Respondent No.2 is one of the partners. Two other partners of Respondent No.1 i.e. Respondent No.3 and Respondent No.4 were also guarantors in respect of the obligations owed by Respondent No.1 to the Petitioner, under the aforesaid Loan Agreement.

5. The Arbitral Award passed by Justice (Retd.) Akil Kureshi, deals with certain issues extensively. The core issue presented before the

Learned Sole Arbitrator in the last round was whether the Petitioner's dual entitlement, namely, to repayment of the loan, and reinstatement as a partner, were two mutually exclusive options for the Petitioner to elect from, or whether they were concurrent options, both of which the Petitioner could ride on. In a nutshell, the Arbitral Award made by Justice Kureshi rules that both options were available to the Petitioner but the Petitioner had to elect one of the two options. The Arbitral Award found that the Petitioner did elect, although belatedly, for repayment instead of reinstatement, and that the guarantee given by Respondent No. 2 could not stand extinguished.

Respondents' Conflicting Contentions:

6. The basis of the opposition by Learned Counsel for Respondent No.2 to referring the matter to arbitration is that the issue being raised now (dispute over the default by the Respondent No. 1 in repaying the loan and the default by the other Respondents in honouring the guarantee) were already covered by the earlier arbitration, or were capable of being raised and covered in the earlier round. Therefore, he would submit, a claim and a dispute over such payment obligations being defaulted upon, are covered by constructive *res judicata*. According to him, the Petitioner could have raised any and every grievance that he had at that time before the Learned Sole Arbitrator. Today, it would not be open for him to seek arbitration for resolution of

disputes under the very same agreement, since the disputes had already been adjudicated.

7. In sharp contrast, Learned Counsel for Respondent No.3 and 4, who are also guarantors for the very same obligations, raise a different ground. Respondent Nos. 3 and 4 instruct their Counsel to submit that the invocation of arbitration is premature. According to them, there is no crystallised default yet by Respondent No. 1 and therefore, this is not the stage when disputes over payment default under the loan and the guarantee could be referred to arbitration. By this token, in their view, once there is a certain default, arbitration may be invoked.

8. All these competing grounds from the Respondents in their bid to stave off a reference to arbitration are subject matter of merits, which entirely falls within the domain of arbitral tribunal. It would actually be inappropriate for the Section 11 Court to delve into such facets of merits, considering that the jurisdiction is confined by Section 11(6A) of the Act as being confined to examining the existence of an arbitration agreement – a position that is now clearly declared as the law, by the Supreme Court.

9. Only to deal with the contentions raised, it is noted that on the face of the earlier Arbitral Award, it effectively rejected declaratory relief sought by Respondent No.2 that the Petitioner was not entitled to invoke the guarantee. The arbitral proceedings did not, *prima facie*,

deal with whether there is a payment default, and did not adjudicate the cause of action being pursued now. In the course of such arbitral proceedings, the Learned Sole Arbitrator found that the Petitioner in this case indeed had a right to claim repayment of the loan. The loan not having been paid till date the cause of action today is the recovery of the loan, and the invocation of the guarantee, since the Petitioner had elected for recovery of the loan instead of reinstatement as partner. *Prima facie*, that would give rise to a new cause of action under an agreement that contains an arbitration agreement, and therefore, this Court ought to make a reference to arbitration, particularly when the Respondents are refusing to arbitrate despite the admitted existence of the arbitration agreement.

10. Without pronouncing upon any facet of merits of the matter, I do not believe that these objections are worthy of detaining the attention of a Section 11 Court any further. The contention that the Petitioner could have raised a counter-claim for repayment in the earlier proceedings, and not having raised it, has lost the right to raise it now, is not a matter I can get into in exercise of the jurisdiction under Section 11 of the Act.

11. Having seen the record with the able assistance of Learned Counsel for all the parties, in my opinion, it would be appropriate to refer all the parties to the very same Learned Sole Arbitrator so that

even if issue of constructive *res judicata* were to be raised, such Learned Sole Arbitrator would be best placed to determine that issue. The Learned Sole Arbitrator, who none of the Respondents contend is *de jure ineligible* under the Seventh Schedule of the Act, would be, in my opinion, best suited to deal with the arbitration. It would also economise the costs for the parties in view of having been acquainted with the agreement and the positions of the parties.

