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

COMM. ARBITRATION PETITION (L) NO. 25249 OF 2022

Sushma Arya and Ors. ..Petitioners
V/s.
Palmview Overseas Ltd. and Ors. ..Respondents

WITH
COMM. ARBITRATION PETITION (L) NO. 25151 OF 2022

Ravi Arya and Anr. ..Petitioners
V/s.
Palmview Investments Overseas Ltd. and Ors. ..Respondents

Mr. Sharan Jagtiani, Senior Advocate a/w Ms. Apurva Manwani, Mr. Priyank Kapadia i/b Yakshay Chheda and Nikhil Ghate for the Petitioner in CARBPL/25249/2022.

Mr. Haresh Jagtiani, Senior Advocate a/w Ms. Bhumika Chulani i/b Vandana Mehta for the Petitioner in CARBPL/25151/2022.

Mr. Kevic Setalvad, Senior Advocate a/w Ms. Bhagyashree Ganwani for Respondent No.1 in both petitions.

Mr. Sameer Bindra and Alok Vajpayi i/b Khaitan & Co. for Respondent No.2 in both petitions.

Mr. Hrushi Narvekar a/w Ms. Chandni Dewani i/b Vashi and Vashi for Respondent Nos. 3 to 7 in both petitions.

CORAM : C.V. BHADANG, J.

RESERVED ON : 27 SEPTEMBER 2022
PRONOUNCED ON : 1 NOVEMBER 2022

JUDGMENT

. By these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('1996 Act' for short), the Petitioners are challenging the order dated 16.06.2022 (which according to the Petitioners is an interim award) passed by the Arbitral Tribunal in the matter of arbitration between the first Respondent Palm View Investment Overseas Limited ('PVIL'), (the claimant before the Arbitral Tribunal) and Arya Iron and Steel Company Pvt. Ltd. ('AISCO') and the Petitioners and others.

2. For the sake of convenience, the order dated 16.06.2022 is referred to as an order. This is subject to determination as to whether it is an interim award, amenable to a challenge under Section 34 of the 1996 Act. By the impugned order, the Tribunal has granted an opportunity to the claimant to prove the resolution dated 16.07.2018 as a valid resolution under British Vergin Island Laws (BVI Laws) or by filing a fresh resolution, as according to the Arbitral Tribunal the irregularity is one, which is curable/rectifiable. It may be mentioned that first

Respondent/claimant has chosen to abide by later option, namely of filing a fresh resolution.

3. The brief facts necessary for the disposal of the petitions may be stated thus.

That the Petitioners herein are Ravi Arya with his family members and Ravi Arya Hindu Undivided Family (HUF). They are together referred to as RA Group. The first Petitioner is the brother of the third Respondent Pavan Arya. The Respondent Nos.3 to 7 which includes Pavan Arya (HUF) are together referred to as PA Group. The Petitioners and the Respondent Nos. 3 to 9 are the Promoters/Directors of AISCO which is a private limited company, incorporated under the Companies Act, 1956 on 27.07.2004.

4. The first Respondent PVIL is a Company said to be incorporated under BVI Laws. Under a Share Purchase and Share Subscription Agreement dated 25.03.2009 (SHA) between the parties, PVIL was inducted as 49% shareholder in AISCO. Post such induction, the share holding was as follows:

(i) PVIL 49%

(ii) RA and their family Members 25.5%.

(iii) PA group 25.5%

5. As per Article 10.1 of the said agreement PVIL was authorised to appoint a nominee Director on the board of AISCO. On 15.01.2010, one Mr. Sunil Jain, was appointed on the Board of AISCO as a nominee Director of PVIL. Article 16 of the Agreement contains an Arbitration Clause.

6. Somewhere in April 2011 disputes and differences arose between the Petitioners (RA Group) and the other parties to the SHA, on account of the share holding in AISCO which according to the Petitioners, was misused by PA Group which gave them a virtual dominance over the affairs of AISCO. PVIL addressed a letter through their Advocate dated 30.04.2018 to AISCO as well as Respondent Nos. 3, 4 and Ravi Arya invoking the arbitration clause and nominated a former Judge of the Supreme Court as an Arbitrator. It may be mentioned that by virtue of the said notice, PVIL made an unquantified claim against AISCO and PA and RA Group.

7. Mr. Vijay Maniyar on behalf of AISCO sent a reply to the invocation notice on behalf of AISCO and nominated a former Chief Justice of this Court as an Arbitrator. This according to the Petitioners was without their consultation. On 06.06.2018, the Petitioners sent a reply to the invocation notice claiming that the initiation of the Arbitration proceedings was sham and untenable on account of an alleged collusion between PVIL and PA group.

8. On 08.06.2018, a former Judge of the Supreme Court accepted his appointment as presiding Arbitrator. Subsequently, he recused himself and another former Judge of the Supreme Court was appointed as presiding Arbitrator.

9. On 20.06.2018, the Petitioners addressed a letter to the Arbitral Tribunal placing on record their objection to continuation of arbitration proceedings as according to the Petitioners, the same was a collusive action between PVIL, AISCO and PA Group.

10. On 16.07.2018, a board resolution was purportedly passed by PVIL authorising Mr. Sunil Jain to initiate the Arbitration proceedings and to depose on behalf of PVIL.

11. According to the Petitioners, the said resolution dated 16.07.2018 is the only authorisation on the basis of which Mr. Sunil Jain, deposed in the Arbitration proceedings. This was in the absence of any pleadings with respect to the validity of the resolution under BVI Laws. It was also contended that the resolution was shown to be passed without any meeting and the resolution was singed by authorised representative of PVIL's sole Director namely 'Execorp' which was also a Corporation said to be registered under BVI Laws.

12. On 26.10.2018 PVIL filed its Statement of Claim (SoC) making a claim of Rs.522 Crores against the Petitioners and their family members and others. Significantly, according to the Petitioners no claim was made against AISCO in a departure from the invocation notice.

13. On 08.04.2019, the amount of claim was enhanced to Rs.821.02 crores.

14. Mr. Sunil Jain filed his affidavit of evidence on 30.01.2019 claiming to be the authorised representative of PVIL as per the Board Resolution dated 16.07.2018.

