REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2019
(Arising out of SLP (C) No. 7979 of 2019)

WAPCOS Ltd. ...Appellant(s)

Versus

Salma Dam Joint Venture & Anr. ...Respondent(s)

WITH

CIVIL APPEAL NO. OF 2019

(Arising out of SLP (C) No..... of 2019)
(Diary No. 6975 of 2019)

J U D G M E N T

A.M. Khanwilkar, J.

Leave granted.

1. These appeals take exception to the judgment and order dated 25.01.2019 passed by the High Court of Delhi at New Delhi in Arbitration Petition No.810 of 2016, whereby the High Court allowed the Arbitration Petition purportedly filed by respondent No. 1 - Salma Dam Joint Venture, under Section 11(6) of the

Arbitration and Conciliation Act, 1996 (for short, "the Act") and appointed a sole Arbitrator.

2. Briefly stated, the Ministry of External Affairs (for short, "MEA") and the appellant in the leading appeal, Water and Power Consultancy Services (India) Limited (for short, "WAPCOSL"), a Public Sector Undertaking, entered into an agreement, dated 29.11.2004, for the implementation of the work on "the Reconstruction, Rehabilitation and completion of Salma Dam Project (3x14 MW), Afghanistan, Package III: Main Civil and Hydro-Mechanical Works" (for short, "project"). The appellant (WAPCOSL), was given the responsibility to provide financial, administrative and contractual management services for the MEA. Even though MEA was to provide the finances, the same was to be channeled through WAPCOSL to the successful awardee of the tender.

3. The respondent No.1 in both the appeals, Salma Dam Joint Venture (for short, "SDJV") was formed by the M/s SSJV Projects Private Limited (for short, "SSPPL") and M/s Angelique International Ltd. (for short, "AIL") under a Joint Venture Agreement (for short, "JVA") dated 09.09.2005 to submit its bid for the said project. In accordance with the terms and clauses of

the JVA, SSPPL was nominated to be the 'Lead Partner' of SDJV with ninety-five percent (95%) share as compared to five percent (5%) share of AIL. SSPPL was also authorized to invoke arbitration by appointing an arbitrator, make claims, et cetera, on behalf of AIL, by executing a Power of Attorney (for short, "PoA") dated 09.09.2005 in favour of SSPPL, in accordance with Clause 3.3 of the JVA.

4. SDJV was successful being the highest bidder and was awarded tender for the said project on 17.01.2006. That was followed by a Contract Agreement dated 09.03.2006 (for short, "Contract Agreement") for executing the stated contract between the WAPCOSL and SDJV. Along with the said agreement, WAPCOSL and SDJV signed certain documents to be read with the Contract Agreement and to form part and parcel thereof. Out of several such documents, Conditions of Particular Applications (for short "CoPA") is the relevant one for the purpose of this case. Clause 20.1 thereof deals with Contractor's claim and Clause 20.6 deals with Arbitration and it is under these clauses, the respondent No. 1 has rested its case, that is, arbitrability and the power to invoke arbitration.

5. Be that as it may, the consideration of the Contract

Agreement was Rs. 253.84 Crores. However, the same was raised to Rs. 470.40 Crores, on a representation made by SDJV. Once again, there was further change by way of revised rates, after a meeting between SDJV and a High-Power Committee (for short, "HPC"). In the said meeting, SDJV cited reasons which were beyond its control for initiating timely construction of the project. That justification found favour with the HPC for which it had recommended revised rates with regard to eight items. A letter was sent by WAPCOSL, informing about the acceptance of revised rates of eight items and raising the total consideration to Rs. 872.67 Crores. Subsequent to this, SDJV and WAPCOSL signed a revised agreement for the rates, referred to as the Amendment of Agreement (for short, "AoA"), dated 09.06.2015.

6. Despite signing of AoA, SDJV raised certain claims before the Engineer of WAPCOSL. After rejection of said representation, SDJV preferred six appeals to the Technical Committee constituted in terms of clause 2.1 of Section – 02 of AoA. Five of these appeals were rejected/disposed of vide report of the Technical Committee dated 28.10.2016.

7. In the meantime, on 04.06.2016, the Dam was inaugurated

by the Hon'ble Prime Minister of India and Hon'ble President of Afghanistan. Subsequent to which, a letter dated 02.08.2016 was issued by AIL addressed to WAPCOSL, informing that SDJV has started the process of dismantling the machinery and the work force from the project site with full awareness of WAPCOSL.

