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

Date of Decision: 13th May, 2022

\+ O.M.P. (T) (COMM.) 31/2021

PRIME INTERGLOBE PRIVATE LIMITED ..... Petitioner

Through: Mr. Gaurav Gupta, Mr. Nikhil Kohli, Ms. Ritika Gambhir Kohli and Ms. Aman Prasad, Advocates.

versus

SUPER MILK PRODUCTS PRIVATE LIMITED ..... Respondent

Through: Mr. Aseem Chaturvedi and Mr. Shivank Diddi, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J. (*Oral*):

I.A. No. 3810/2021 *(seeking condonation of delay of 564 days in filing the present accompanying petition)*

1. In light of the relaxation of limitation granted through several orders of the Supreme Court *vide* Suo Moto W.P. (C) 3/2020, ***Re: Cognizance for extension of limitation,*** and also for the grounds and reasons stated in the application, the delay of 564 days in filing the present petition, is condoned and the application is allowed.

2. The application stands disposed of.

O.M.P. (T) (COMM.) 31/2021

3. The Petitioner/ counter-claimant could not file its counter-claims within the prescribed time during the course of the arbitral proceedings before the Sole Arbitrator – Hon'ble Ms. Justice Pratibha Rani (Retd.), former Judge of this Court, who was unilaterally appointed by the Respondent. With the Respondent deciding not to pursue its claims and inability of Petitioner to raise any counter-claim(s), the Arbitrator terminated the proceedings. In this in this background, Petitioner relying on the law as laid down in ***Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd.***,[1] has preferred the present petition seeking appointment of an independent substitute Arbitrator, for adjudication of its counter-claims.

- *Statutory provisions invoked* – Section 14 r/w Section 15 of the Arbitration and Conciliation Act, 1996 [*hereinafter* "***the Act***"].
- *Relevant Order of the Tribunal* – Termination Order dated 22nd August, 2019 passed by the Sole Arbitrator [*hereinafter* "***Termination Order"***].

BRIEF FACTS

4. The facts necessary for deciding the present *lis* are set forth *in seriatim* as under: -

4.1. Prime Interglobe Pvt. Ltd. [*hereinafter* "***PIPL***"] entered into 12 Franchise Agreements [*hereinafter* "***FAs***"] with Super Milk Products Pvt. Ltd. [*hereinafter* "***SMPPL***"]. In addition to FAs, parties also executed one 'Master Franchise Agreement' dated 03rd October, 2016 [*hereinafter* "***MFA***"].

[1] 2019 SCC OnLine SC 1517

4.2. On 27th May, 2019, SMPPL terminated FAs which was objected to by PIPL leading to disputes between the parties. SMPPL invoked arbitration *vide* letter dated 06th June, 2019 and unilaterally appointed the Arbitrator.

4.3. In the first hearing before the Arbitrator on 12th June, 2019, SMPPL filed an application under Section 17 and PIPL filed an application under Section 16 of the Act. During the course of second hearing on 14th June, 2019, an offer was made by PIPL to comply with some of the prayers made in the application under Section 17. The same were accepted by SMPPL and the matter was listed for arguments on afore-noted applications. *Vide* communication dated 13th July, 2019 addressed to the Arbitrator, SMPPL sought extension of time for filing Statement of Claim [*hereinafter* "***SOC***"] which was allowed and the next date of hearing was fixed as 17th August, 2019.

4.4. In the meantime, on 27th July, 2019, SMPPL wrote a letter to the Arbitrator stating that it did not wish to file its SOC or pursue its monetary claim under the FAs and prayed that the Consent Order dated 14th June, 2019 passed in the application under Section 17 of the Act, be passed as a final award in favour of the Claimant. Relevant portion of the said correspondence reads as under: -

> "*Against this background, we state, that the Claimant does not wish to further pursue its monetary claims under the 12 Franchise Agreements forming subject matter of the present arbitral proceedings and prays that the Consent Order dated 14 June 2019 be passed as a final award in favour of the Claimant in the Application under Section 17 of the Act.*
>
> *All rights and contentions of the Claimant/our Client under the MFA including claims and dues are expressly reserved and nothing stated*

hereinabove shall be deemed to be an admission or waiver of claims on part of the Claimant for its claims under the MFA. The Claimant further expressly reserves its rights to pursue its claims under the MFA before the appropriate forum.