15. Mr. Sunil Jain was cross-examined on behalf of the Petitioners from July 2019 to October 2021. Mr. Sunil Jain claimed during the course of his evidence that he had invoked the arbitration on the basis of oral instructions from one Mr. P. I. Jindal, who according to the Petitioners, is not even the Director of PVIL.

16. The Petitioners Ravi Arya and Nakul Arya filed an application under Section 31 read with Section 32 of 1996 Act, seeking a declaration that the claim is presented without any authority and seeking a declaration that invocation notice dated 30.04.2018 is without any authority and for dismissal of the claim.

17. PVIL filed reply claiming that Mr. Sunil Jain was duly authorised to invoke arbitration, to file SoC and to depose on behalf of PVIL.

18. The Tribunal passed the impugned order, granting opportunity to cliamant-PVIL either (i) to prove the Resolution dated 16.07.2018 as being valid under BVI Laws or (ii) to file a fresh resolution.

19. On 01.07.2022, PVIL has communicated its decision to exercise second option i.e. filing a fresh resolution on behalf of PVIL.

Feeling aggrieved, the present petitions are filed.

20. I have heard learned counsel for the parties. With the assistance of the learned counsel for the parties, I have gone through the record.

21. Mr. Sharan Jagtiani and Mr. Haresh Jagtiani, the learned Senior Counsel for the Petitioners made following submissions.

(i) That PVIL is a company said to be registered as per BVI Laws, with a sole Director, namely a company known as Execorp Limited, which itself is said to be a company registered as per BVI Laws.

(ii) That Mr. Sunil Jain has no concern with PVIL nor he is even an employee thereof. It is submitted that the only source of purported authority of Mr. Sunil Jain is the resolution dated 16.07.2018 which has to be proved as a matter of fact by an expert witness in BVI Laws, else otherwise the validity of the resolution has to be decided by applying the Indian laws.

(iii) The learned counsel have referred to the deposition of Mr. Sunil Jain and, in particular the question and answers from question nos. 85 to 100, in which Mr. Sunil Jain has claimed complete ignorance about the legal structure of PVIL, signatories to the said resolution and/or familiarity with BVI Laws. It is submitted that PVIL has made no attempt to establish the legality of the said resolution, as required by Section 45 of the Indian Evidence Act, as foreign law is an issue of fact.

(iv) It is submitted that in view of the categorical admission by Mr. Sunil Jain and the absence of any other efforts on behalf of the claimant-PVIL to prove the resolution, an application was made under Section 31(6) and 32 of 1996 Act for dismissal of the claim, as further proceedings, had become "unnecessary and impossible" as envisaged under Section 32(2)(c) of the 1996 Act.

(v) The learned Counsel were at pains to point out that the Tribunal has accepted both these grounds, namely that

the resolution was invalid, as the same had not been proved "**as yet**" (para 73). It is pointed out that the Tribunal has also come to the conclusion that the resolution was invalid on application of the laws of India (para 56).

(vi) It is contended that having come to such categorical conclusion, the Tribunal could not have held the illegality as curable and rectifiable. It is submitted that in the face of the finding that the resolution has not been established, either under BVI laws or under Indian laws, the Tribunal ought to have found that very initiation of claim itself was without any authority rendering the Tribunal *funtus officio*.

(vii) It is pointed out that the resolution did not comply with the provisions of Section 45 of the Indian Evidence Act and was also in breach of Section 149 of the Companies Act, 2013 (2013 Act for short) inasmuch as under the Companies Act, a Corporation cannot be a Director of another Corporation/Company. It is submitted that a concept of single Director Companies is not acknowledged under 2013 Act. It is submitted that the Tribunal misapplied the provisions of Section 28(2) of 1996 Act, purportedly to "cure and ratify" the breaches, which action by the Tribunal is in violation of the public policy of India and fundamental policy of Indian law.

(viii) It is submitted that the first option is also invalid on account of fact that the resolution which inherently lacks authority cannot be permitted to be proved/ratified particularly in the absence of necessary pleadings and a case made out in the SoC.

(ix) It is submitted that even the second option is impermissible as ratification presupposes that the act which is ratified is otherwise valid and enforceable. He submitted that ratification cannot be done of a resolution which inherently lacks authority and is invalid and illegal. It is submitted that in granting the option to claimant-PVIL, the Tribunal has acted in equity which is in contravention of Section 28(2) of the said Act, which is evident from the observations in para 77 of the order. It is submitted that Article 16 of SHA does not contemplate, the Tribunal deciding *ex aequo et bono* or as *amiable compositeur*. It is submitted that unlike a Civil Court, which is a Court of plenary jurisdiction, the Arbitral Tribunal is a creature of a contract and cannot act beyond the same.

(x) It is submitted that, had the said objection been raised by the petitioners at the conclusion of the arbitral proceedings and not at the interim stage, the Tribunal, could not have resorted to such options being given to the first Respondent/ claimant. Thus in the submission of the learned senior counsel, the same could not have been done at the interim stage.

(xi) On behalf of the Petitioners reliance is placed on the following decisions:

(i) Ssangyong Engineering and Construction Co. Ltd. v/ s. National Highways Authority of India[1]
(ii) Vijay Karia and Others v/s. Prysmian Cavi E Sistemi SRL and Ors.[2]
(iii) Associate Builders v/s. Delhi Development Authority[3]
(iv) Renusagar Power Co. Ltd. v/s. General Electric Co.[4]
(v) Bhat Nagarkar Developers v/s Dilip Dhondiba Gaikwad and Ors.[5]
(vi) Indian Farmers Fertilizer Co-operative Limited v/s Bhadra Products[6]
(vii) Maharashtra State Electricity Distribution Company Limited v/s. Godrej and Boyce Manufacturing Company Limited[7]
(viii) Sanjay Roy v/s. Sandeep Soni and Ors.[8]

22. He, therefore, submitted that the petitions be allowed.

23. Mr. Setalvad, the learned senior counsel for Respondent No.1 has supported the impugned order. The learned Counsel has made following submissions:

(i) That Mr. Sunil Jain was appointed as a nominee Director of PVIL on the Board of Directors of AISCO. It is

1 (2019) 15 SCC 131
2 (2020) 11 SCC 1
3 (2015) 3 SCC 49
4 1944 Supp (1) SCC 644
5 First Appeal No. 310 of 2014
6 (2018) 2 SCC 534
7 2019 SCC Online Bom 3920
8 2022 SCC Online Del 1525

submitted that Mr. Sunil Jain was also authorised by the resolution dated 16.07.2018 to depose on behalf of the claimant PVIL.

