



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

COMMERCIAL ARBITRATION PETITION NO. 19 OF 2024

WITH
INTERIM APPLICATION NO.1742 OF 2024
IN
COMMERCIAL ARBITRATION PETITION NO.19 OF 2024

Laguna Resort Pvt. Ltd.

.....Petitioner

: Versus :

Concept Hospitality Pvt. Ltd.

....Respondent

Mr. Ashutosh Kumbhakoni, Senior Advocate with Mr. Mahermosh Humranwala. Mr. Mahesh Menon and Ms. Aakansha Anand i/b. Mahesh Menon & Co., for the Petitioner.

Mr. Sumit Rai with Ms. Samrudhi Gholap i/b. Mr. Satyan Israni, for the Respondent.

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CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 05 DECEMBER 2025.

PRONOUNCED ON: 17 DECEMBER 2025.

JUDGMENT:

1) By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, (**Arbitration Act**) the Petitioner has challenged Award of the learned Sole Arbitrator dated 28 November

2022. By the impugned Award, the learned Arbitrator has directed Petitioner to pay to the Respondent sum of Rs. 78,09,220/- alongwith interest @ 12% p.a. calculated from due date of each invoice. Petitioner is also directed to pay costs of arbitration of Rs. 21,28,809/-. The Arbitral Tribunal has also allowed post award interest @ 14% per annum on the awarded sums.

FACTS

2) The Petitioner-Laguna Resorts Private Ltd (**Laguna**), is an incorporated entity under the Companies Act, 1956, which was formerly known as Hasina Resorts Pvt. Ltd. (**Hasina**). Petitioner is the owner of land property located at Lonavala. It desired construction of hotel on the land. Petitioner-Laguna entered into Hotel Management Agreement dated 27 September 1999 (**Concept Agreement of 1999**) with Respondent-Concept Hospitality Private Ltd (**Concept**) for construction, management and operation of Petitioner's hotel named Laguna Resort at Lonavala. Under the Agreement the Concept agreed to construct a hotel for Petitioner and to render consultancy and advisory services including entire management and operations of the hotel. The period of Agreement from 27 September 1999 was for five years with further option to extend the same by another period of five years. During currency of extended term of the HMA, Evergreen Hospitality Pvt. Ltd. (**Evergreen**) showed interest in managing the hotel. Accordingly, Tripartite Assignment Agreement dated 1 April 2009 (**Assignment Agreement**) was executed between the Petitioner-Laguna, Concept and Evergreen, under which Concept assigned its right to operate and manage the Hotel under 1999 Agreement for remaining term thereof from 1 April 2009 to 13 March 2011 in favour of Evergreen.

Later a Hotel Management Agreement dated 11 March 2011 (**Evergreen Agreement of 2011**) was executed between the Petitioner-Laguna and Evergreen and the activity of management and operation of Laguna Resorts by Evergreen was governed by the said 2011 Agreement.

3) Disputes arose between Petitioner-Laguna and Evergreen and by notice dated 8 October 2012, Evergreen invoked the arbitration clause under the Evergreen Agreement of 2011 in respect of claims pertaining to the period from 1 April 2009 to 11 March 2011 as also for the period from 12 March 2011 to 11 March 2016. Independently, the Concept also invoked arbitration clause under Concept Agreement of 1999 raising claims pertaining to the period from July 2006 to March 2009. This Court appointed a sole Arbitrator to adjudicate disputes under the Evergreen Agreement. Similarly, same learned Arbitrator was appointed to adjudicate disputes under the Concept Agreement of 1999. During pendency of arbitral proceedings Concept merged into Evergreen w.e.f. 24 December 2013 and the merged entity was renamed as Concept Hospitality Private Ltd (**CHPL**).

4) The arbitral proceedings commenced by the Concept pertaining to the invoices for period from July 2006 to March 2009 were concluded by Award dated 13 September 2016, under which the Concept was awarded a portion of its claim. Petitioner has apparently honoured the said Award and the Award is thus fully complied with. In arbitral proceedings filed by the Evergreen in respect of invoices pertaining to the period from 1 April 2009 to 11 March 2016, Petitioner filed Application under Section 16 of the Arbitration Act, questioning the jurisdiction of the Arbitral Tribunal

to decide disputes relating to period from 1 April 2009 to 11 March 2011 on the ground that the said period was governed by the Concept Agreement of 1999 and not by the Evergreen Agreement of 2011. The Application was rejected. The Arbitral proceedings were decided in favour of the Evergreen and the learned Arbitrator made Award dated 22 December 2015 in favour of the Evergreen in respect of the entire period from 1 April 2009 to 11 March 2016. The learned Arbitrator held that 2011 Agreement was merely renewal of 1999 Concept Agreement.

5) Petitioner challenged the Award dated 22 December 2015 under Section 34 of the Arbitration Act and by order dated 12 March 2019, this Court partially set aside the Award so far as it related to recovery of amounts pertaining to invoices for the period from 1 April 2009 to 11 March 2011. Rest of the Award was confirmed. Petitioner has apparently complied with the Award by making the payments in respect of the period from 1 April 2009 to 11 March 2011.

6) The merged entity-CHPL invoked arbitration vide letter dated 24 May 2019 under the Concept Agreement of 1999 in respect of invoices pertaining to the period from 1 April 2009 to 11 March 2011 and thereafter filed Application under Section 11 of the Arbitration Act for appointment of the Arbitrator. By order dated 15 January 2020, this Court appointed the sole Arbitrator to resolve the disputes covered under the Concept Agreement of 1999 for the period from 1 April 2009 to 11 March 2011.

7) Respondent-CHPL filed Statement of Claim dated 21 February 2020 and claimed sum of Rs.12,24,20,350/-. The

Petitioner filed Statement of Defence. Petitioner also filed Application under Section 16 of the Arbitration Act challenging the jurisdiction on the ground of the claim being barred by limitation, the claim being barred by *res judicata* and claim being barred by constructive *res judicata* under Order II Rule 2 of the Code of Civil Procedure, 1908 (**the Code**). By order dated 8 July 2021, the learned Arbitrator dismissed the Application filed under Section 16 of the Arbitration Act. The learned Arbitrator framed issues based on the pleadings. Parties led evidence in support of their respective cases. The learned sole Arbitrator has made the Award dated 28 November 2022 awarding the sum of Rs.78,09,220/- in favour of Respondent-CHPL alongwith interest @ 12% p.a. calculated on the date of each invoice till the date of the Award. The learned Arbitrator has also awarded costs of arbitration and post Award interest of 14% p.a. Aggrieved by the Award dated 28 November 2022, the Petitioner has filed the present Petition under Section 34 of the Arbitration Act.