Fifth Schedule Invocation:

12. It is at this stage that Learned Counsel for Respondent No. 2 states that he has instructions to oppose the choice of the same arbitrator, even while he hastens to add that he is not alleging any ground of conflict of interest attracting the Seventh Schedule making him *de jure* ineligible. His ground is not one of fact-based conflict, but an argument in law – according to him, the provisions of the Fifth Schedule of the Act would pose a hurdle as a matter of law, for the same arbitrator to be appointed as the Arbitral Tribunal for this round of arbitration.

13. According to Learned Counsel for Respondent No.2, the plain language of two items in the Fifth Schedule of the Act would come in the way of the Learned Sole Arbitrator. Specific reference is drawn to Item 16 and 24 of the Fifth Schedule of the Act.

14. Item 16 falls under the head “*Relationship of the arbitrator to the dispute*” while Item 24 falls under the head “*Previous services for one of the parties or other involvement in the case*”. Neither of these, in my opinion, can pose a hurdle by any stretch of reason. On the contrary one would need to inflict serious violence to rational logic to construe a hurdle being posed by these two provisions.

15. The Fifth Schedule is a guide to an arbitrator in discharging his obligation to make a disclosure under Section 12(1) of the Act – in particular, clause (a) of that sub-section, which requires disclosure of the existence of direct or indirect past or present relationship or interest in a party, or relation to the subject matter of dispute. Such relationship or interest could be in the nature of financial, business, professional or other kind of relationship or interest, which is likely to give rise to justifiable doubts as to independence or impartiality.

16. In my opinion, the relationship of having been an independent adjudicator in the past cannot fall within the parameters of relationship or interest in a party to the dispute or an interest in the subject matter of the dispute.

17. According to the Learned Counsel for Respondent No. 2, under Item 16, if an arbitrator “has previous involvement in the case”, justifiable doubts as to his independence can be said to arise. This objection has to be stated to be rejected. The arbitrator in question was

not “involved” in the case as advisor to, or representative of, any of the parties in the earlier round of proceedings. His “involvement” was as the arbitrator himself – which is the best indicia of independence considering that the Fifth Schedule is a guideline for the arbitrator in making disclosures. In the Fifth Schedule, two items (Items 15 and 16) deal with the relationships between the arbitrator and the dispute. In my opinion, given the components under this head, the rule of *noscitur a sociis* would indicate how to interpret these provisions. Item 15 throws light as to how to read Item 16 since these are two species of one genus.

18. Item 15 points to arbitrators who had given legal advice or had provided an expert opinion on a dispute to a party to the arbitration, or to any affiliate of one of the parties. That would evidently throw light on what is the nature of the coverage under that sub-head. One would read the import of Item 16 of the Fifth Schedule by its association with Item 15, both falling under the same head. Item 15 makes it clear that the involvement referred to in Item 16 should be an involvement that places the arbitrator in a position of an interest in one of the parties. It can never be countenanced that an individual’s “involvement” as an independent arbitrator would result in that individual becoming a non-independent candidate to be an arbitrator. Such a reading would be absurd to say the least. One would need to shun a commonsensical

view and adopt a view that inflicts violence to common sense to agree with the contention raised by Learned Counsel for Respondent No. 2 in relation to Item 16 of the Fifth Schedule.

19. Item 24 of the Fifth Schedule too does not turn the needle for the contention raised by Respondent No. 2. Under this provision, if the arbitrator currently serves or has served within the past three years as an arbitrator in another arbitration on a related issue involving one of the parties or an affiliate or one of the parties, it could give rise to a justifiable doubt as to independence and impartiality. For example, if an arbitrator has been nominated to a three-member Arbitral Tribunal in another arbitration, it could perhaps be deduced that the party nominating the arbitrator has chosen that arbitrator as a nominee he is comfortable with, and thereby raise doubts. Even such a reading would be inappropriate in my opinion, since an arbitrator is not a servant of the party nominating him but a servant of the Arbitral Tribunal that is a quasi-judicial forum adjudicating the cause of action presented to the Arbitral Tribunal.

20. Be that as it may, the emphasis in Item 24 of the Fifth Schedule is to eliminate any conflict of interest arising out of appointing an arbitrator who would already have a point of view on a “related issue”. If a view is already formed by an arbitrator, that view is something to be examined as to whether it could raise a doubt on independence or

impartiality. It is a guideline for making a disclosure to the parties. The underlying theme appears to be to disclose any facts that can lead to the parties drawing an inference of a pre-disposition on an issue related to one of the parties, and that too in another arbitration.