(ii) It is submitted out that in the points framed for determination, there is no issue on the validity of the Board Resolution. There was no dispute about the validity of the said resolution in the Statement of Defence (SoD) of the Petitioners. Even when the points for determination were amended on 15.07.2019, no issue qua the validity of the Board Resolution was framed. It is pointed out that after completion of cross-examination of Mr. Sunil Jain (CW-1) and before commencing cross-examination of CW-2, the application was filed under Section 31 read with Section 32 of 1996 Act.

(iii) It is submitted that the impugned order is not an interim award and therefore, not amenable to challenge under Section 34 of 1996 Act. It is submitted that the impugned order does not finally decide any legal rights of the parties, under SHA and therefore, does not answer the requirements of an interim award. The learned Counsel has pointed out that an interim award must necessarily decide a claim or a part of the claim and/or a counter claim, which forms subject matter of the arbitral proceedings, for which reliance is placed on the following decisions.

(i) Sanshin Chemicals Industry v/s. Oriental Carbons & Chemicals Ltd.[9]
(ii) Harinayaran G. Bajaj v/s. Sharedeal Financial Consultants Pvt. Ltd.[10]
(iii) Deepak Mitra v/s. District Judge, Allahabad[11]
(iv) Punj Lloyd Ltd. v/s. Oil and Natural Gas Corporation Limited[12]
(v) Container Corporation of India Limited v/s. Texmaco Limited[13]
(vi) Ranjiv Kumar v/s. Sanjiv Kumar[14]

(iv) It is submitted that even assuming that impugned order is an interim award, the scope of the challenge under Section 34 of 1996 Act, is very limited and looking to the fact that the Tribunal has passed a well reasoned order which is neither perverse nor one which shocks the conscience of the court nor is in conflict with basic norms of justice or morality, it does not fall within the meaning of the expression, in conflict with public policy of India as explained by the Supreme Court in *Ssangyong Ltd.(supra)*.

(v) It is submitted that there is no requirement in law to have a Board Resolution for issuing a notice for invocation of Arbitration or to depose as a witness. Reliance in this regard is placed on the decision of Delhi High Court in *Pavan Kumar Dalmia V/s. HCL Infosystems*[15]. The learned Counsel has placed

9 (2001) 3 SCC 341
10 2003(2) Mh. L.J. 598
11 AIR 2000 All 609
12 2016 SCC Online Bom 3749
13 2009 SCC Online Del 1594
14 AIR 2018 Cal 130 (DB)
15 2012 SCC Online Del 1508

further reliance on the decision of the National Company Law Appellate Tribunal ('NCLAT') in *Mohit Minerals Limited v/s. Nidhi Impotrade Pvt. Ltd.*[16] The learned counsel submitted that the decision though not binding has persuasive value.

(vi) It is next submitted that the defect in proof of the Board Resolution, if any, is merely a procedural irregularity, which is curable. It is submitted that a suit filed by Company without a Board Resolution is not fatal and is a curable defect. The learned Counsel was at pains to point out that a substantive right, should not be allowed to be defeated, on account of a procedural irregularity, which can be cured at any stage. The learned Senior Counsel placed reliance on the following decisions in this regard.

(i) United Bank of India v/s. Naresh Kumar[17]
(ii) Sheth Builders v/s Michael Gabriel[18]
(iii) Alcon Electronics Pvt. Ltd. v/s. Celem S.A.[19]
(iv) Uday Shankar Triyar v/s. Ram Kalewar Prasad Singh[20].
(v) Pragya Electronics Pvt. Ltd. v/s Cosmos Ferrites Ltd.[21]
(vi) National Ability SA v/s. Tinna Oil & Chemicals Ltd.[22]
(vii) Welding Rods Pvt. Ltd. v/s. Indo Borax and Chemicals Ltd.[23]

16 2021 SCC Online NCLAT 44
17 (1996) 6 SCC 660
18 2020 SCC Online Bom 9042
19 (2015) 1 Mh.L.J. 852
20 (2006) 1 SCC 75(FB)
21 (2021) SC Online Del 3428
22 2008 (105) DRJ 446
23 (2001) SCC Online Guj 269 (DB)

(viii) Western India Theaters Ltd. v/s. Ishwarbhai Somabhai Patel[24]

(vii) It is submitted that reliance on behalf of the Petitioners on the decision in *State Bank of Travancore v/s. Kingstone Computers India Pvt. Ltd.*[25] is misplaced, as it does not consider the earlier decision, in *United Bank of India (supra)*. It is pointed out that Delhi High Court in *Sangat Printers Limited v/s. M/s. Wimpy International Ltd.*,[26] has observed that State Bank of Travancore(supra) has not considered the decision in Union Bank of India (supra). The learned counsel has submitted that reliance on *Nibro Limited v/s. National Insurance Co. Limited* [27] is also misplaced, in view of the decision of the Division Bench of Gujarat High Court in *Welding Rods Private Limited supra).* It is submitted that Gujrat High Court did not follow the decision of the Delhi High Court in *Nibro Limited* (supra) and on the contrary has followed decision of the Division Bench of this Court in *Western India Theaters Limited* (supra). He therefore submitted that the petition deserves to be dismissed.

24. On the basis of rival submissions following points arise for my determination.

24 AIR 1959 Bom 386 (DB)
25 (2011) 11 SCC 524
26 2012 SCC Online Del 299
27 (1991) ILR 2 Del 172

(i) Whether the impugned order is an interim award within the meaning of section 2(1) (c) read with section 31(6) so as to be amenable to a challenge under section 34 of the 1996 Act ?

(ii) If yes, whether the impugned order/interim award needs interference within the scope of the challenge under section 34 of the 1996 Act?

(iii) If yes, what order?