SUBMISSIONS

8) Mr. Kumbhakoni, the learned Senior Advocate appearing for the Petitioner would submit that the Award of the learned sole Arbitrator is without jurisdiction as there is no Arbitration Agreement between the Petitioner and the Respondent-CHPL in respect of disputes arising out of invoices pertaining to the period from 1 April 2009 to 11 March 2011. The said invoices are governed by the Concept Agreement of 1999, which is a reason why learned Single Judge of this Court partially set aside the earlier Award dated 22 December 2015. That the merged entity CHPL cannot initiate arbitration proceedings in respect of the invoices pertaining to the

period 1 April 2009 to 11 March 2011 and in any case, cannot claim the benefit of Section 43(4) of the Arbitration Act as the previous arbitral proceedings were initiated by different entity i.e. Evergreen. That therefore time spent in Evergreen arbitration cannot be excluded for the purpose of computation of limitation in respect of arbitration arising out of altogether different Agreement of 1999. That period spent in arbitral proceedings emanating out of one agreement cannot be excluded while invoking arbitration under altogether different agreement. That there is absolutely no connection with Concept Agreement of 1999 and Evergreen Agreement of 2011 and that mere severance of Award relating to period from 1 April 2009 and 11 March 2011 by this Court cannot be a reason for invocation of arbitration under an altogether different Agreement (Evergreen Agreement of 2011).

9) Mr. Kumbhakoni would further submit that the learned Arbitrator has erroneously applied exclusion-provision under Section 43(4) of the Arbitration Act in contravention of fundamental policy of Indian Law. That in order to claim such exclusion, the claimant must satisfy fully and completely that the new arbitration proceedings commenced under Section 43(4) of the Arbitration Act after setting aside of the Award must be 'with respect to the dispute so submitted'. That not just the 'claim' but also the 'dispute' has to be identical in respect of two arbitral proceedings. That the exclusion must also be claimed by the same parties, which is also a requirement envisaged under Section 14 of the Limitation Act, 1963. That a clear finding is recorded by this Court in order dated 12 March 2019 that Evergreen Agreement of 2011 cannot indeed be termed as extension of the Concept Agreement of 1999. That the time of which exclusion is sought was

not spent in arbitration resulting on account of invocation of same arbitration clause /agreement.

10) Mr. Kumbhakoni would further submit that there is no Arbitration Agreement between the Petitioner and Evergreen for resolution of disputes pertaining to the period 1 April 2009 to 11 March 2011. That an Arbitration Agreement is an agreement within the agreement. That therefore mere assignment of rights in favour of Evergreen by Tripartite Assignment Agreement dated 1 April 2009 did not result in automatic creation of Arbitration Agreement between the Petitioner and Evergreen. That under Tripartite Assignment Agreement, only the enumerated rights under the Concept Agreement of 1999 would get assigned to Evergreen. That there was no intention between the parties to resolve the disputes between the Petitioner and Evergreen by arbitration under Tripartite Assignment Agreement dated 1 April 2009.

11) Mr. Kumbhakoni would further submit that it is now a settled law that if parties enter into a contract making general reference to another contract, such general reference would not have the effect of incorporating arbitration clause from referred document. That arbitration clause from another contract can be incorporated into the contract, where such reference is made, only by a specific reference to the arbitration clause. In support, he would rely upon judgment of *M.R. Engineers and Contractors Private Limited V/s. Som Datt Builders Limited*¹ and submit that the principles are reiterated in *NBCC (India) Ltd. V/s. Zillion Infraprojects Pvt. Ltd.*². Mr. Kumbhakoni would therefore submit that mere reference in the Tripartite Assignment Agreement to the

¹ (2009) 7 SCC 696

² SLP (CIVIL)NO. 7573 OF 2021 DECIDED ON 19/03/2024

Concept Agreement of 1999 does not mean that arbitration clause in Concept Agreement of 1999 gets incorporated in Tripartite Assignment Agreement. He would submit that parties to Concept Agreement of 1999 are different from parties to Tripartite Assignment Agreement. That when rights of Guarantor under one agreement are assigned by the Guarantee in favour of a third party, with consent of Guarantor, the Arbitration Agreement between Guarantor and Guarantee does not automatically get assigned in favour of the third party. In support, he would rely upon judgment of learned Single Judge of this Court in *Vishranti CHSL V/s. Tattva Mittal Corporation Pvt. Ltd.*³.

12) Mr. Kumbhakoni would submit that the merged entity CHPL is essentially exercising rights of Evergreen under the Tripartite Assignment Agreement dated 1 April 2009 and that there is absence of Arbitration Agreement between the Petitioner and Evergreen. If on the other hand, the merged entity CHPL claims to have exercised rights of Concept under the Concept Agreement of 1999, the exclusion benefit under Section 43(4) of the Arbitration Act cannot be claimed as Concept was not a party to Evergreen Arbitration in which the previous Award was set aside. That Concept in such case cannot rely on Evergreen arbitration proceedings to claim exclusion of time for limitation under Section 43(4) of the Arbitration Act. Also if Respondent's contention of incorporation of arbitration clause in Tripartite Assignment Agreement is to be accepted, then Concept would lose right to invoke arbitration even under Concept Agreement of 1999. However, Concept, on its own, invoked arbitration on 12 March 2013 much after execution of Tripartite Assignment Agreement dated 1 April 2009, secured

³ Arbitration Application(L) decided on 19/10/2020

Award in its favour and recovered money from the Petitioner. That this factor indicates that the Concept retained right to arbitrate with Petitioner in respect of the period covered by the Concept Agreement of 1999 notwithstanding execution of Tripartite Assignment Agreement dated 1 April 2009. This would essentially mean that Evergreen did not secure any right to arbitrate under the Tripartite Assignment Agreement dated 1 April 2009, which remained with Concept and was exercised independently vide invocation dated 12 March 2013.

13) Mr. Kumbhakoni would further submit that failure on the part of the Petitioner to raise the objection of absence of Arbitration Agreement does not preclude it from raising the same directly before this Court in a Petition under Section 34 of the Arbitration Act. This issue is concluded by the Apex Court in *Gayatri Project Limited V/s. Madhya Pradesh Road Development Corporation Limited*⁴. On above broad submissions, Mr. Kumbhakoni would pray for setting aside the impugned Award.