In this light, the Claimant does not wish to file a Statement of Claim, and humbly prays that the Hon'ble Tribunal, appropriate orders on the next date of hearing.

The Claimant reserves its right to claim costs of the arbitral proceedings and the computation of the same shall be shared at the stage of passing of the final award."

4.5. On 16th August, 2019, PIPL addressed a letter to the Arbitrator stating that the arbitral proceedings are rendered infructuous in absence of any claim and the Tribunal is *functus officio*. Relevant part of the said letter reads as under: -

"*We state that the present proceedings have been rendered infructuous as the Claimant has refused to make a Claim before the Hon'ble Tribunal. We further state that this Hon'ble Tribunal has not adjudicated any matter arising out of or in connection with the disputes among the parties. It is further stated that the Claimant's application under Section 17, Arbitration & Conciliation Act, 1996 has already been rendered infructuous in view of the consent terms agreed between the Parties and recorded in the order dated 14.06.2019.*

In view of the above, we state that the present proceedings stand terminated and consequently this Hon'ble Tribunal is functus officio on account of the refusal of the Claimant to pursue its claims.

It is clarified that there has been no adjudication or determination of any of the claims and/or defences in the present proceedings. The Respondent is therefore entitled to, and expressly reserves the right to agitate its rights and contentions including any claims, counter-claims and/or defences in accordance with law under the said Agreements before the appropriate forum of competent jurisdiction."

4.6. On 17th August, 2018, during the third hearing, the Arbitrator gave PIPL an opportunity to file its claims and during the course of hearing, PIPL

submitted that it was examining the matter.

4.7 On the same date, PIPL addressed a communication to the Arbitrator stating that since there is no claim on behalf of SMPPL, the arbitral proceedings are liable to be terminated under Section 25(*a*) of the Act, and there has been no adjudication of the rights or disputes in the present proceedings with respect to the 12 FAs. PIPL also reiterated that it had not given up any rights under the FAs, including right to raise claims/ counter-claims and relied upon the judgment of this Court in ***Union of India v. Arun Kumar Gupta***.[2] Relevant portion of the afore-said communication is reproduced below: -

> "*1. The Respondent categorically states that it has not waived or given up any rights available to it under the said 12 Franchise Agreements with respect to raising any claims/counter claim against the Claimant;*
>
> *2. The termination of the present proceedings under Section 25(a) of the Arbitration and Conciliation Act, 1996, on account of the refusal of the Claimant to file a statement of claim or pursue its Claims under the 12 Franchise Agreements, cannot in any manner whatsoever, amount to foreclosure of the rights of the Respondent to raise claims under the said Agreements in future as there has been no adjudication of any rights of the parties or the disputes thereto, in the present Arbitral proceedings.*
>
> *3. The Respondent categorically reserves its rights to raise any claims against the Claimant herein, under the said Agreements in future, as also stated in the email dated 16.08.2019;*
>
> ***xx … xx … xx***
>
> *5. In light of the above, it is humbly submitted that as there is no claim before the Arbitral Tribunal on behalf of the Claimant, the proceedings are to be terminated under Section 25(a) of the Arbitration and Conciliation Act, 1996, and there has been no adjudication of the rights or disputes in the present*

[2] 2018 SCC OnLine Del 8285

proceedings with respect to the 12 Franchise Agreements, and the Respondent has the right to pursue its claims under the said agreements, in accordance with law at the appropriate stage."