Point (i)

This point has to be taken up for consideration at the out set, as it goes to the root of the matter. It is only if, the order can be reckoned or treated as an interim award, its validity can be challenged and examined under section 34 of the 1996 Act.

25. The expression 'interim award' has not been defined under the said Act. Section 2(1)(c) of the Act defines 'arbitral award' to include an 'interim award'. Section 31(6) of the Act provides that the Arbitral Tribunal may at any time during the arbitral proceedings, make an interim arbitral award on 'any matter', with respect to which it may make a final award. The issue as to what would constitute an 'interim award', is no longer *res integra* and is subject matter of several decisions both of the Supreme Court and the High Courts. Although the principles

may be well settled, the matter turns upon the application of these principles to the individual facts of a case

26. Before proceeding to consider the rival circumstances and the submissions made it would be worthwhile to briefly notice the decisions on which reliance is placed by the parties.

27. In IFFCO Ltd (supra) the respondent before the Supreme Court had made a claim in which the appellant (the respondent before the arbitrator) had raised a issue of limitation. The learned arbitrator decided the issue in favour of the claimant holding that the claim was not barred by limitation. That was challenged by the appellant in a petition under section 34 of the Act, claiming that the said order was an 'interim award' styling it as a 'First partial award'. The learned District Judge held that the it was not an interim award and thus the petition under section 34 of the Act was held to be not maintainable. The High Court concurred with the same and the matter went to the Supreme Court. The Supreme Court after taking a survey of relevant provisions and decisions holding the field, including certain English Decisions has held that the award was an interim award which could be separately and independently challenged under section 34 of the Act.

28. In MSEDCL the petitioner had invited tenders for execution of certain work. The respondent Godrej and Boyce

Manufacturing Company Ltd (Godrej Ltd for short) a lead partner of a Joint Venture (JV) with Electropath Services (India) Pvt Ltd had submitted a bid in pursuance of which a Memorandum of understanding (MoU) was entered into by the parties. As disputes and differences arose between the parties the respondent Godrej Ltd invoked the arbitration. Before the learned Arbitrator the Respondent Godrej Ltd filed a Statement of Claim (SoC) without impleading Electropath Ltd one of the members of the JV. The petitioner filed an application under section 32 of the Act *inter alia* claiming that there was no privity of contract between the respondent Godrej Ltd as the contract was awarded to a Joint Venture of which the respondent was only a lead partner. Thus the claim could have been filed only by the joint Venture and not by respondent Godrej Ltd that too without impleading Electropath Ltd. The learned Arbitrator rejected the application holding that he had jurisdiction to decide the dispute between the parties. Feeling aggrieved the petitioner approached this court. This court held that the claim filed by the respondent in its individual capacity without express authority of Electropath Ltd as one of the partners of the JV was not maintainable. In the face of a finding as above this court allowed application filed by the petitioner before the arbitrator.

29. The submission on behalf of the petitioner in this case, on the basis of the decision in MSEDCL, is that this court had entertained a petition under Section 34 of the Act, where the

learned arbitrator at an interim stage had refused to allow application under Section 32 of the Act. Secondly, it is submitted that when the claim itself was not at the instance of a party to the agreement, in as much as, it was the joint venture, which was the party to the agreement, the same was held to be not competent.

30. The test for deciding whether a particular award or order (the nomenclature not withstanding) is an interim award is whether it relates to 'any matter' with respect to which the tribunal may make a final arbitral award. The Supreme Court in IFFCO Ltd has *inter alia* held that the expression 'matter' is "wide in nature and subsumes issues at which parties are in dispute". The award itself can be in respect of a claim, part of a claim or a counterclaim between the parties.

31. In my humble view the issue whether the arbitration was invoked, the SoC was filed and was sought to be substantiated by a witness duly authorised, goes to the root of the matter. The result of a finding, on such a issue, one way or the other, is on the maintainability of the claim itself. It can also be seen that if such a defence by the respondent/s before the Arbitral Tribunal is accepted, it has the effect of conclusion/termination of the arbitration proceedings, being either unnecessary or impossible. It is now well settled, as held by the Supreme Court in IFFCO Ltd, that the language of Section 31(6) of the Act is, 'advisedly wide', in nature. A perusal of para 8 of the judgment

would show that the Supreme Court has only sounded one note of caution, namely the Arbitral Tribunal in such a case should consider whether there is any real advantage in delivering interim award bearing in mind the avoidance of delay and additional expense. It has been held that ultimately a fair resolution of the dispute, should be uppermost in the mind of the Arbitral Tribunal.

32. Reliance placed on behalf of the respondents on various decisions to my mind is misplaced as the cases clearly turned on their own facts, apart from the fact that all these decisions are rendered prior to the decision of the Supreme Court in IFFCO Ltd.

33. In Harinarayan (supra) an application under section 27 of the Act seeking assistance of the court in taking evidence was rejected by the Arbitrator which was held to be not an an interim award. The learned counsel for the respondent has placed reliance on the observations in para 7 of the judgment, in which this court has observed that an important indication in holding what is an 'award' flows from the the expression in 'matter' with respect to which it may make a final award. In the first place the observations have to be read in the context of the challenge as raised in the said case which was to an order rejecting an application under section 27 of the Act. Secondly and more importantly we have the decision of the Supreme Court in

IFFCO Ltd which holds that the expression 'matter' is wide in nature. It certainly could not be said that an application under section 27 is a matter in respect of which a final award could be contemplated That application was essentially in the nature of a step-in-aid for recording evidence.

34. In *Sanshin Chemicals Industry* (supra), the issue was as to place or venue of the arbitration. The second part of the agreement, in that case, provided that in the event of lack of agreement between the parties, as to venue, was required to be determined by the joint arbitration committee of three members.

35. The case of *Punj Lloyd* (supra), involved a challenge to the order by which an application for amendment of one of the claims was rejected by the arbitrator. This court held that for such a decision to be construed as an interim award, within the meaning of Section 2(1) (c) of the Act, there has to be adjudication of the claim on merits.