14) Mr. Rai, the learned counsel appearing for the Respondent would oppose the Petition submitting that the arbitral Award is validly passed in the light of clear existence of Arbitration Agreement between the parties. That Petitioner never raised the objection of absence of Arbitration Agreement before the learned Arbitrator. That though the Application under Section 16(2) of the Arbitration Act was filed by the Petitioner, it related only to objections of limitation and *res judicata*. That the objection of absence of Arbitration Agreement was not raised in the said Application. He would submit that the provision under Section 7(4)

⁴ 2025 SCC OnLine SC 1136

(c) of the Arbitration Act, where existence of Arbitration Agreement is alleged, but is not denied, amounts to an Arbitration Agreement between the parties. That in the present case, there is an exchange of Statement of Claim and Statement of Defence and existence of Arbitration Agreement alleged by the Respondent was denied by the Petitioner. He would invite my attention to the pleadings in paragraphs 3.1 to 3.11 of Statement of Claim and response in paragraph 5 of the Statement of Defence to demonstrate that the assertion of existence of Arbitration Agreement by the Respondent was not denied by the Petitioner. He would also rely on provisions of Section 16(2) of the Arbitration Act in support of his contention that the plea of lack of jurisdiction of Arbitral Tribunal cannot be raised after conclusion of arbitral proceedings. That the combined effect of Section 7(4)(c) and 16(2) of the Arbitration Act is such that a party is precluded from raising the plea of jurisdiction of Arbitral Tribunal or absence of Arbitration Agreement after conclusion of arbitration proceedings. That in any case, arbitral award cannot be set aside only on the ground of absence of Arbitration Agreement not once the arbitration proceedings are concluded.

15) Mr. Rai would further submit that the Tripartite Assignment Agreement incorporates arbitration clause from Concept Agreement of 1999. That there is no 'general reference' to arbitration clause but 'incorporation' thereof under Tripartite Assignment Agreement dated 1 April 2009. He would submit that the Apex Court in *M.R. Engineers and Contractors* (supra) has held that there is a difference between 'reference to another document in a contract' and 'incorporation of another document in a contract'. That the Apex Court in *NBCC (India) Ltd.* also noticed in paragraph 23 of the judgment that the acts therein involved a case of

'reference' and not of 'incorporation'. He relies on judgment of the Apex Court in *Shinhan Bank V/s. Carol Info Services Limited*⁵ in support of his contention that when all terms and conditions are made integral part of another contract, it would also incorporate arbitration clause. That in the present case there is an incorporation of all clauses of original Management Agreement in the Tripartite Assignment Agreement. That therefore the Tripartite Assignment Agreement is a case of 'incorporation' and not of 'reference' in terms of *M.R. Engineers and Contractors*. Referring to Recital No.1 and Clauses 3 and 9 of the Assignment Agreement, Mr. Rai would submit that arbitration clause got incorporated and intent to arbitrate was express and clear. He would further submit that there is no question of assignment of Arbitration Agreement. That when all rights under one agreement are assigned, arbitration clause also gets incorporated in the new contract. That in *Vishranti CHSL* (supra) also this Court has expressly clarified in paragraph 16 of the judgment that incorporation or otherwise of arbitration clause depends on interpretation of contract and not by mere nomenclature thereof. That the said judgment is not applicable to the facts of the present case as the contract therein involved case of 'reference' and not 'incorporation'.

16) Without prejudice, Mr. Rai would further submit that even if it is held that Petitioner can be permitted to raise the issue of absence of Arbitration Agreement or lack of jurisdiction of Arbitral Tribunal in Petition filed under Section 34 of the Arbitration Act by applying the ratio of the judgment in *Gayatri Project Limited* (supra), the Petitioner has failed to make out 'strong and good reasons' for permitting raising of issue of jurisdiction directly before

⁵ (2023) 20 SCC 388

this Court. In the present case, the Award expressly holds that the case involved admitted non-payment of invoices and that no defence was raised about non-rendering of services. That there is no equity in favour of the Petitioner. That Petitioner availed remedy by filing Section 16 Application but still failed to raise the objection of jurisdiction. That 'strong and good reasons' can be imported only in a situation where a party is precluded by some reasons or exigency from raising a plea of Arbitration Agreement. In a case where dispute is fully contested and jurisdictional pleas were in fact raised, it would be iniquitous to simply allow party to raise a plea of most preliminary contention that there was no agreement to arbitrate. That even in *Gayatri Project Limited* the Apex Court has ultimately ruled that arbitral award cannot be annulled only on the ground of lack of jurisdiction after conclusion of the arbitral proceedings in absence of the objection raised before the learned Arbitrator.

17) Mr. Rai would further submit that the Respondent-CHPL is entitled to the benefit of exclusion of time limit under Section 43(4) of the Arbitration Act as the second arbitration in respect of the period from 1 April 2009 to 11 March 2011 was invoked by CHPL to exercise rights of Evergreen as assigned to it under the Tripartite Assignment Agreement. That thus, mere merging of Evergreen into CHPL would not mean that the merged entity cannot exercise right to invoke fresh arbitration by having recourse to provisions of Section 43(4) of the Arbitration Act. Mr. Rai would accordingly pray for dismissal of the Petition.

REASONS AND ANALYSIS

18) Petitioner has challenged the arbitral award dated 28 November 2022 by which it is directed to pay Rs.78,09,220/- to the Respondent-CHPL which is towards the unpaid invoices raised by Evergreen for operating and managing the hotel during the period from 1 April 2009 to 11 March 2011. It must be observed at the very outset that the Petitioner has not questioned the award of the claim on merits. It has not questioned the liability to pay the awarded sum or its quantification. The Award is mainly challenged by raising the objection of limitation. During the course of arguments, the issue of absence of Arbitration Agreement is also strenuously pressed, which was not argued before the learned Arbitrator. Petitioner also questions maintainability of arbitral proceedings at the behest of Respondent-CHPL.

POINTS FOR DETERMINATION

19) In the light of above challenges raised by the Petitioner, the four broad issues that arise for consideration in the Petition are as under:

(i) Whether under the provisions of Section 43(4) of the Arbitration Act, the time spent in arbitration relating to disputes arising out of Evergreen Agreement of 2011 can be excluded while computing limitation period for invoking arbitration relating to dispute arising out of Concept Agreement of 1999 read with Assignment Agreement of 2009?

(ii) Whether the benefit of limitation-exclusion provision under Section 43(4) of the Arbitration Act would be available to

‘Concept Hospitality Private Limited’ when the previous arbitration was at the behest of ‘Evergreen’?

(iii) Whether there is Arbitration Agreement between the Petitioner and Evergreen for resolution of dispute arising out of invoices relating to period 1 April 2009 to 11 March 2011?

(iv) Whether a party who fails to raise the issue of jurisdiction or issue of absence of Arbitration Agreement before the Arbitral Tribunal can be permitted to raise the same directly before this court in Petition filed under Section 34 of the Arbitration Act? And whether that objection needs to be pleaded in the Petition?