8. Subsequent to the execution of AoA, dispute arose between the JV partners which resulted in AIL filing a petition (bearing number O.M.P. (I) (COMM.) 70/2016) under Section 9 of the Arbitration Act, wherein the High Court of Delhi, vide order dated 05.09.2016, directed WAPCOSL to deposit the amount payable to SDJV with the Registrar of the High Court in order to secure the interests of both the JV entities. The High Court in a separate petition (bearing number Arb. P. 442/2016), filed by AIL against SSPPL, also appointed a sole arbitrator for their (AIL and SSPPL) *inter se* disputes.

9. On 21.09.2016, the Board of Directors of AIL resolved to revoke the PoA executed in favour of SSPPL and in furtherance of the same, AIL, vide letters dated 19.10.2016 and 11.11.2016, wrote to the respective Banks and also to WAPCOSL informing them about the revocation of the authority of SSPPL. Thus, it was

duly notified through these letters that in future, only those letters or communications which are signed or acknowledged by both the parties (AIL and SSPPL) shall be valid and be entertained by WAPCOSL.

10. Notwithstanding the abovementioned letters sent by AIL, upon rejection of the claims of SDJV by the Technical Committee, on 28.10.2016, SSPPL, unilaterally, espousing claims of SDJV proceeded to invoke the arbitration process, under clause 20.6 of CoPA and also appointed a nominee arbitrator, vide letter dated 12.11.2016. WAPCOSL, in response, vide letter dated 05.12.2016, recorded that since SDJV is a joint venture entity and the authority of SSPPL to represent AIL has been revoked, the appointment of arbitrator by SSPPL, unilaterally, is illegal in terms of clause 4.2 of the Contract Agreement and clause 3.2 of the JVA.

11. Resultantly, SSPPL filed a petition on behalf of SDJV against WAPCOSL under Section 11(6) of the Arbitration Act (bearing number Arb. P. 810/2016) before the High Court of Delhi, wherein it has been asserted that the PoA dated 15.07.2005 given by AIL in its favour is still in force and forms part of the Contract Agreement dated 09.03.2006. This assertion

is factually incorrect. In that, the PoA was executed as a follow up document alongwith JVA on 09.09.2005 itself. Whereas, the Board of Directors of AIL vide resolution dated 15.07.2005 had authorised its officer to execute the JVA and PoA, which were so executed on 09.09.2005.

12. The said arbitration petition was contested by the appellant (WAPCOSL). However, the High Court allowed the same vide order dated 15.03.2017 and appointed an arbitrator for WAPCOSL.

13. Feeling aggrieved, WAPCOSL preferred a Special Leave Petition (bearing number SLP (Civil) 26555/2017) before this Court. This Court, vide order dated 03.11.2017, directed impleadment of AIL as a party and also stayed the arbitral proceedings. AIL appeared before this Court and asserted that it did not give consent to SSPPL for appointment of an arbitrator or for filing petition under Section 11(6) of the Arbitration Act. Thus, it had urged that SSPPL had no authority to unilaterally appoint an arbitrator for SDJV or to file the subject petition on behalf of SDJV. Further, the petition filed in the name of SDJV through SSPPL was not as per Delhi High Court Rules. This Court, vide order dated 11.12.2017, deemed it proper to set aside the order

passed by the High Court of Delhi dated 15.03.2017 and to relegate the parties before the High Court for reconsideration of all aspects, as would be raised by the parties including regarding the locus and competence of SSPPL to unilaterally appoint an arbitrator or file arbitration petition under Section 11 of the Act.

14. The High Court of Delhi, vide judgment dated 25.01.2019 (for short, "impugned judgment"), once again allowed the said arbitration petition and appointed a sole arbitrator, instead of three arbitrators envisaged in CoPA.