Impugned Termination Order

4.8. The Arbitrator considered the e-mail communications extracted hereinabove and passed the impugned Termination Order on 22nd August, 2019 holding that in absence of SOC under the FAs, the mandate of the Arbitral Tribunal stands terminated under Section 25(*a*) of the Act. The operative portion of the Order, reads as follows: -

"*The Claimant has not filed any Statement of Claim under the 12 Franchise Agreements (referred to above) and no dispute for adjudication is pending before the Tribunal. Therefore, this Tribunal need not delve upon the contentions raised on behalf of the Respondent. The contents of the emails sent by the parties have been extracted hereto above only to straighten the record. In the given circumstances as there is no Statement of Claim before this Tribunal under the 12 Franchise Agreements, the proceedings are terminated under Section 25(a) of the Arbitration and Conciliation Act, 1996. The parties are left to bear their own cost.*"

4.9. Aggrieved by the aforesaid Order, PIPL has approached this Court seeking appointment of an independent substitute Arbitrator for adjudication of its counter-claims against SMPPL under the FAs.

CONTENTIONS OF THE PARTIES

On behalf of PIPL:

5. Mr. Gaurav Gupta, counsel for Petitioner/ PIPL makes the following submissions: -

5.1. By way of the Termination Order, the Arbitrator terminated the proceedings under Section 25(*a*) of the Act *qua* the rights of SMPPL and not that of PIPL under Section 25(*b*). If the arbitral proceedings have been

terminated due to non-prosecution or non-filing of SOC under Section 23 of the Act, it does not *ipso facto* bar the filing of counter-claims or adjudication thereupon by the Tribunal, in accordance with law. A counter-claim is, by its very nature, an independent claim

5.2. Although, the Arbitrator relies on Section 25(*a*) of the Act, for termination of the proceedings, however, given the facts of the present case, Section 32(2)(*a*) of the Act is applicable. Section 25(*a*) applies in case of '*default*' on part of the Claimant (SMPPL herein) to communicate its SOC, whereas, Section 32(2)(*a*) of the Act is applicable when the Claimant '*withdraws his claim*' and as such, the facts of the present case attract Section 32(2)(*a*).

5.3. It is well-settled that an order terminating the arbitral proceedings under Section 32 of the Act, can be challenged before the Court under Section 14.[3] In the alternative, even if the Termination Order is considered as termination of proceedings under Section 25(*a*) of the Act, then also, PIPL can invoke Section 14 of the Act.[4]

5.4. The Sole Arbitrator was unilaterally appointed by SMPPL. The Apex Court, in a catena of cases, has held that unilateral appointment of an Arbitral

[3] ***Lalit Kumar v. Dharmadas***, (2014) 7 SCC 255. (pp.4-6 paras 10-15) and ***PCL Suncon v. NHAI***, 2021 SCC OnLine Del 313 (pp. 10-11 paras 42-43).
[4] ***Gangotri Enterprises Limited v. NTPC Tamil Nadu Energy Company Limited***, MANU/DE/0115/2017 (pp. 5-7 paras 25 to 27); ***Bridge and Roof v. Guru Gobind Singh Indraprasth University***, MANU/DE/4107/2017 (pp. 2-3 paras 9 – 12); ***M.L. Lakhanpal v. Darshan Lal***, MANU/DE/0366/2018 (pp. 6-10 paras 35 to 42); and ***Sharda Engineering v. South East Central Railway***, 2017 SCC OnLine Chh 516 (pp. 3 para 4).

Tribunal is impermissible in law and Court has the power to appoint an independent Arbitrator under Section 14 r/w Section 15 of the Act.[5] In that light, this Court has the power to appoint an independent substitute Arbitrator to adjudicate the counter-claims of PIPL.

On behalf of SMPPL

6. *Per contra*, Mr. Aseem Chaturvedi, counsel present today as well as Mr. Darpan Wadhwa, Senior Counsel who had made submissions on behalf of Respondent/ SMPPL on previous occasions, argued as follows: -

6.1. The Arbitral Tribunal stands terminated by the erstwhile Arbitrator and, as on date, no Tribunal exists, as such, there can be no substitution, as prayed for. The same can also be inferred from a bare perusal of the prayer sought for by PIPL, wherein it has preferred not to challenge the legality of the Termination Order passed by the Tribunal but has merely prayed for appointment of a substitute Arbitrator. In the present case, upon the passing of the Termination Order, the erstwhile Arbitrator became *functus officio*. Thus, the present petition filed under Section 14 r/w Section 15 is not maintainable.