COMMERCIAL ARRANGEMENT FOR OPERATION OF HOTEL

20) The above issues arise out of a slightly complex commercial arrangement between multiple entities, which needs to be very briefly stated. Petitioner is the owner of land, on which Laguna Resort (hotel) has been constructed as per the Hotel Management Agreement dated 27 September 1999 executed between Petitioner and Concept. Concept apparently constructed a hotel and operated and managed the same in pursuance of Concept Agreement of 1999. On 1 April 2009, Evergreen appeared on the scene and agreed to take over the activities of management and operation of the hotel. Accordingly, a Tripartite Assignment Agreement dated 1 April 2009 was executed between the Petitioner, Concept and Evergreen under which rights and obligations of Concept arising out of Concept Agreement of 1999 were brought over by Evergreen. Evergreen thus operated and managed the hotel from 1 April 2009 under the Tripartite Assignment Agreement dated 1 April 2009. Apparently, under the Tripartite Assignment

Agreement dated 1 April 2009, some activities relating to deputation of staff etc. were to be still performed by Concept, even though operation and management of the hotel was undertaken by Evergreen.

21) In the year 2011, Petitioner decided to hand over the entire management and operation of the hotel directly to Evergreen as tenure of Concept Agreement of 1999 had apparently expired. Accordingly, another Hotel Management Agreement dated 11 March 2011 was executed by the Petitioner in favour of Evergreen under which Evergreen became the operator and manager of the hotel. It appears that Evergreen operated the hotel till 11 March 2016.

22) During performance of Evergreen Agreement of 2011, Concept and Evergreen merged together w.e.f. 24 December 2013 and the merged entity is named CHPL, which apparently performed the Evergreen Agreement of 2011 till 11 March 2016.

THREE PERIODS OF HOTEL OPERATION

23) This is how there are three distinct periods, during which the activity of management and operation of the hotel has occurred by different entities:

(i) 1 April 2009 to 31 March 2009 : Hotel was operated and managed only by Concept.

(ii) 1 April 2009 to 11 March 2011 : Hotel was managed and operated by Evergreen who was an assignee under

Assignment Agreement dated 1 April 2009. However, certain activities were still performed by Concept.

(iii) 12 March 2011 onwards : Hotel was managed and operated exclusively by Evergreen in terms of Evergreen Agreement of 2011.

THREE ARBITRAL PROCEEDINGS AGAINST PETITIONER

24) Three distinct arbitral proceedings have been conducted and concluded against the Petitioner in respect of the above three periods, details of which are as under :

(i) In respect of the period from July 2006 to March 2009, Concept invoked arbitration and secured award dated 13 September 2016. The claim of Concept based on invoices pertaining to July 2006 to March 2009 is allowed by Award dated 13 September 2016 and the said Award has apparently been satisfied.

(ii) In respect of the invoices pertaining between the periods from 1 April 2009 to 11 March 2011 and 12 March 2011 to 11 March 2016, Evergreen initiated arbitration resulting into Award dated 22 December 2015 awarding the claim in respect of the invoices pertaining to the entire period from 1 April 2009 to 11 March 2016. This Award is set aside partly by this Court by order dated 12 March 2019 holding that disputes relating to invoices pertaining to the period 1 April 2009 to 11 March 2011 were not covered by Evergreen Agreement of 2011. The Award dated 22 December 2015, to the extent the same was confirmed for the invoice relating to period from 12

March 2011 to 11 March 2016 has also been satisfied by the Petitioner.

(iii) For invoices pertaining to the period 1 April 2009 to 11 March 2011, Evergreen, (through the merged entity CHPL), initiated arbitration proceedings, which has resulted in the impugned Award dated 28 November 2022 awarding claim in favour of Evergreen.

It is the last award dated 28 November 2022, which is subject matter of present arbitral proceedings.

25) Since Concept and Evergreen merged together w.e.f. 24 December 2013 forming the merged entity 'CHPL', the last arbitral proceedings pertaining to the period from 1 April 2009 to 11 March 2011 were initiated by the merged entity CHPL.

26) Having dealt with the exact contractual relations between the Petitioner, Concept, Evergreen and CHPL and different arbitration proceedings amongst them, I now proceed to answer the four issues framed for determination.

APPLICABILITY OF EXCLUSION PROVISION UNDER SECTION 43(4) ON THE GROUND OF 'DISPUTES' IN TWO ARBITRAL PROCEEDINGS BEING DIFFERENT

27) The first objection raised by the Petitioner to the impugned arbitral Award is that the claim of CHPL in respect of the invoices for the period 1 April 2009 to 11 March 2011 is time barred. It must be observed at this stage that this objection of limitation was raised by Petitioner by filing application under Section 16 of the Arbitration Act and the same is rejected by order dated 8 July 2021. The Order dated 8 July 2021 has merged in the

final award and can be questioned under Section 34 of the Arbitration Act.

28) The objection of limitation is premised on the contention that the benefit of exclusion of period of limitation under Section 43(3) of the Arbitration Act is inapplicable to arbitral proceedings initiated at the behest of CHPL for the period from 1 April 2009 to 11 March 2011. Here there are twin objections. The first objection is about *disputes* arising out of distinct agreements and the second objection is about *parties* not being same to both the arbitration proceedings. As of now, I take up for consideration the first objection of '*disputes*' arising out of different agreements.

29) As observed above, Evergreen had initially initiated composite arbitral proceedings in respect of the twin periods from 1 April 2009 to 11 March 2011 as also the period from 12 March 2011 to 11 March 2016, combining both the periods into common claim. The period from 1 March 2009 to 11 March 2011 is covered by Tripartite Assignment Agreement dated 1 April 2009. As against this, the second period from 12 March 2011 to 11 March 2016 is covered by Evergreen Agreement of 2011. The arbitral award dated 22 December 2015 covering the entire period from 11 March 2009 to 11 March 2016 has been partially set aside by this Court by order dated 12 March 2019. This Court held that Arbitral Tribunal lacked jurisdiction to decide the claim for management fees for the period between 1 April 2009 to 11 March 2011 as the said period was not covered by Evergreen Agreement of 2011, under which the arbitration clause was invoked. It would be apposite to reproduce the relevant findings recorded by this Court in order dated 12 March 2019 which reads thus :-

4. The challenge in the present petition is on the footing that in this reference, which related to the term of operation between 12 March 2011 to 11 March 2016, the learned arbitrator decided disputes covered by the first agreement. The claims referred to the arbitration in this reference, it is not disputed, were claims for management fees and interest, for the period from 1 April 2009 to 6 May 2013, whereas the period covered by the first agreement is between 1 April 2009 and 11 March 2011.

5 Before the learned arbitrator, the Petitioner herein raised an issue of jurisdiction under Section 16 of the Act. It was submitted by the Petitioner that the arbitrator, who was appointed in pursuance of an arbitration clause contained in the second agreement, did not have jurisdiction to decide issues coming under the first agreement. At the hearing of this application, it was agreed between the parties that the issue of jurisdiction could be decided by the arbitrator at the final hearing of the reference. The learned arbitrator, in his impugned award, has come to a conclusion that the second agreement was a renewal agreement; the rights and liabilities incurred under the first agreement devolved on the Respondent (claimant before the arbitral tribunal). The arbitrator also held that both at the time when the claim was made as also when the arbitration clause under the second agreement was invoked by the Respondent, the Petitioner herein did not object to any claim being made thereunder on the ground that part of it was in respect of the period covered under the first agreement, which was not covered by the arbitration clause contained in the second agreement. The arbitrator held that no objection in that behalf was taken even before this court, when the matter was referred by the court under Section 11 of the Act..