15. The High Court opined that the arbitration agreement between SDJV and WAPCOSL was still in force on the date of filing of the arbitration petition and the same would operate between the parties. That finding has been reached despite the AoA having been executed between the parties on 09.06.2015. The High Court also opined that SSPPL had authority under the JVA as well as the Contract Agreement to represent SDJV, as a leading partner thereof. It held that SSPPL derived authority from clause 20.6 of CoPA read with the other enabling terms in the JVA and FIDIC Conditions of Contract for Construction (for short, 'FIDIC'). The High Court was also impressed by the fact

that SSPPL had 95 per cent shareholding in SDJV as against only 5 per cent shareholding of AIL, the other partner. For that reason, it went on to observe that AIL cannot be permitted to derail the arbitration process commenced for and on behalf of SDJV through SSPPL. The High Court was also impressed by the fact that despite the execution of AoA, the Technical Committee entertained the appeals filed by SDJV in respect of certain items. That goes to show that even the Technical Committee was of the view that the dispensation regarding settlement of further claims of SDJV could be pursued and the arrangement arrived under AoA between the parties cannot be treated as full and final settlement. Resultantly, SDJV was well within its rights to take recourse to arbitration for resolution of the disputes in that regard. Further, the fact as to whether SDJV was entitled for the relief, regarding the claims raised, was a matter within the exclusive domain of the Arbitral Tribunal. The High Court, therefore, allowed the Arbitration Petition and appointed a sole Arbitrator for resolution of the disputes between the parties.

16. Feeling aggrieved, WAPCOSL as well as AIL have assailed the decision of the High Court by filing separate Special Leave Petition(s).

17. We have heard learned Senior Counsel Mr. Gaurav Panchnanda for WAPCOSL (appellant) and Mr. Shyam Divan for AIL (appellant), and Mr. Sachin Datta, learned Senior Counsel for SDJV (respondent No.1 in both the appeals).

18. After cogitating over the erudite arguments of the counsel appearing for the respective parties and perusing the relevant records, including Arbitration Petition and the written submissions filed by the learned counsel, in our opinion, two principal issues need be answered in this judgment. First, whether on the date of presentation of Arbitration Petition, purportedly by SDJV through SSPPL on 15.12.2016, the arbitration agreement posited in Contract Agreement dated 09.03.2006 was in existence or subsisting and in force? Second, whether the Arbitration Petition filed in the name of SDJV through SSPPL, in law can be considered as having been properly and validly presented despite the express revocation of authority of SSPPL vide resolution passed by the Board of Directors of AIL on 21.09.2016 and duly communicated to SSPPL as well as WAPCOSL before 15.12.2016, as was granted to SSPPL in terms

of JVA read with PoA including the Contract Agreement?

19. Reverting to the first question, we must immediately advert to the Arbitration Agreement incorporated in the Contract Agreement. That can be discerned from clause 4, which reads thus:-

> "4. Settlement of Disputes
> 4.1 It is specifically agreed by and between the parties that all the differences or disputes arising out of the Agreement shall be decided by process of settlement of disputes and arbitration as specified in Clause 20 of the Conditions of the Contract.
> 4.2 It is also agreed that the Salma Dam Joint Venture agreement dated 9th September 2005 shall be treated as part of this agreement and both the parties to the said joint venture namely M/s SSJV Projects Private Limited and M/s Angelique International Limited shall also be jointly and severally liable in the process of settlement of disputes in arbitration between WAPCOS and Salma Dam Joint Venture."

This clause must be read alongwith the terms specified in CoPA in particular clause 20 and clauses 1.14, 4.3 and 20.6 of FIDIC. Going by the Contract Agreement read with relevant clauses of CoPA and FIDIC, it is obvious that the parties had agreed for resolution of all their differences or disputes arising from the Contract Agreement by process of settlement of disputes and arbitration.

20. In the present case, however, in due course, because of fortuitous situation, the parties had to agree to amend certain

terms and conditions of the Contract Agreement and to provide for revised contract rates. That was done after due negotiations, as is evinced from the correspondence exchanged between SDJV and WAPCOSL vide letters dated 15.09.2011 and 17.09.2012 and the recitals of the AoA itself. Finally, the parties (SDJV and WAPCOSL in particular) executed a formal Amendment of Agreement (AoA) on 09.06.2015. The same records the new arrangement eventually agreed upon between the parties. It will be useful to first refer to the preamble of the AoA which reads thus:

> "1.0 Preamble
>
> Consequent upon the modification of rates of certain Items of works in January 2013 which is subject to special terms and conditions, the Amendment to the Original Agreement between WAPCOS and SDJV (the Parties) was required to be entered upon thereafter.
>
> Nevertheless the work at site continued at very fast pace and in good faith and trust as per the revised rates agreed between the Parties. Despite several constraints the project completion progressed well during the years 2013 and 2014 and substantial part of the works (around 97%) of the Dam and Spillway was completed by 31st December 2014. Remaining works are continuing at the project site.
>
> Now, as the Amendment to Agreement is to be formalized for proper implementation and records, therefore, in continued good faith and trust the Parties have agreed to sign this Amendment of Agreement by incorporating the actual site conditions, practical difficulties and subsequent developments that have taken place at site.
> ……. ."