6.2. The Termination Order was passed under Section 25(*a*) of the Act that results in termination of arbitral proceedings, and not merely the mandate of the Arbitrator. In terms of Section 15 of the Act, power of a Court to appoint

[5] ***TRF Limited v. Energo Engineering Projects Limited***, (2017) 8 SCC 377; ***Bharat Broadband Network Limited v. United Telecoms Limited***, (2019) 5 SCC 755; ***Perkins Eastman Architects DPC and another v. HSCC (India) Ltd.***, 2019 SCC OnLine SCC 1517.

a substitute Arbitrator is only in a case where "*the mandate of the arbitrator terminates*", and the said provision does not vest a generic power for appointment of a substitute Arbitrator in any/ all cases, and certainly not in case where the proceedings themselves have been terminated.[6]

6.3. PIPL has proceeded on an incorrect understanding of the law by contending that owing to the non-obstante clause contained in Section 25(*a*), a termination thereunder is of the mandate of the Arbitrator and not of the arbitral proceedings. This interpretation is incorrect and contrary to the bare legislative text. The termination under Section 25(*a*) of the Act is akin to a termination under Section 32. Further, the liberty granted under Section 25(a) extends only to the Claimant (SMPPL) and not the Respondent (PIPL). Thus, PIPL cannot avail itself of the exception contained in Section 25(*a*) of the Act.

6.4 Even assuming that PIPL, for the purposes of its counter-claim(s), was to plead that it qualified as a 'claimant' and is entitled to benefit thereon, it ought to have made an application before the Arbitrator, and not before this Court. Admittedly, PIPL has not approached the Arbitrator with any such application.

6.5. PIPL chose not to prefer a counter-claim before the Arbitrator and the same can be inferred from the fact that PIPL neither contested nor raised any counter-claim(s) before the Tribunal, despite being given an opportunity by

[6] ***PCL Suncon*** (*supra*)

the Arbitrator. PIPL, in fact, explicitly stated (as is evident from the records) that it would raise a counter-claim, if any, at an appropriate stage in future.

6.6. Further, the conduct of PIPL disentitles it to seek any indulgence from this Court. In an on-going arbitral proceeding, between the same parties, before another Tribunal appointed by this Court, the arbitral fee is unpaid by PIPL owing to liquidity concerns, leaving SMPPL to bear the entire cost of the arbitral proceedings.

6.7. Reliance placed on the judgment of the Supreme Court in ***Perkins Eastman*** (*supra*) is misplaced since the judgment was passed in November 2019, while the appointment of the Arbitrator took place in June 2019 and arbitral proceedings stood terminated *vide* Termination Order, at which time, the law permitted unilateral appointments.

ANALYSIS

7. The questions that arise for determination are: (a) whether PIPL has rightly invoked the remedy under Section 14/ 15 of the Act, particularly when the Termination Order is ostensibly passed under Section 25(*a*) of the Act; (b) whether PIPL should be directed to approach the erstwhile Arbitrator, who passed the Termination Order, and whether such an Arbitrator would have the power to recall the said order?

8. In order to adjudicate upon the above-stated questions, that centre around the interpretation of Sections 25(*a*) and 32 of the Act, it is essential to first analyse the above-said two provisions.