36. In *Deepak Mitra,* before the Allahabad High Court the Arbitral tribunal had passed an order with a view to ascertain the feasibility/viability of a proposal for vertical division of the movable and immovable properties of the two companies after ascertaining the wishes of the share holders of the companies. The arbitral tribunal held that the division was not practically possible. That was the order which was subject matter of

challenge before the Allahabad High Court in which it was held that the order cannot be construed as an interim award.

37. In *Ranjeev Kumar*(supra), before the Calcutta High court the question was whether the rejection by the arbitrator of an objection as to the admissibility into evidence of a key document which was subject matter of dispute between the parties, can be construed as an interim award amenable to a challenge under section 34 of the 1996 Act.

38. The case of Container Corporation (supra) before the Delhi High Court involved a challenge to the order by which the Arbitral Tribunal had dismissed an application for amendment of written statement, so as to include a counterclaim, on the ground that it was belated and made at the stage when the final arguments were being heard by the Tribunal. The said case also in my considered view, turned on its own facts.

39. In my view, in none of the cases on which reliance is placed on behalf of the respondents, involved determination of a claim or a part of the claim or a counterclaim by the arbitrator. None of them involved determination of a matter which can be subject matter of a final award.

40. On application of the principles in IFFCO Ltd. and the fact that the impugned order decides a matter (about

maintainability of the claim, albeit against the Petitioners) in respect of which the arbitral tribunal could have passed a final award, in my view the order partakes of the nature of an interim award which is amenable to a challenge in a petition under section 34 of the Act. The point is accordingly answered in the affirmative.

As to point No (ii)

41. This takes me to the merits of the matter.

In the present case, the petitioners had sought dismissal of the claim by an interim award by filing an application under section 31(6) read with section 32(2)(c) of the 1996 Act on the ground that the continuation of the proceedings has become unnecessary or impossible. The contention is based on the evidence of Mr. Sunil Jain who has been examined by the claimant-PVIL in support of its claim. Mr Sunil Jain had invoked the arbitration, filed Statement of Claim and deposed on behalf of Claimant-PVIL on the strength of a resolution dated 16.7.2018. Placing reliance on the evidence/admissions of Mr. Sunil Jain it was contended on behalf of the petitioners that the resolution is not proved to be valid as per the BVI laws or the Indian law. It was pointed out that the very initiation of the claim was invalid. It is necessary to note that the Arbitral Tribunal has accepted that the resolution is not proved as per Indian or BVI laws.

42. It may be mentioned that the claimant-PVIL has not challenged the said findings and can be said to have accepted the same in as much as it has opted to abide by one of the choices given by the Arbitral Tribunal. Thus it is not necessary to examine the said findings, as the contentions raised by the petitioners questioning the validity of the resolution dated 16.7.2018 have been accepted by the Arbitral Tribunal.

43. The short question is whether after accepting that the resolution was invalid, the Arbitral Tribunal was justified in treating it as a curable defect/irregularity and granting opportunity to rectify the same either by production of a new resolution or proving that the resolution dated 16.7.2018 was valid as per BVI laws.

44. The challenge on behalf of the petitioners is essentially on the ground that the impugned decision is in conflict with the public policy of India being in contravention with fundamental policy of Indian Law and in conflict with basic notions of justice within the meaning of Explanation 1(ii) and (iii) to section 34(2)(b)(ii) of the 1996 Act. It is contended that the Arbitral Tribunal had no authority to pass an order as an *amiable compositeur*.

45. On the contrary it is contended on behalf of the first respondent that the irregularity has rightly been held to be

curable granting opportunity to the first respondent to either produce a fresh resolution or to prove that the resolution dated 16.7.2018 is in accordance with the BVI laws.

46. Before dealing with the rival submissions, the admitted position as emerging from record which has been noticed by the Tribunal in paragraph 49 may be reproduced thus:

(i) The claimant-PVIL is a foreign company incorporated under BVI laws with a sole director which a corporation known as Execorp which is also said to be registered under BVI laws. Thus, the sole Director of PVIL is not a natural person, but a body corporate.

(ii) The Resolution dated 16.07.2018 by which the authority is given to Mr. Sunil Jain to initiate these proceedings is signed by some person on behalf of 'Execorp'. The identity of this person is not known. In his cross-examination Mr. Sunil Jain has also admitted that he is unable to identify the signatory.

(iii) The Tribunal has therefore, found that the validity of the resolution is to be examined/tested on the application of BVI laws.

47. In paragraph 51, the Tribunal has found that there should have been necessary pleadings about the authenticity of resolution in the SoC as at that time the claimant did not know what would be the response of the Respondent. The Tribunal has also found that there are no averments that the resolution is passed as per BVI laws. Mr. Sunil Jain has also admitted that he is not familiar with BVI laws. The Tribunal has noted a concession on behalf of the learned counsel for the claimant-PVIL that the foreign law is a question of fact under the provisions of Section 45 of the Evidence Act, when deposed to in proceedings in India.

48. In paragraph 53, the Tribunal has noted that, in the absence of proof of the said fact, under the Foreign law, the same is to be tested by applying Indian Law for its validity as that is also the mandate under Section 28(b) of 1996 Act. The Tribunal has noted that the issue has to be addressed as to whether such a resolution would be valid on the application of Indian law, as if it was based in India for which the relevant provisions contained in the Companies Act, 2013 have to be looked into. The Tribunal has thereafter proceeded to consider the validity of the resolution in the context of the provisions of Section 149 of the Companies Act, 2013. The Tribunal has noted the challenge on behalf of the Petitioners to the purported resolution claiming that it does not pass the muster of Section 149 of the Companies Act for the following reasons:

a) Section 149 of the Companies Act does not recognise a Corporation being a Director of another Corporation.
b) A document has to necessarily reveal the identity of its author.
c) The document has not been proved as per the provisions of the Evidence Act.