6. Neither of these two grounds conveys a possible view of the matter entitling the Respondent to an award from the arbitrator. The question is not whether the second agreement was a renewal of the first agreement. **The question is whether the arbitration clause contained in the second agreement covers disputes arising under the first agreement. It is one thing to say that the rights under the first agreement devolve or continue to inhere in the Respondent, but quite another to say that simply for that reason the Respondent can actually enforce such rights and make a claim in respect thereof before an arbitrator appointed under another agreement.**

7 Besides, under the first agreement, the parties had an option to go for renewal of the lease, which renewal, however, had to be on its own terms and conditions; such separate

terms and conditions were to be agreed upon between the parties. Learned Counsel for the 'Respondent has produced a chart which shows several dissimilarities or differences between the two agreements. **In the premises, the second agreement cannot indeed be termed as an extension of the first agreement.** But even if we were to hold that every term of the second agreement is similar or identical to the original term of the first agreement, **that still does not imply that the arbitration clause in the second agreement covers disputes under the first agreement.** In that sense, the question posed by the arbitrator relating to his jurisdiction was an irrelevant question, which had no bearing on the controversy before him. Naturally, the wrong question yielded a wrong answer.

8 The other ground, on which the learned arbitrator has held in favour of the Respondent on the question of jurisdiction, namely, want of an objection on its part when the application for reference was made under Section 11 of the Act, is also neither here nor there. Merely, because parties agree to have a dispute referred to an arbitral forum, it cannot be said that the parties have submitted to the jurisdiction of the arbitrator. Despite agreeing to appointment of an arbitrator, it is always open to a party to question the arbitrator's jurisdiction. It is another matter that in a case, where the question of jurisdiction is raised before the court in an application under Section 11 and that question is decided by the court whilst referring the matter to arbitration. In that case, the order of the referring court may be decisive so far as the question of jurisdiction is concerned and it may not be open to any party to agitate that issue before the arbitrator. In the present case, the matter was referred to the learned arbitrator by consent of both parties. What was not in dispute was that the existence of an arbitration agreement as between the parties. There is nothing to suggest that the Petitioner had agreed that the arbitrator would have jurisdiction to decide all disputes forming part of the reference by reason of having agreed to the appointment of the sole arbitrator. At any rate, at the earliest possible opportunity, the question of jurisdiction had indeed been raised by the Petitioner before the arbitral tribunal under Section 16 of the Act and an order of the arbitrator was invited on such objection

9. Under Section 4 of the Act, where a party despite knowing that any provision of the Act which the party may derogate from, or any requirement under the arbitration agreement has not been complied with, proceeds with the arbitration without stating his objection in that behalf without undue delay or, if a time limit is provided for stating that objection,

within such period of time, he shall be deemed to have waived his right to object. It is doubtful, if a waiver referred to in Section 4 would include within its fold an objection to subject matter jurisdiction. Be that as it may, it is not the case of the Respondent that the Petitioner did not take objection of jurisdiction of the learned arbitrator without undue delay or beyond the period reserved by stating such objection. There is, in the premises, no question of any waiver of the Petitioner's right to object to the arbitrator's jurisdiction within the meaning of Section 4.

10 In the premises, the arbitrator clearly lacked jurisdiction to decide a particular part of the dispute, namely, claim for management fees for the period between 1 April 2009 to 11 March 2011 and the petition, to that extent, must succeed. Accordingly, the arbitration petition is partly allowed, by setting aside the impugned award to the extent it relates to recovery of management fees as also other amounts relatable to the period between 1 April 2009 to 11 March 2011 as well as interest thereon. The rest of the award is sustained.

(emphasis added)

30) Thus, this Court held that though right under the first agreement continued to inhere in Evergreen, enforcement thereof could not be sought by Evergreen before the learned Arbitrator appointed under another agreement. This Court thus held that arbitral proceedings initiated by invoking clauses of Evergreen Agreement of 2011 could not decide claims pertaining to the period governed by Tripartite Assignment Agreement dated 1 April 2009.

31) After part of the Award dated 22 December 2015 pertaining to the period from 1 April 2009 to 11 March 2011 was set aside by this Court, CHPL invoked arbitration vide letter dated 24 May 2019. The invocation was under the Hotel Management Agreement/Concept Agreement dated 27 September 1999, which is clear from Paras-2 and 3 of the letter, which read thus:-

2. We invite your attention to our-letter dated May 3, 2019 addressed to you on behalf of our: Clients, in which we had clearly-called upon you to pay the sum of Rs.81,23,407/- (Rupees Eighty-One Lacs Twenty-Three. Thousand Four Hundred and Seven Only) with the stipulated interest which had fallen due-under the Management Agreement dated September 27, 1999 (hereinafter the said Agreement) signed by you; with Our Clients for-the purpose stated in the said Agreement. The. said amount was required-to be paid by you-to our Clients within 15 days from the date of our said letter along with interest @12% per month: We regret to state that you have. deliberately. failed to pay the said amount of Rs.81,23,407/--along with interest as on the date of this letter.

3. Your deliberate failure to pay the Said amount of Rs.81,23,407/-with interest as stated above has left no choice to our Clients but to seek legal course to recover the said amount along with interest. **We further state that resolution of any dispute is governed by the Article XXIII (the said Article) of the said any such dispute, unless -the Agreement.** The said Article clearly provides that any such dispute unless the Parties concur in the appointment of a Single Arbitrator, shall be referred-to two Arbitrators, one to be appointed by each Party and proceed further in. accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the Award of such Arbitration shall be binding on both the Parties.

(emphasis and underlining added)

Thus, there is no dispute to the position that the arbitration has been invoked under Article XXIII of the agreement dated 27 September 1999.

32) Thus, the arbitral proceedings resulting in Award dated 22 December 2015 were under Evergreen Agreement dated 11 March 2011, whereas invocation of arbitration leading to the impugned Award is through Concept Agreement dated 27 September 1999. In that view of the matter, whether time spent in conduct of arbitral proceedings leading to Award dated 22 December 2015 can be excluded while computing the period of limitation for

invocation of arbitral proceedings arising out of Concept Agreement of 27 September 1999 is the issue which this Court is tasked upon to decide.