Contours of Section 25(a) of the Act

9. Section 25(*a*) of the Act, primarily deals with termination of proceedings upon default of a party, and reads as under: -

> "*25.* ***Default of a party.****— Unless otherwise agreed by the parties, where, without showing sufficient cause,—*
> *(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings*"

10. On a bare reading of the above provision, it emanates that Section 25(*a*) is applicable in case of '*default of a party*'. The said provision contemplates that where the claimant, without showing sufficient cause, fails to communicate his statement of claim, within the time as stipulated under Section 23, the Tribunal shall be empowered to terminate the proceedings. Section 25 of the Act is triggered in case of failure on part of a party to show sufficient cause. It results in either termination of proceedings under sub-clause (a) or, continuation of arbitration proceedings, notwithstanding the default under sub-clauses (b) and (c) of Section 25 of the Act.

11. The ambit of Section 25(*a*) of the Act and remedy available with a party against such order has been discussed in the decision of the Supreme Court in ***SREI Infrastructure Finance Ltd. v. Tuff Drilling P. Ltd.***.[7] In the said case, at first sitting, when both the parties appeared, the Arbitral Tribunal directed the Respondent therein to file its SOC. However, subsequently, owing to default on part of the Respondent, Arbitrator terminated its right to file SOC under Section 25(*a*) of the Act. The Respondent then filed an application seeking recall of the termination order and condonation of delay in filing

[7] (2018) 11 SCC 470.

SOC. The Appellant challenged the maintainability of the application on the ground that by virtue of the termination order, the Tribunal had become *functus officio* and hence, it could not recall its own termination order. The Tribunal rejected the application of the Respondent and held that it cannot recommence the arbitral proceedings. The High Court set-aside the termination order passed by the Arbitrator and remitted the matter back to it to decide the application afresh. The Supreme Court dismissed the appeal and held that the Tribunal had committed an error in holding that it had no jurisdiction to recall its termination order passed under Section 25(*a*). On '*sufficient cause*' being shown, the Tribunal can recall the order and recommence the arbitration proceedings.

Contours of Section 32(2) of the Act

12. Section 32(1) of the Act elucidates the situations when arbitral proceedings shall be terminated *viz.* by way of a final arbitral award or by an order of the Tribunal under sub-section (2) of Section 32. The three situations where the Tribunal can terminate the arbitration proceedings envisaged under the Section 32 are as follows: -

(i) when the Claimant "*withdraws his claims*",

(ii) when the parties "*agree on termination of the proceedings*", or

(iii) when the Tribunal finds that the "*continuation of the proceedings has for any other reason become unnecessary or impossible*".

Whether PIPL could have invoked Sections 14/ 15 of the Act?

13. Now the question arises regarding the provision that is applicable to the

impugned Termination Order and whether PIPL can seek appointment of a substitute Arbitrator. In ***Lalit Kumar v. Dharmadas***,[8] the Arbitrator terminated the proceedings on account of lack of interest being shown by the Claimant to pursue arbitration. The original Applicant wrote to the Arbitrator seeking revocation/ modification of termination order issued by him and also filed a petition seeking appointment of an Arbitrator under Section 11 of the Act. The said petition was dismissed. The Supreme Court held that the termination order issued by the Arbitrator, fell within the scope of Section 32(2)(*c*) of the Act i.e., the continuation of the arbitration had become 'impossible' and on a "*cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court as provided under Section 14(2)*".

14. ***In M.L. Lakhanpal v. Darshan Lal***[9], a coordinate bench of this Court dealt with challenge to rejection of applications for filing and extension of time to file SOC. In arbitration proceedings, several opportunities were granted to the Petitioner to file its SOC, however, when the Petitioner failed to appear and file the claim, the Tribunal closed right the right to file its SOC. Applications seeking recall of the said order moved by the Petitioner were also rejected. In challenge to the said order, this Court relied upon ***Lalit Kumar*** (*supra*) and held that the order passed by the Arbitrator closing the right of the Petitioner to file its SOC can be challenged either under Section 34 or Section 14(2) of the Act. Relevant portion of the said decision is as follows: -

[8] (2014) 7 SCC 255.
[9] 2018 SCC OnLine Del 6833.