49. The Tribunal has found that there is "sufficient merit" in the arguments advanced on behalf of the Petitioners (Applicants before the Tribunal). The Tribunal has found that although 2013 Act, unlike the earlier Companies Act, 1956 puts *imprimatur* to a single Director Company, at the same time such a single Director, under the Companies Act has to be a natural person. The Tribunal has noted that in the instance case, the sole Director of the Claimant-PVIL is itself, a artificial person namely Execorp, which is a Corporate Body. It has also been found that the source of incorporation of 'Execorp' is not known, whether it is also a BVI Company or a company incorporated in some other jurisdiction/country. The resolution does not even reveal identity of the person who has singed on behalf of the Execorp. It has been found that when Execorp is the Director which itself is a Corporation, signatory on behalf of Execorp has to be a person authorised by Execorp. This aspect is not revealed from the reading of the resolution and no material is placed on record to substantiate the same. The Tribunal in paragraph 56 has finally concluded that the Resolution cannot be treated as a valid Resolution under the Companies Act, 2013.

50. From paragraph 57 onwards, the Tribunal has examined the submissions on behalf of the Petitioners that necessarily the claimant's link and connection to the Statement of Claim has to be established, which can be discerned from Section 23 of the 1996 Act, as well as Order XXIX Rule 1 of CPC. The Tribunal has noted that Order XXIX Rule 1 of CPC requires the pleadings of such a Corporation, to be signed and verified on behalf of the such Corporation by any Director or the principal officer of the Corporation, who is able to depose to the facts of the case. The Tribunal has specifically noted that this principle is based on public policy and is applicable to Arbitral Tribunal as well, even when strict rules of procedure do not apply to arbitration proceedings. The Tribunal has thereafter noted an admitted fact that Mr. Sunil Jain is neither a Director nor a principal officer of the claimant-PVIL. Therefore, his Authority to sign and verify the Statement of Claim is entirely dependent on the Board Resolution. In paragraph 58, the Tribunal has noted that the learned counsel for the Claimant PVIL, could not satisfactorily explain the aforesaid legal aspect raised on behalf of the Petitioners questioning the validity of the Resolution.

51. It was contended on behalf of the claimant-PVIL that although in the application under Section 31, the Petitioners had sought an award declaring that Mr. Sunil Jain does not have requisite authority to a) invoke the arbitration, b) to institute the

claim on behalf of the claimant-PVIL and c) to depose on behalf of the claimant, in paragraph 2, they had limited scope of application to the issue of Mr. Sunil Jain's authority to institute the proceedings. In paragraph 2, the Petitioners had further submitted that Mr. Sunil Jain had no authority to affirm/present the Statement of Claim and/or to depose on behalf of the claimant. Finally in paragraph 11, the Petitioners set out their submissions that there was no valid authority to invoke the arbitration. It is pointed out that in the prayer clause, the Petitioners had sought a declaration that the claim is presented without authority, that the notice invoking arbitration is without authority and for dismissal of the claim. It is pointed out that the Tribunal although held that the Resolution was invalid under the Indian law, the Tribunal has not held that Mr. Sunil Jain, had no authority to initiate the proceedings or to sign the Statement of Claim or to depose on behalf of the Claimant-PVIL.

52. In my considered view, there cannot be any hair splitting of the matter. Essentially the challenge is to the authority of Mr. Sunil Jain to act on behalf of the Claimant-PVIL on the strength of the purported Resolution dated 16.07.2018 The invocation of the Arbitration clause, filing of SoC and/or deposition on behalf of the claimant are concomitants of such authority. It is not possible to accept that once the Tribunal comes to the conclusion that there were no pleadings about the

validity of the Resolution as per BVI laws, the identity of the person, who had signed the resolution on behalf of Execorp, was not established and the said Resolution did not pass the muster of Section 149 of 2013 Act still Mr. Sunil Jain would have authority to initiate proceeding or to sign the SoC and/or to depose on behalf of the claimant PVIL. It is necessary to note that the Board Resolution is dated 16.07.2018 while the invocation notice is issued on 30.04.2018.

53. Coming back to the order passed by the Tribunal, in paragraph 60, the Tribunal has noted, the agreement by the learned senior Counsel for both the sides that it is within the discretion of the Tribunal to decide the issue at the interim stage or at the final stage. The Tribunal has noted that the discretion has to be exercised in an objective manner, after weighing all the circumstances. The Tribunal has in its discretion found it "better to decide the issue at this stage" more so when the Tribunal "had heard a detailed argument in this behalf".

54. I have set out the findings recorded by the Tribunal at some length as the Tribunal, on facts has accepted the contentions on behalf of the Petitioners, questioning the validity of the Resolution, which was the sole source of authority of Mr. Sunil Jain.

55. Before proceeding further, it would be necessary to deal with certain decisions on which reliance is sought to be placed by the learned counsel for the parties. On behalf of the Petitioners, reliance is placed on *State Bank of Travancore* (supra) in order to submit that proper authorisation in favour of the person to launch the Arbitration proceedings is a fundamental requirement and in the absence thereof, the claim ought to be dismissed. The learned Senior counsel for the claimant-PVIL has submitted that the decision in *State Bank of Travancore*, does not consider the earlier decision of the Supreme Court in *Union Bank of India*(supra). In that case, the Appellant, Union Bank of India, had instituted a suit for recovery of loan and the question was whether the plaint was duly signed and verified by competent person. The Trial Court holding that the plaint was not duly singed and verified by a competent person, dismissed the suit which was reversed by the first Appellate Court and the decee of the first Appellate Court was confirmed by the High Court and the matter went to the Supreme Court. The Supreme Court found that a company like the appellant Union Bank of India can sue and be sued in its own name, placing reliance on Order VI Rule 14 and Order XXIX Rule 1 of CPC. It was held that even in the absence of any formal letter of authority or power of attorney by virtue of office itself a person referred to in Order XXIX Rule 1 can sign and verify the pleadings on behalf of the Corporation. In my considered view, the decision cannot come to

the aid of the claimant-PVIL for the reason that Order XXIX Rule provides that a suit and the pleadings on behalf of the Corporation may be signed and verified by a Secretary or by any Director or other Principal Officer of the Corporation, who is able to depose to the facts of the case. In the present case, admittedly Mr. Sunil Jain is neither a Secretary nor a Director nor the Principal Officer of the Claimant. The Tribunal has itself held that the decision in *Union Bank of India* (supra), *Pragya Electronics Pvt. Ltd.* (supra) and *MTNL* (supra) do not advance the case of Claimant-PVIL (see paragraph 74). In my considered view for a similar reason, the decision in *Alcon Electronics Pvt. Ltd.*(supra), *Sheth Builders* (supra) and *Sangat Printer Private Ltd.* (supra) which are based on the decision of the Supreme Court in *Union Bank of India*, will not apply. It is further necessary to note that decision in *Alcon Electronics Pvt Ltd.* (supra) and *Sheth Builders*(supra) arose out of Order VII Rule 11 of CPC for rejection of plaint. It is necessary to note that an order seeking rejection of plaint under Order VII Rule 11 has to be decided on a demurer confining to the pleadings made in the plaint, alone unlike in the present case where the application filed by the Petitioners was decided after the evidence of the witness Mr. Sunil Jain and on the basis of admissions given by the said witness.