21. In clause 1.1 of AoA, reference is made to the estimated cost

of works and the balance work to be completed in the revised estimated cost. The note below the chart given in clause 1.1 and clauses 1.2 to 1.6 of the preamble are of some relevance. The same read thus:

> "1.1 The balance work has to be completed in the revised estimated cost as given below.
>
> Estimated Cost of Works
>
> …. ….. ……
>
> Note: If due to site conditions, the balance quantities increases, the contractor will carry out the construction and complete the work
>
> 1.2 This Amendment of Agreement will form part of the Original Agreement no. WAPCOS/SDP/AFG/Pkg.-III-05 dated 9th March 2006.
>
> 1.3 This Amendment of Agreement includes revised Bill of Quantity (BoQ) (containing executed & balance quantum of works, New Items of work, etc) with the modified approved rates for eight major item of Civil works and modified cost of Hydro-Mechanical works along with additional terms and Conditions of Contract.
>
> 1.4 Any Clauses/items other than the Amendment of Agreement will be governed by Original Agreement and in case of any dispute the decision of CMD, WAPCOS will be final and binding to the Contractor.
>
> 1.5 In case of any inconsistency between Original Agreement and Amendment of Agreement, the content of Amendment of Agreement will succeed.
>
> 1.6 In case of any dispute on Technical Specification and interpretation of any contract clauses the decision of CMD, WAPCOS will be final and binding to the Contractor.
> …… ."

22. It may be useful to now advert to clauses 1.2 and 1.3 of

Section -01 of the AoA, which read thus:

> **"REVISED COST AND RELATED TERMS AND CONDITIONS**
>
> Clause 1.0
> …. ….. …..
>
> The revision of cost/modified rates of above item are subject to the following:
> 1.1 …. …. ….
>
> 1.2 The balance pending claims of Contractor stands buried and it was agreed by the Contractor that, no claims will be raised by Contractor on any of the pending/settled claims/other claims resulting out of the correspondences made so far and there will be no arbitration for the settlement of claims. It is agreed that the Contractor shall not be paid any further amount on claim/additional rate for new item of work settled or pending over and above the payments already released to the contractor.
>
> 1.3 In future, no claim of Contractor on any account shall be entertained. However any claim arising out of force majeure shall be examined."

Here, we may also take note of Section-02 of AoA concerning the amendment in general conditions of CoPA. Clause 2.1 of this section predicates that sub-clause 1.1.2.16 of CoPA stands modified as Technical Committee means committee constituted by CMD, WAPCOSL.

23. It is pertinent to note that the execution of stated AoA has not been disputed by SDJV or for that matter by SSPPL. More so, these entities have not even challenged the implementation of

AoA. On the other hand, it has come on record that all concerned gave effect to the terms set out in AoA by offering revised rates to SDJV in conformity with the agreed rates referred to in AoA and which payment was received and availed of by SDJV/SSPPL without any demur. We may hasten to add that even the subject Arbitration Petition does not question the execution of AoA or the applicability thereof. Indeed, the asseveration in the Arbitration Petition is that the claim set up by SDJV is in reference to items and bills raised subsequent to the execution of AoA.

24. The moot question is: whether the AoA has the effect of undoing and abrogating the arbitration clause predicated in the Contract Agreement? According to SDJV and SSPPL, the arbitration clause in the Contract Agreement remains intact and undisturbed. The parties continue to be bound by the same.