> "*41. Therefore, the order passed by the Sole Arbitrator closing the right of the petitioner to file the Statement of Claim and rejecting his application seeking recall of the said order could either be challenged under Section 34 of the Act or under Section 14(2) of the Act….*"

15. In ***Gangotri Enterprises Ltd. v. NTPC Tamil Nadu Energy Company Ltd.***[10], the Petitioner sought time to file its SOC on five occasions but failed to do so. Consequently, the Tribunal closed its right under Section 23 r/w Section 25 of the Act. A petition under Section 14(1) of the Act was filed seeking appointment of a substitute Arbitrator. This Court, placing reliance on ***Lalit Kumar*** (*supra*) held that the appropriate recourse/ remedy for the Petitioner to challenge the order closing its right to file its claims was amenable to challenge under Section 14 of the Act. Relevant portion of the said decision reads as follows: -

> "*26. The decision in the case of Lalit Kumar V. Sanghavi (supra) also turned on the principle that the petitioner could not be rendered remediless on account of the arbitrator terminating the proceedings. In that case no recourse would be available to the petitioner under Section 34 of the Act and thus the question would have to be considered within the scope of Section 14 of the Act. Thus, this decision applies only in cases where the arbitral proceedings are terminated by the arbitrator other than by making an award, that is, under Section 32(2) of the Act; it is clearly not applicable where the arbitral proceedings are terminated by virtue of Section 32(1) of the Act, that is, by making of an award.*
>
> *27. Thus, the second question, whether the order dated 28.04.2016 closing the right of GEL to file its statement of claims and thereby terminating the proceedings qua such claims, is amenable to challenge under Section 14 of the Act, is answered in the affirmative. In cases where the arbitrator's mandate is terminated, a re-course to Section 14(2) of the Act would be available provided a specific remedy is not provided under the Act. In the present case, the arbitrator's mandate to adjudicate any claims of GEL under the Agreement, stands terminated. Concededly, the order dated 28.04.2016 as also the final award that may be passed, in as much as it would not include GEL's claim, would not be amenable to challenge under Section 34 of the Act.*"

[10] 2017 SCC OnLine Del 6560.

16. It has been argued that, as on the date of the Termination Order, there was no SOC filed by the SMPPL and therefore, the appropriate provision applicable is Section 25(*a*). In the opinion of the Court, this is not the correct interpretation. Section 25(*a*) is attracted under a different factual situation. As discussed above, the primary distinction between Section 25(*a*) and Section 32(2)(*a*) of the Act is that the former is triggered when the claimant fails to communicate his SOC as per the prescribed timelines under Section 23 i.e., there is a default on part of the claimant, and the latter kicks in when the Tribunal finds that the continuation of the proceedings has, for any other reason, become *"unnecessary or impossible"*. The present case is not one wherein SMPPL's claim(s) were terminated and/ or struck off on account of failure to file SOC despite opportunities. Rather, SMPPL/ Claimant has consciously chosen to withdraw/ give up its claim thereof. Hence the termination could not have been under Section 25(*a*), as mentioned by the Arbitrator *vide* its Termination Order, rather under Section 32(2)(*a*) of the Act, notwithstanding the fact that Arbitrator has relied upon Section 25(*a*) of the Act. It is a well-settled position in law that non-mentioning or wrong mentioning of a provision of law is inconsequential. Moreover, the circumstances leading to passing of the Termination Order makes the nature of the said Order absolutely evident. SMPPL had consciously decided not to pursue its claims and made a request to the Arbitrator for disposal in terms of the interim directions.

17. In the instant case, there may not have been a SOC before the Arbitrator as on the date of termination yet, the claims have been withdrawn. SMPPL expressly prayed that their financial claims should not be adjudicated, thereby

indicating to the Tribunal that they are giving up their claims. The withdrawal thus, clearly falls within the ambit of Section 32(2)(*a*) of the Act. Once SMPPL/ Claimant withdrew its claims and there was no counter-claim set up by PIPL on that date, continuation of proceedings became "*unnecessary or impossible"* and were terminated under Section 32(2) of the Act. Once the arbitration proceedings were terminated, the mandate of the Arbitral Tribunal stood terminated. In that light, the question whether the proceedings stood validly terminated is for this Court to determine in the instant petition under Section 14 of the Act.