21. Here again, the wider theme is the sub-heading under which Items 20 to 24 are placed in the Fifth Schedule. Items 20 and 21 deal with situations where the arbitrator has acted as counsel for or against one of the parties or their affiliates. Item 22 deals with the arbitrator having been appointed twice or more in the past three years by one of the parties or their affiliates – a pointer to deep comfort that one of the parties would have with the arbitrator. Item 23 deals with the law firm of the arbitrator having been an advisor to any of the parties or their affiliates in the past three years. It is in this light that one must see Item 24 – where an arbitrator is acting or has acted as arbitrator in another arbitration on a related issue involving one of the parties or its affiliates.

22. The case at hand would not fall within any of the conceptual positions of potential non-independence or partiality that these Items of the Fifth Schedule stipulate – because, in the instant case, the arbitrator has acted in the past, not as a partisan advisor, but as an independent arbitrator. In fact, it is the very same Learned Sole Arbitrator who has neutrally interpreted the parties' position in the

earlier round. It is indeed true that a Petition under Section 34 challenging the earlier award dated March 3, 2023, has been filed in this Court, but that would not mean that the arbitrator is not impartial or not independent.

23. Consequently, also taking into account the explicit submission that Respondent No.2 does not intend to state that Learned Sole Arbitrator is *de jure* ineligible to act as an arbitrator under the Seventh Schedule, I do not see how the Learned Counsel for Respondent No. 2 drawing my attention to Item 15 and 26 of the Fifth Schedule, should alter my inclination to refer the parties to arbitration by the very same arbitrator.

Supreme Court's View: HRD Corporation:

24. For good order's sake it must be mentioned that Items 16 and 24 of the Fifth Schedule has come in for explicit interpretation by the Supreme Court in *HRD Corporation*¹, when an award by an arbitrator was assailed under these items of the Fifth Schedule. At the risk of adding to the length of a judgement that is effectively only a reference to arbitration under Section 11 of the Act, the following two paragraphs are worthy of extraction:-

¹ *HRD Corporation (Marcus Oil and Chemical Division) vs. GAIL (India) Ltd. – (2018) 12 SCC 471*

23. Coming to Justice Doabia's appointment, it has been vehemently argued that since Justice Doabia has previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period, he is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement "in the case". From the italicized words, it was sought to be argued that "the case" is an ongoing one, and a previous arbitration award delivered by Justice Doabia between the same parties and arising out of the same agreement would incapacitate his appointment in the present case. We are afraid we are unable to agree with this contention. In this context, it is important to refer to the IBA Guidelines, which are the genesis of the items contained in the Seventh Schedule. Under the waivable Red List of the IBA Guidelines, para 2.1.2 states:

"The Arbitrator had a prior involvement in the dispute."

24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression "the arbitrator" in Item 16 cannot

possibly mean “the arbitrator” acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as “the arbitrator” refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served “as arbitrator” before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a “business relationship” with the respondent under Item 1. Nor is the delivery of an award providing an expert “opinion” i.e. advice to a party covered by Item 15.

[Emphasis Supplied]

25. The emphasis supplied above is to avoid prolix reiteration of what the Supreme Court has held. Suffice it to say, the fact that Item 16 is seen in both the Fifth Schedule (which is a guideline for disclosure by the proposed arbitrator) and the Seventh Schedule (which brings in the element of *de jure* ineligibility of the arbitrator) is clearly interpreted, and the law has already been declared by the Supreme Court. The fact pattern described above is near identical for purposes of interpreting Items 16 and 24 of the Fifth Schedule.

26. Having disposed of the doubts sought to be raised by invocation of Items 16 and 24 of the Fifth Schedule, it would be necessary to reiterate that the parties would be at liberty to raise all issues on merits

of the case, including the argument about constructive *res judicata* before the Arbitral Tribunal hereby appointed.

Directions:

27. In these circumstances, this Petition is ***finally disposed of*** appointing Justice (Retd.) Akil Kureshi as the Sole Arbitrator, who was the arbitrator who had adjudicated in the earlier round.

28. Parties are directed to approach the Learned Sole Arbitrator at the time convenient to him, no later than a week from the date on which this judgement is uploaded on this Court's official website. The Learned Sole Arbitrator shall issue directions as to how to proceed further in the matter.

29. With the aforesaid directions, this Application is finally disposed of. I have persuaded myself not to consider imposing costs despite the dispute at hand being a commercial dispute.

30. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]