56. This takes me to the material issue as to whether after accepting that the Resolution dated 16.07.2018 was not valid as per the Indian law and there were no pleadings and/or evidence to support or to establish the said Resolution as per the BVI Laws, the Tribunal was justified in treating the said irregularities as being curable granting two options to the claimant-PVIL. The reasoning in this regard can be found in paragraph 74 onwards. The Tribunal has relied upon the decision of Delhi High Court in *National Ability SA (supra)* which in turn is based on the decision of the Supreme Court, in *Jugraj Singh and another v/s. Jaswant Singh and another*[28], a decision of the Gujarat High Court in *Welding Rods Pvt Ltd.* (supra) and the decision of this Court in *Western India Theaters Ltd*. (supra).

57. In *National Ability SA* (supra), the Gujarat High Court *inter alia* held that a suit is not to be dismissed for technical reason such as plaint has not been signed and verified by a competent person, because such type of objections do not go to the root of the matter "if the party has otherwise substantiated the case". That was a case where one Ms. Priya D. Nair had filed execution proceedings on behalf of the company as its constituted attorney. An objection to the maintainability, was raised on the ground that there was no resolution of the company giving her such authority to file the execution proceedings. The Delhi High Court placing reliance on the decision in *Jugraj Singh* (supra)

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held that the defect was curable. The Tribunal has reproduced the observations of the Supreme Court in *Jugraj Singh*. That was a case where the question was whether one Mr. Chawla possessed a power of attorney for executing a document and for presentation of its registration. There were two power of attorneys, the first executed on 30.05.1963 was found to be not in compliance of the requirements of law, so as to clothe Mr. Chawla with the authority to execute the sale deed or to present it for registration. This was on account of the fact that the power of attorney was not authenticated as required by Section 33 of the Indian Registration Act. It can be seen that there was a second power of attorney which was executed before a proper notary public which complied with the laws of California and was a authenticated document as required by that law. It can thus be seen that in the case of *Jugraj Singh* case, the issue was only about the authenticated power of attorney for execution and registration of a document. That apart, the second power of attorney was found to be effective and compliant both under Section 85 of the Indian Evidence Act and Section 33 of the Indian Registration Act. In my humble view, the decision clearly turned on its own facts.

58. In *Welding Rods* (supra) there was a initial resolution on the basis of which a winding up petition was filed which did not specifically authorise the person to file a winding up petition.

There was a clarificatory resolution passed subsequently by the Board of Directors clarifying that the person who filed the winding up petition was duly authorised to file winding petition as well which resolution was taken on record. It can thus be seen that in that case there were indeed resolutions passed which were otherwise valid except that the earlier resolution did not authorise the concerned person to file the winding up petition, in respect of which a clarificatory resolution was issued subsequently. It can not be equated with a case where the resolution is found to be invalid as per the Indian Law and where it was also found that the claim of claimant-PVIL, lacked necessary pleadings about the validity of the resolution as per BVI laws.

59. In *Western India Theaters* (supra) this Court found that the power of attorney on the strength of which, the legal proceedings were instituted was not a general power of attorney and did not specifically authorise a person to file the company petition in question. A perusal of the observations in paragraph 19 and 20 would show that this defect was found to be curable particularly in view of the fact that the Petitioner himself was present in the court and was prepared to sign the petition. This Court found that if the Petitioner himself signs the petition then the flaw which rendered the petition bad or made it not maintainable, disappears.

60. Thus, in my humble opinion, none of the cases relied upon involved a factual situation as obtaining in the present case. It is significant to note that none of these cases arose out of Arbitration proceedings. It can be seen that these cases either arose out of the order passed by the Civil Court which unlike an Arbitral Tribunal is a Court of plenary jurisdiction or in respect of filing of winding up petition. In *Jugraj Singh*, the issue being only relating to the execution and presentation of a document for its registration. The learned counsel for the Petitioners in my view are right that an Arbitral Tribunal unlike a Court of plenary jurisdiction is a creature of contract governed by the agreement between the parties and cannot act in equity, in the absence of an express authorisation by the parties.

61. To conclude, the Tribunal has held thus, in paragraph 77 of the Judgment.

> *"77. The dicta of the aforesaid pronouncements is that such a defect is curable. That apart, as noticed above in the present case, there was no specific denial about the passing of the Resolution by these Applicants/Respondents in their respective defence statements and to specific question was raised by the Respondents that the resolution was not valid under the BVI Laws or Indian Laws. Because of this reason, no specific Issue was framed either. Therefore, there was no occasion for the Claimant to lead any evidence on this aspect. This is yet another reason that the Claimant should be given a chance to show that Mr.Sunil Jain is vested with necessary authority to institute the present Arbitration proceedings and has*

also been authorized to sign and verify the Statement of Claim and to depose in the matter. Non-granting of such an opportunity would cause prejudice to the Claimant and would amount to mis-carriage of justice to the Claimant."

62. The learned counsel for the Petitioners submitted that findings and the observations in the aforesaid paragraphs are contrary to the findings recorded by the Tribunal in paragraphs 51 and 67 of the order which read thus:

"51. Conscious of the fact that it is a foreign company created under BVI Laws, there should have been necessary pleadings about the authenticity of the Resolution in the SOC as at that time, the Claimant did not know what would be the response of the Respondents. Be as it may, there are no averments that the Resolution is passed as per BVI Laws. Mr.Sunil Jain has also admitted, as CW-1, that he is not familiar with BVI laws. Even Mr.Vijay Singh, learned counsel for the Claimant, did not refute the legal position to the effect that a foreign law question, under the provisions of Section 45 of the Evidence Act, is a question of fact when deposed to in proceedings in India.