33) The law is now fairly well settled that once an award has been set aside and parties are relegated to their original positions, the parties can recommence the arbitration proceedings afresh. [SEE *Juggilal Kamlatpat v. General Fibre Dealers Ltd.*⁶, *McDermott International Inc. v. Burn Standard Co. Ltd.*⁷, *Dakshin Haryana Bijli Vitran Nigam Limited v. M/s. Navigant Technologies Pvt. Ltd.*⁸ and *Associated Constructions v. Mormugoa Port Trust*⁹,]

34) The remedy of parties to initiate fresh proceedings after setting aside of the Award is to be found in sub-section (4) of Section 43 of the Arbitration Act. Section 43 actually deals with the period of limitation for invocation of arbitral proceedings which provides thus:-

Limitations –

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case

⁶ AIR 1962 SC 1123

⁷ (2006) 11 SCC 181

⁸ (2021) 7 SCC 657

⁹ (2010) 5 MhLJ 739

undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

(emphasis added)

35) Thus, under sub section (4) of Section 43 of the Arbitration Act, after an arbitral award is set aside, the period between commencement of the arbitration and the date of order of the Court can be excluded while computing the time for commencement of proceedings with respect to the dispute so submitted. Ordinarily, Section 43(4) applies to a case where for the very same dispute, a fresh round of arbitration is initiated after the previous award is set aside. The objective behind the enactment of sub-section (4) of Section 43 is to ensure that an error committed by Arbitral Tribunal in making the Award should not deprive the claimant of an opportunity to initiate fresh round of arbitration proceedings. This is why period spent in first round of arbitration is to be excluded while computing limitation for initiation of second round of arbitration. However, what needs to be ensured in such cases is that the second round of arbitral proceedings are initiated in respect of the very same dispute. Therefore, Section 43(4) uses the expression for commencement of proceedings '*with respect to the dispute so submitted*'. Based on used of the expression '*with respect to the dispute so submitted*' it is sought to be contended on behalf of Petitioner that the key for availing the benefit of limitation-exclusion provision under Section 43(4) of the Arbitration Act is 'similarity of

dispute'. It is contended that the moment the 'dispute' between two arbitral proceedings is not the same, Section 43(4) of the Act becomes inapplicable.

36) There is no doubt about the position that the dispute pertaining to invoices for the period 1 April 2009 to 11 March 2011 was subject matter of first round of arbitral proceedings leading to Award dated 22 December 2015 and it is for this reason that provisions of Section 43(4) of the Arbitration Act are relied upon by the Respondent and reliance thereon has found favour with the Arbitral Tribunal.

37) However, the earlier arbitration was invoked under Evergreen Agreement of 11 March 2011 and this court ruled that learned Arbitrator appointed under the Agreement dated 11 March 2011 did not have jurisdiction to resolve disputes not covered by that agreement, through which the Tribunal was created. The true purport of the order passed by this Court on 12 March 2019 is that Evergreen ought to have initiated separate arbitration proceedings under Tripartite Assignment Agreement dated 1 April 2009 covering the period from 1 April 2009 to 11 March 2011. Since it erroneously mixed its claim pertaining to the period from 1 April 2009 to 11 March 2011 and sought its adjudication through Arbitral Tribunal lacking inherent jurisdiction, the Award, to that extent, got set aside. It therefore became necessary for Evergreen (*in its new avatar as CHPL*) to invoke arbitration proceedings under Concept Agreement dated 27 September 1999. As observed above, Evergreen took over the rights and obligations of Concept under the Agreement of 27 September 1999 vide Tripartite Assignment Agreement dated 1 April 2009. Evergreen (in the form of merged

entity of CHPL) therefore exercised the remedy of arbitration under the agreement by which the disputed invoices for the period 1 April 2009 to 11 March 2011 were governed.

38) Thus, what Evergreen ought to have done was to invoke a separate arbitration by invoking arbitration clause under the Concept Agreement of 1999 for resolution of disputes pertaining to the period from 1 April 2009 to 11 March 2011. This would essentially mean that the Evergreen ought to have invoked two separate arbitrations rather than mixing the two periods in one arbitration. Once the position gets crystallized that the two disputes were required to be resolved through tribunals constituted under the two distinct Arbitration Agreements, the starting point for computing the period of limitation qua each dispute would also be distinct. Therefore, the invocation of arbitration clause under the Concept Agreement of 1999 for resolution of disputes pertaining to the period 1 April 2009 to 11 March 2011 ought to have been within prescribed period of limitation under the Limitation Act 1963, which was within three years of accrual of right to sue. However, this invocation is done by the Respondent much later through invocation notice dated 24 May 2019. To save the claim from being hit by limitation, time spent in conduct of earlier arbitration proceedings arising out of Evergreen Agreement is sought to be excluded.

39) The Arbitral Tribunal has held that the Petitioner is entitled to the benefit of 'limitation exclusion' provision under Section 43(4) of the Arbitration Act and that the claim of the Respondent is within limitation. The Arbitral Tribunal has held that the dispute in case before it and in the earlier arbitration proceedings was same and that therefore Section 43(4) would apply

to the instant case. The Arbitral Tribunal has held in paras-50 to 53 of the impugned Award as under:-

50. **In my view, the dispute in the instant case and the earlier arbitration is the same.** The contention of the Respondent, in my view, overlooks the fact that the claim or the dispute is the non-payment of Invoices for the period from 1 April, 2009 to 11 March, 2011. The Claimant had even in the earlier arbitration sought payment of the same Invoices on a plea that the 2011 Agreement was a renewal of the 1999 Agreement. The Arbitral Award dated 22nd November, 2015 was set aside on the grounds of the 1999 Agreement i.e. the arbitral agreement as contained in the 1999 Agreement not being invoked. **To my mind, the invocation of the arbitral agreement is different and distinct from the claim made or dispute raised.** Hence, in my view the dispute pertaining to non-payment of the invoices for the period from 1st April, 2009 to 11th March, 2011 is common to both the earlier arbitration and the instant arbitral proceedings.

51. The third contention as to identity of agreements was urged by the Respondent in the context of arguing that the 1999 Agreement was never invoked earlier but is now invoked. This clearly is a reference to the same arbitral agreement. Hence, according to the Respondent the second proceeding or claim must arise on the same arbitral agreement and not otherwise. To my mind, this is not borne out on the plain language of the statute. The last phrase of sub-section 43(4) of the Act or what is delineated above as the third part uses the phrase "commencement of the proceedings (including arbitration)". Hence, this is a clear indication that the second round of proceedings need not necessarily be an arbitral proceeding but could be any proceeding which may even include an arbitral proceeding. Hence, the second round of proceedings may not invoke any arbitration agreement. Thus, I am unable to accede to the said submission of the Respondent.