25. For considering this plea we must appreciate the backdrop in which the AoA has been executed, to understand the true import of the terms and conditions set out therein. From the correspondence exchanged between the parties preceding the execution of AoA, being letters dated 15.09.2011 and 17.09.2012, it is amply clear that the parties were *ad idem* that substantial part of the works (around 97 per cent) of the "Dam and Spillway"

was completed by 31.12.2014. This fact has been plainly restated in the preamble of the AoA. The AoA also records that if due to site conditions, the balance quantities increase, the contractor will carry out the construction and complete the work. Further, the AoA would form part of the Contract Agreement dated 09.03.2006 and it includes revised Bill of Quantities (BoQ) (containing executed and balance quantum of works, new items of works, etc.) with the modified approved rates for eight major items of civil works and modified cost of Hydro-Mechanical works along with additional terms and conditions of Contract. Clause 1.4 of the AoA makes it amply clear that any other clauses/items other than the AoA will be governed by Original Agreement (Contract Agreement) and in case of any dispute, the decision of CMD, WAPCOSL will be final and binding on the contractor. Clause 1.5 of the AoA makes it further clear that in case of any inconsistency between the Contract Agreement and AoA, the terms specified in AoA will prevail. Clause 1.6 of the preamble postulates that in case of any dispute on technical specifications and interpretation of any contract clauses, the decision of CMD, WAPCOSL will be final and binding on the contractor. Section-01 of AoA then deals with revised cost and related terms and

conditions. Clause 1.0 thereof provides that the revision of cost/modified rates of the items referred to therein will be subject to clauses 1.2 and 1.3, amongst others. Clause 1.2 of Section-01 envisages that the balance pending claims of contractor "stands buried" and it has been agreed by the contractor, that no claims will be raised by the contractor on any of the pending/settled claims/other claims resulting out of correspondences made so far and there will be "no arbitration" for the settlement of claims. Clause 1.3 of Section-01 also makes it clear that in future no claim of contractor on any count shall be entertained except the claim arising out of force majeure.

26. Despite such peremptory agreement and declaration by the parties, SDJV proceeded on an erroneous basis that the arbitration agreement in Contract Agreement still subsists and can be enforced by it. As aforesaid, neither SDJV nor SSPPL have disputed the execution of AoA nor it is even remotely suggested in the Arbitration Petition that the AoA was executed by them under duress or coercion. From the indisputable circumstances, it becomes amply clear that the stated terms and conditions set out in the AoA were agreed upon by all concerned primarily due to revision of cost of the project upto Rs. 872.67

crores which is 3.44 times the original project cost, (i.e. Rs. 253.84 crores) as the same was subject to clauses 1.2 and 1.3 of Section-01[1]. Notably, this AoA was executed at a stage when substantial part of the works (around 97%) had already been completed. In our opinion, the terms and conditions specified in AoA leave no manner of doubt that the arbitration agreement has been done away with – as is manifest from the unambiguous declaration that balance pending claims of Contractor stand buried and that there will be no arbitration for the settlement of claims[2].

27. To get over this position, SDJV would contend that Section-02 of AoA specifically deals with the amendments in general conditions of CoPA but it makes no reference to amendment of clause 20 of CoPA. That may be so, however, in our view, it will be of no avail. We will deal with this aspect a little later. Suffice it to observe that the terms and conditions of AoA make it amply clear that the arbitration agreement stands overridden in view of the express declaration in AoA in that regard referred to earlier.

28. As noticed earlier, AoA was executed on 09.06.2015 by

1 See – Clause 1.0 of Section-01 of AoA (in paragraph 22 above)
2 See – Clause 1.4 of Preamble (in paragraph 21 above) read with clauses 1.2 and 1.3 of Section -01 of AoA (in paragraph 22 above).

which date, substantial part of the works (around 97 per cent) of the "Dam and Spillway" had been completed. The water filling in dam commenced on 26.07.2015 by closing diversion tunnel gate. That presupposes that the "Dam and Spillway" work was fully completed before that date. It is also not disputed that the project was inaugurated by the Prime Minister of India and the President of Afghanistan on 04.06.2016. The terms agreed upon between the parties and as recorded in AoA dated 09.06.2015 was the outcome of steep revision of rates. These circumstances are germane whilst answering the question under consideration. We have no manner of doubt that the purport of the terms and conditions incorporated in the AoA dated 09.06.2015 are unambiguous expression of intent to supersede the arbitration agreement incorporated in Contract Agreement dated 09.03.2006 and to resolve all the contentious issues regarding the claims of SDJV, in the manner specified therein.