67. The learned counsel for the Claimant may be right in his submission that some of the Respondents have not denied the existence of the said Board Resolution. However, it also cannot be denied that Respondent No.2 has specifically denied this document. Therefore, admission of some of the Respondents will not advance the case of the Claimant predicated on "admission". Further, even if the Tribunal proceeds on the basis that Board Resolution is admitted, that would amount to admission about the

factum of passing such a Board Resolution. It does not mean that there is an admission about the validity of the Board Resolution dated 16.07.2018."

63. I do find that once the Tribunal had held in paragraph 51 that there should have been necessary pleadings about authenticity of the Resolution in the SoC as the claimant cannot envisage as to what could be the defence of the Respondents and further having held in paragraph 67 that notwithstanding the denial by the Petitioners of the existence of the said Board Resolution, the claimant PVIL was not justified in relying on admission of some of the respondents and further having held that it would be only an admission of fact of passing such Board Resolution and not about its validity, could not have then relied upon the fact that there was no specific denial of the passing of the Resolution by the Petitioners in their respective defence statements.

64. This takes me to the scope of the interference available under Section 34 of 1996 Act. As noticed earlier, the ground of challenge is based on Section 34(2)(b)(ii) of the said Act read with Explanation 1(ii) and (iii). It is contended that the decision by the Arbitral Tribunal is in contravention to the fundamental policy of Indian Law and also in conflict with the most basic notions of justice.

65. The law relating to the nature and scope of the challenge under Section 34 is no longer *res-integra*. In this case, there is a common reliance placed by the parties on the decision of the Supreme Court in *Ssangyong Limited* (supra). In addition on behalf of the Petitioners, reliance is placed on *Vijay Karia* (supra).

66. The principle which can be culled out from these decisions is that a Domestic award passed in an International Commercial Arbitration, can be set aside, if the same is shown to be (i) contrary to the principles of legislative policy, on which the Indian statutes and laws are found, (ii) if it disregards binding judgment of Superior Courts or (iii) arrives at a decision which shocks the conscience of the Court. In Ssangyong Ltd, the Supreme Court held that it was not open for the NHAI could not have substituted or rewritten the contract unilaterally which has the effect of substituting a workable formula under the agreement by another formula, which was *dehorse* the agreement.

67. According to the Petitioners, the impugned decision is in contravention with the fundamental policy of Indian law and/or with the basic notions of justice on the following grounds.

(i) The proceedings as filed are not instituted by a 'party' to the Arbitration Agreement contained in SHA dated 25.03.2009. It is contended that it is the fundamental principle

and policy of Arbitration law in India that only a 'party', to an Arbitration Agreement can invoke arbitration for which reliance is placed on Section 2(1)(h) read with Section 7 of the Act.

(ii) The opportunity to cure invalidity of the Board Resolution dated 16.07.2018 was not subject matter of any application by the claimant. In other words, it is contended that the said relief has been granted without being asked for. In support of the said submission, reliance is placed on paragraph 36 of the Judgment in *Ssangyong Limited* (supra) and paragraph 33 of the Judgment in *Sanjay Roy* (supra).

(iii) Granting of such opportunity, dilutes the finality of the decision forming subject matter of interim award and would thus, be against Section 35 of 1996 Act, which attaches finality to the Arbitral Award. It is contended that once the Tribunal has come to the conclusion that the Resolution dated 16.07.2018 was not valid in accordance with the Indian Law, only course open to the Arbitral Tribunal was to dismiss the claim and could not have kept the dispute alive by granting the options to the claimant-PVIL.

(iv) The Tribunal has not considered the submissions on lack of authority with Mr. Sunil Jain to invoke the Arbitration, although the submissions in this regard have been recorded by

the Tribunal in paragraph 5(e), 10, 13, 19, 20, 25 and 63 of the order. It is submitted that the Tribunal has not recorded any finding on this aspect.

(v) There is a inherent contradiction in the findings recorded in paragraphs 51 and 67 on one hand and paragraph 77 on other and lastly;

(vi) The Tribunal has exercised jurisdiction in equity which is not permitted under Section 28 of the Act, in the absence of an express authorisation.

68. The learned counsel for the Respondents has submitted that all that the Tribunal has done is to grant an opportunity to the claimant PVIL to produce fresh resolution or to establish the validity of the Resolution dated 16.07.2018 which course followed by the Tribunal cannot be said to be in conflict with the public policy of India or in contravention of the fundamental policy of Indian law or in conflict with basic notions of justice.

69. I have given my anxious consideration to the rival submissions in this regard. I have already held that the finding that there are no pleadings to show that the resolution dated 16.07.2018 is valid in accordance with BVI laws and the further finding that resolution is not valid as per the Indian law and does

not pass the muster of Section 149 of 2013 Act goes to the very root of the matter as to the authority of Mr. Sunil Jain to institute the claim and to depose on behalf of the Claimant-PVIL. I also find that the findings in paragraphs 51 and 67 and those, contained in paragraph 77 are contrary to each other and the defect was not such which could have been rectified/remedied. The learned counsel for the Petitioners is right in contending that ratification can only be of an act which is otherwise valid. A perusal of paragraph 77 would also show that the Tribunal has exercised jurisdiction in equity which may be impermissible in view of Section 28(2) of 1996 Act which *inter alia* provides that the Tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so. I also find that although the Tribunal has recorded the submissions about lack of authority with Mr. Sunil Jain to invoke Arbitration as raised on behalf of the Petitioners, there is no finding in that regard recorded.

70. In my considered view, the impugned order/ interim award, would be in contravention of the public policy of India and fundamental policy of Indian law. In the result, the petitions are allowed. The impugned order/ interim award dated 16.06.2022 is hereby set side. The application filed by the Petitioners under Section 31 read with Section 32 of the 1996 Act, is hereby allowed as prayed.

In the circumstances, there shall be no order as to costs.

Pending applications, if any, are also disposed of.

C.V. BHADANG, J.