18. Mr. Chaturvedi has also laid emphasis on the words "*unless the Respondent objects to the order*" appearing in the provision to argue that Section 32(2)(*a*) is not applicable. This submission is devoid of merit as, at the time of withdrawal of the claims, PIPL did not raise any objection.

19. At this juncture, it must also be noted that SMPPL had argued that in light of the judgment of the Supreme Court in ***SREI Infrastructure*** (*supra*), the remedy, if any, is only to seek review/ recall of the Termination Order. This is not the correct reading of the judgment. In the said judgment, the Supreme Court held that an application seeking recall of termination under Section 25(*a*) of the Act is maintainable, however, that cannot be interpreted to mean that the proceedings under Section 14 of the Act cannot lie. The Court finds no ground to relegate PIPL to the Arbitral Tribunal to seek recall of the Termination Order. In any event, as already discussed above, the order passed by the Tribunal, terminating the proceedings is not under Section 25(*a*) of the Act and therefore, the objection of SMPPL regarding maintainability of this

petition, by placing reliance upon the decision in ***SREI Infrastructure*** (*supra*) is misconceived. On the contrary, even if the Termination Order is construed to be passed under Section 25(*a*), yet the instant petition, under Section 14 of the Act is maintainable.

Whether PIPL should be redirected to the erstwhile Arbitrator and whether the Arbitrator has the power to recall the Termination Order?

20. Next, question arises as to whether the same Arbitral Tribunal can be requested to adjudicate the counter-claims which the PIPL intends to file. The Court finds merit in the contention of PIPL that all throughout the proceedings, PIPL had reserved its right to file counter-claim and did not give up this right. This is apparent from the communication dated 17th August, 2019 wherein PIPL categorically reserved its right to raise counter-claims against the SMPPL. In the said communication, PIPL was not absolutely clear as to whether it intended to file its claim before the Arbitrator, as it only stated that "*Respondent has the right to pursue its claims under the said communication, in accordance with law, at the appropriate stage".* In any event, before terminating the proceedings *qua* counter-claims of PIPL, the Tribunal ought to have put PIPL to show cause. Now, with that termination, the entire proceedings altogether have been closed and the entire record of the arbitral proceedings have been returned to SMPPL. In view of the judgment of the Supreme Court in ***Perkins Eastman*** (*supra*), the erstwhile Arbitrator is *de jure* ineligible to resume her office as her appointment was made unilaterally by SMPPL, in violation of Section 12(5) of the Act. Therefore, the Court is now empowered to appoint a substitute Arbitrator.

Conclusion

21. PIPL has unadjudicated counter-claims which the erstwhile Arbitral Tribunal cannot decide having being appointed unilaterally, in view of the legal position established by the Supreme Court in ***Perkins Eastman*** (*supra*). The remedy of arbitration available to PIPL cannot be rendered inviable and PIPL cannot be left remediless. The prayer sought in the present petition must be granted and accordingly, an independent substitute Arbitrator should be appointed to adjudicate the disputes between the parties.

22. In view of the foregoing, the present petition is allowed and Hon'ble Mr. Justice D.K Jain (Retd.), former Judge of the Supreme Court [Contact No.: +91 9999922288] is appointed as the common Sole Arbitrator for adjudication of counter-claims of PIPL arising from and under the FAs referred above.

23. The parties are directed to appear before the Sole Arbitrator as and when notified. This is subject to the Arbitrator making necessary disclosure(s) under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

24. The Arbitrator will be entitled to charge their fee in terms of the provisions of the Fourth Schedule appended to the Act.

25. All rights and contentions on merits, are left open.

26. The present petition is allowed in the afore-said terms.

SANJEEV NARULA, J

MAY 13, 2022
as
(Corrected and released on: 23rd May, 2022)