29. The High Court, however, rejected the argument of the appellant(s) herein on the following basis:

> "10.5 What is, however, not disputed is that as a matter of fact, the J.V. entity had lodged its claim with the Engineer appointed under the C.A. and upon the Engineer repelling its claim, five appeals were lodged with the Technical Committee which rejected the same by way of a common order dated 28.10.2016. A perusal of the order of the Technical Committee would show that the

claims lodged by the J.V. entity have been examined on merits and also from the perspective of the plea raised before it with regard to their admissibility in view of the provisions of Clauses 1.2 and 1.3 of the AOA.

10.6 Therefore, if, as contended on behalf of WAPCOS, Clauses 1.2 and 1.3 of the AOA barred the J.V. entity from pressing any pending or future claims, then, to my mind, there was no need for the Technical Committee to deliberate upon the claims on merits. It is the stand of the J.V. entity that all the claims lodged by it with WAPCOS pertain to a period post the execution of the AOA.

10.7 The record shows that the AOA was executed on 09.06.2005, while the subject project was inaugurated post its completion only in 2016. Furthermore, it is the case of the J.V. entity that the AOA provided for revision of rates for eight major items concerning civil works and hydro mechanical works. Therefore, if at all, the bar would apply to claims, which were referable to pre-existing claims, or claims pertaining to revision of rates relatable to eight major items of civil works and hydro mechanical works or those claims which overlapped with these claims. That being said, as to whether the position taken by the J.V. entity is correct or not is a matter which can only be examined by the Arbitral Tribunal once the matter is tried as based on mere pleas and counter pleas, this aspect cannot be decided in a Section 11 petition. Particularly, given the facts obtaining in this case, it is not possible to come to a definitive conclusion that there was accord and satisfaction upon the execution of the AOA.

10.8 Therefore, the ground taken on behalf of WAPCOS that no claim could be lodged post execution of the AOA is untenable and hence cannot be accepted. There is, to my mind, much merit in the submission advanced on behalf of the J.V. entity that the AOA cannot impede adjudication of all future claims whether or not they have their genesis in the AOA. If that was the intent, as correctly argued on behalf of the J.V. entity, the AOA should have done away with Clause 20.6 of COPA, which contains the arbitration agreement."

30. As regards the first reason weighed with the High Court that the Technical Committee entertained the five appeals filed on

behalf of the SDJV, that in our view cannot undo the effect of terms and conditions of AoA which had annulled the arbitration clause in the Contract Agreement. There are at least two other tangible reasons to overturn the stated opinion of the High Court. First, the Technical Committee was, as a matter of fact, constituted under clause 2.1 of Section – 02 of AoA by the CMD of WAPCOSL, as is evident from the communication dated 21.10.2015 sent by WAPCOSL to SDJV. That fact has been restated in the subsequent correspondence. The Technical Committee was, therefore, not constituted in terms of Clause 20.1 of CoPA as has been erroneously assumed by the High Court. Second, the fact that the Technical Committee processed the appeals instituted by SDJV does not mean that WAPCOSL had waived the terms and conditions of AoA, in particular clauses 1.2 and 1.3 of Section-01 thereof. No averment is found in the Arbitration Petition to even remotely suggest that it was a case of waiver express or tacit, by WAPCOSL *qua* the stipulation specified in clauses 1.2 and 1.3 of Section-01 of AoA. Hence, this reason weighed with the High Court is manifestly wrong and cannot stand the test of judicial scrutiny.

31. The second reason weighed with the High Court is again

founded on incorrect assumption about the date of AoA. The High Court in paragraph 10.7 proceeds on the basis that AoA was executed as back as on 09.06.2005 and having noted that date, the High Court then observed that the project was inaugurated only in 2016. On this erroneous assumption, the High Court rejected the claim of the appellant(s) herein. As a matter of fact, the AoA was executed on 09.06.2015, at which point of time, 97 per cent of the project was completed and the same was rolled out by filling of the Dam from 26.07.2015 in less than one month, by closing diversion tunnel gate. Not only that, the project was dedicated to the people of Afghanistan soon thereafter on 04.06.2016. Thus understood, it becomes clear that the parties had agreed to give quietus to all the claims and adopt revised rates recommended by High Power Committee, as recorded in AoA executed on 09.06.2015. Suffice it to note that the basis for rejecting the argument of the appellant(s) is founded on erroneous assumption that AoA was executed on 09.06.2005. That is an error apparent on the face of the record.