52. Another contention of the Respondent, was that Section 43(4) of the Act, is only meant to provide an opportunity to address what the Section 34 Court cannot do. It was urged that since a Section 34 Court cannot modify or vary an Award but merely set aside the same, Legislature has given a window in Section 43 to enable parties and seek a modification or variation of the Award as may arise in a given case. It was in this context that the judgment of the Apex Court in the case of Project Director, NHAI vs M. Hakeem (2021) 9 SCC I was

also relied upon. According to me, the plain language of Section 43(4) of the Act, militates against such an interpretation. Further, if the above contention is accepted it would mean that when an Arbitral Award is set aside under Section 34(2)(iv) on the grounds of being a dispute not contemplated by or not falling within the terms of submission to arbitration, the Claimant would be unable to seek an exclusion of time to file appropriate proceedings subsequently. According to me, this would be one of the contingencies which the Legislature was conscious of and hence, used the phrase "commencement of the proceedings (including arbitration)" in Section 43(4) of the Act.

53. In light of the above, to my mind Section 43(4) would apply to the case of the Claimant since the Award dated 22nd November, 2015 has been set aside and the present claim is based on the same/similar dispute i.e. non-payment of Invoices for the period 1st April, 2009 to 11th March, 2011.

(emphasis added)

40) The Arbitral Tribunal has thus laid emphasis on the expression '*for the commencement of the proceedings (including arbitration)*' for holding that the Legislative intent is to provide an opportunity for initiating any other proceedings (like suit), including arbitration, when the award is set aside under Section 34(2)(iv) on the grounds of being a dispute not contemplated by or not falling within the terms of submission to arbitration.

41) I am in agreement with the above interpretation by the Arbitral Tribunal of Section 43 (4) of the Arbitration Act. Section 43 (4) is not restricted to only the situation where the same dispute is continued from one arbitral proceeding to another. As rightly held by the Arbitral Tribunal, Section 43(4) uses the expression '*for the commencement of the proceedings (including arbitration)*' meaning thereby that the fresh proceedings need not be only arbitration. It can also be a suit. To illustrate, if a copyright dispute is decided in arbitration and Section 34 Court annuls the Award on the ground of

the dispute not being arbitrable, the remedy for the Claimant would be to file a suit. When claimant in such a case institutes a suit, the same cannot be thrown out on the ground of limitation as Section 43(4) would come to the aid of such Claimant for exclusion of time spent in arbitral proceedings while computing period of limitation in filing of suit. Another illustration is where there is no agreement between the parties to resolve the disputes by arbitration and the award is set aside on that count, the claimant can institute a suit and benefit of Section 43(4) would be available in such case as well. Of course, this applies equally when the same transfers from one arbitration to another. To illustrate, if the award is set aside on the ground of territorial jurisdiction of seat of arbitration, the Claimant can initiate fresh arbitral proceedings at the correct seat by having recourse to provisions of Section 43(4) of the Arbitration Act. Likewise if the award is set aside otherwise than on merits, like misconduct of the arbitrator, the claimant can once again invoke the Arbitration Agreement.

42) Thus, provisions of Section 43(4) would apply to multiple types of eventualities, such as:

- (i) Where the award is set aside otherwise than on merits, such as the ground of misconduct or incapacity of arbitrator, violation of principles of natural justice, etc and the claimant's right to sue continues and re-adjudication of the same dispute is sought in fresh arbitral proceedings;
- (ii) Where the dispute is found to be not arbitrable for reason of being not covered by the Arbitration Agreement or not capable of being settled through

private dispute resolution mechanism, etc and fresh proceeding like a suit is to be instituted.

- (iii) Where part of the Award is set aside on the ground of jurisdiction and the claimant either files a suit or invokes the arbitration clause once again to espouse the cause pertaining to that part.

43) Once it is held that the benefit of Section 43(4) is available for second and third kind of eventualities discussed above, I do not see any difficulty in not extending the benefit of Section 43(4) to the case at hand. In the present case, Evergreen erroneously conflated the dispute relating to invoices for period 1 April 2009 to 11 March 2011 with the dispute relating to invoices for period from 12 March 2011 onwards, unmindful of the fact that the former dispute was not covered by the Evergreen Agreement of 2011. Theoretically speaking, if there was no Arbitration Agreement between parties relating to dispute for invoices for period 1 April 2009 to 11 March 2011, Evergreen would be required to institute a suit and as observed above, the benefit of limitation-exclusion provision under Section 43(4) would have been available to it while computing the period of limitation in instituting the suit. Merely because there is Arbitration Agreement between parties governing the dispute relating to invoices for period 1 April 2009 to 11 March 2011, the same would not mean that the benefit of provisions of Section 43(4) would become unavailable to Evergreen.

44) Petitioner has strenuously contended that the 'disputes' between the two arbitral proceedings are distinct and that therefore benefit of Section 43(4) would not be available. I am unable to agree. The dispute in respect of invoices for period 1 April 2009 to 11

March 2011 was a part of previous arbitral proceedings and the same is again part of the current arbitral proceedings. Therefore limitation exclusion provision under section 43(4) of the Arbitration Act would clearly be available in the instant case. As observed above, once Section 34 Court has set aside the previous Award on the ground that part of the dispute was incapable of being resolved by arbitration by that arbitral tribunal, and the Claimant's remedy to enforce the claim qua that part has remained unaffected, benefit of section 43(4) would be available for exercising the remedy of fresh arbitral proceedings.

45) The concept of 'similarity in dispute' envisaged under Section 43(4) would apply even to a 'part of dispute'. Where the Award comprising of multiple claims is severed, and bad part of the Award is set aside, and if right to sue in respect of severed bad part of the Award continues, the Claimant can exercise alternate remedy in respect of that bad part. To illustrate, in arbitral proceedings for dissolution of partnership firm and for rendition of accounts, the Claimant also seeks a declaration that he alone, and not the partnership firm, is the tenant of premises, and Award is made granting share to the Claimant in assets of the firm and also a declaration of tenancy. The Court in exercise of power under Section 34, sustains part of the Award granting share in the assets of the firm, but severs the same by annulling the declaration of tenancy on the ground of non-arbitrability, the Claimant can exercise the alternate remedy of filing a declaratory suit in the Court of Small Causes by seeking exclusion of period of limitation under Section 43(4) of the Arbitration Act. In such circumstances, the Defendant in the suit cannot claim that the 'entirely' of dispute in both proceedings is not the same. Here the concept of 'similarity of

dispute' would be applicable to the declaration of tenancy, which was subject matter in both the proceedings. Thus, similarity of dispute can also be in respect of part of the dispute, and the entirety of dispute need not be similar.

46) In the present case also, the 'entirety' of dispute between the two arbitral proceedings was not identical and it need not be so. So long as it is satisfied that dispute relating to invoices for period 1 April 2009 to 11 March 2011 was subject matter of previous arbitral proceedings, the benefit of Section 43(4) of the Act would be available.