32. The third reason weighed with the High Court is that clause 20.6 of CoPA, providing for resolution of disputes by arbitration has not been modified by AoA. Indeed, clause 4 of the Contract

Agreement makes reference to clause 20 of CoPA. However, on a fair reading of clause 4 of the Contract Agreement and in particular 4.1 as reproduced hitherto, it would be crystal clear that the substance of the provision is to provide for process of settlement of disputes and arbitration. Reference to clause 20 of CoPA is only to indicate that the procedure specified therein may have to be followed whilst taking recourse to that process. However, as the substantive provision regarding remedy of arbitration itself has been done away with in terms of clauses 1.2 and 1.3 of Section-01 of AoA, there was no need to modify clause 20 in CoPA dealing with machinery provision. Thus, the remedy of arbitration cannot be resurrected merely because clause 20 of CoPA has not been expressly modified in the AoA. Hence, even this reason does not commend us.

33. As these are the only reasons which had weighed with the High Court to reject the argument of the appellant(s) regarding non-existence of arbitration agreement and the same being untenable in law, it must necessarily follow that the Arbitration Petition filed for and on behalf of SDJV through SSPPL was not maintainable. In other words, the Arbitration Petition should have been rejected for lack of subsisting or existing arbitration

agreement between the parties on the date of filing of Arbitration Petition.

34. It is not unknown in commercial world that the parties amend original contract and even give up their claims under the subsisting agreement. The case on hand is one such case where the parties consciously and with full understanding executed AoA whereby the contractor gave up all his claims and consented to the new arrangement specified in AoA including that there will be no arbitration for the settlement of any claims by the contractor in future. Having chosen to adopt that path, it is not open to the contractor to now take recourse to arbitration process or to resurrect the claim which has been resolved in terms of the amended agreement, after availing of steep revision of rates being condition precedent. We may usefully rely on the underlying principle expounded by this Court in ***Damodar Valley Corporation vs. K. K. Kar***[3], wherein the Court observed as follows:-

> "…..As the contract is an outcome of the agreement between the parties it is equally open to the parties thereto to agree, to bring it to an end or to treat it as if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such

3 (1974) 2 SCR 240 @ 243-244

> a way that it cannot subsist. In all these cases, since the entire contract is put an end to, the arbitration clause, which is a part of it, also perishes along with it. Section 62 of the Contract Act incorporates this principle when it provides that if the parties to a contract agree to substitute a new contract or to rescind or alter it, the original contract need not be performed. Where, therefore, the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration, that dispute cannot be referred to the arbitration as the arbitration clause itself would perish if the averment is found to be valid. As the very jurisdiction of the arbitrator is dependent upon the existence of the arbitration clause under which he is appointed, the parties have no right to invoke a clause which perishes with the contract."

In a subsequent decision in ***National Insurance Company Limited vs. Boghara Polyfab Private Limited***[4], in paragraph 52 this Court held as follows:

> "**52.** Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject are:
> *(i)* ....
> (*ii*) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no-claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.
> (*iii*) ....
> (*iv*) ....
> (*v*) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The

4 (2009) 1 SCC 267

> claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration."

Further, in ***Nathani Steels Ltd. v. Associated Constructions***[5], this Court observed as follows:-

> "3.....Even otherwise we feel that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause. We are, therefore, of the opinion that the High Court was wrong in the view that it took."

35. Having said this, no other issue need be addressed in these appeals. As a result, these appeals must succeed. Resultantly, the impugned judgment of the High Court is set aside and the

5 1995 Supp (3) SCC 324

Arbitration Petition No. 810 of 2016 filed by the respondent No. 1 herein stands dismissed.

36. However, we must keep the option available to the parties to take recourse to other remedies, *inter se*, which they are free to adopt in accordance with law; and the rejection of Arbitration Petition will be no impediment for them to pursue those remedies. We, accordingly, keep all other issues and contentions available to the parties open, to be determined in appropriate proceedings as and when occasion arises.

37. The appeals are allowed in the above terms with no order as to costs. All pending applications are also disposed of.

.....J.
(A.M. KHANWILKAR)

.....J.
(DINESH MAHESHWARI)

New Delhi;
November 14, 2019.