47) Accrual of the two disputes through two distinct contracts would again make no difference. In fact, distinct disputes arising out of two distinct contracts is the reason why the previous award is set aside. The distinction between the disputes arising out of the two Agreements is indicated below:

Awards	Award 28 November 2022	Award 22 December 2015
Agreements	Concept Agreement of 1999 read with Assignment Agreement of 2009	Evergreen Agreement of 2011
Dispute	Management of Hotel by Evergreen (in association with Concept) for period 1 April 2009 to 11 March 2011	Management of Hotel exclusively by Evergreen for the period 12 March 2011 onwards

The above comparative chart explains that the two disputes arise out of two distinct contracts between the parties. However, this is the exact reason why this Court set aside part of the Award dated 22 December 2015 to the extent it sought adjudication of the dispute relating to invoices for period 1 April 2009 to 11 March 2011.

However, Evergreen's right to sue to recover amounts covered by invoices for period 1 April 2009 to 11 March 2011 continued notwithstanding setting aside part of Award dated 22 December 2015. That right has been exercised by Evergreen (through merged entity of CHPL) vide notice dated 24 May 2019. The Legislative intent in such case is that a party is not left remediless because it bonafidely believed that even the dispute relating to invoices for period 1 April 2009 to 11 March 2011 could be adjudicated in former arbitral proceedings. If the Claimant commits a mistake in erroneously seeking adjudication of dispute through arbitral tribunal lacking jurisdiction, the law does not prevent him from correcting the course of action and exercising the remedy before correct forum. If the legislative intent was to punish the claimant for the mistake of seeking adjudication through a wrong forum, Section 43(4) would not have used the expression 'for commencement of proceedings (including arbitration)'. If a suit can be instituted after declaration by Section 34 Court that the remedy of arbitration '*qua* a dispute' was erroneous, I do not see any difficulty why fresh arbitral proceedings cannot be initiated before another arbitrator if that dispute is governed by an Arbitration Agreement. This principle would apply irrespective whether whole of the award or part of the award is set aside. Even *qua* part of the award, which is set aside, fresh arbitral proceedings can be invoked by availing the benefit of limitation-exclusion provision under Section 43(4) of the Arbitration Act.

48) Mere invalidity of invocation of arbitration by Evergreen on 8 October 2012 (for claims pertaining to 1 April 2009 to 11 March 2011) cannot be a reason for not extending the benefit of Section 43 (4) to the Respondent. Invocation of arbitration by

Evergreen on 8 October 2012 (for the period 1 April 2009 to 11 March 2011) was akin to filing of a suit before a wrong Court. Section 43 (4) of the Arbitration Act also provides similar relief as that of Section 14 of Limitation Act. If arbitration is erroneously or invalidly invoked, instead of exercising some other remedy, the exclusion provision would still apply as legislative intent is not to punish the claimant whose invocation is found without jurisdiction. Therefore mere invalidity in invocation vide letter dated 8 October 2012 cannot be a reason for not extending the benefit of exclusion under Section 43(4) of Arbitration Act.

49) The Arbitral Tribunal has thus rightly allowed the benefit of 'limitation exclusion' provision in respect of invocation of fresh arbitral proceedings. Therefore the objection raised by the Petitioner about the claim being barred by limitation deserves to be rejected.

CLAIM OF BENEFIT UNDER SECTION 43(4) BY MERGED ENTITY

50) It is contended on behalf of the Petitioners that parties to the two arbitral proceedings were not identical. The arbitral proceedings leading to Award dated 22 December 2015 were initiated by Evergreen whereas the arbitral proceedings leading to the impugned Award dated 28 November 2022 are initiated by CHPL. The objection arises out of a misconceived notion that CHPL is actually espousing claim of Concept. This is apparent from Ground 5.10 pleaded in the Petition. Mr. Rai has however clarified that CHPL has prosecuted the claim of Evergreen in the second arbitral proceedings. As observed above, CHPL is a merged entity arising out merger between Concept and Evergreen. Both Concept and Evergreen have independent rights arising out of the three contracts as discussed above. If CHPL was to exercise rights in

respect of Concept, what Mr. Kumbhakoni contends would have been correct. CHPL, wearing the hat of Concept, could not seek exclusion of time spent in arbitral proceedings conducted at the behest of Evergreen under Section 43(4). To paraphrase, Concept could not have taken benefit of merger by seeking to exclude time spent in arbitral proceedings conducted at the behest of a distinct entity. However, in the present case, CHPL is actually exercising and prosecuting the rights of Evergreen. Evergreen is no longer in existence. CHPL has taken over the right to litigate, which vested in Evergreen. If there was no merger, Evergreen would have initiated the second arbitral proceedings thereby obviating any objection of parties being different. Merely because there is a merger and merely because the merged entity (CHPL) has initiated the second arbitral proceedings, it cannot be contended that parties to the two arbitral proceedings are different. What Mr. Kumbhakoni canvasses in the proposition that merger destroys right of the entity which has merged into another. This proposition is unknown to law. With mergers, Evergreen's right to litigate or right to arbitrate is taken over by CHPL. Therefore, the objection of parties to the two arbitral proceedings being different does not appeal to this Court. The objection is accordingly rejected.

OBJECTION OF NON-EXISTENCE OF ARBITRATION AGREEMENT, PERMISSIBILITY TO RAISE SUCH OBJECTION DIRECTLY BEFORE SECTION 34 COURT WITHOUT RAISING IT BEFORE THE ARBITRAL TRIBUNAL AND NECESSITY OF PLEADING OF SUCH OBJECTION

51) I have fused Point Nos. (iii) and (iv) formulated above while answering the same and there is good reason for doing so. The objection of non-existence of Arbitration Agreement has taken a back seat and what needs to be decided first is whether that

objection deserves to be considered and decided in the first place in the facts and circumstances of the case.

52) During the course of oral submissions, Mr. Kumbhakoni has strenuously contended that there is no Arbitration Agreement between the Petitioner and Evergreen for resolution of dispute pertaining to the invoices for the period 1 April 2009 to 11 March 2011. As observed above, the initial Hotel Management Agreement was executed in favour of Concept by the Petitioner on 27 September 1999. The rights and obligations arising out of Hotel Management Agreement dated 27 September 1999 were brought over by Evergreen through Tripartite Assignment Agreement dated 1 April 2009. The Hotel Management Agreement dated 27 September 1999 undoubtedly contains Arbitration Agreement. Thus, there was an agreement to arbitrate between Concept and Petitioner. The issue for consideration is whether assignment of rights and obligations under Hotel Management Agreement dated 27 September 1999 in favour of Evergreen would also have the effect of creation of Arbitration Agreement between Petitioner and Evergreen. This is because there is no distinct arbitration clause under Tripartite Assignment Agreement dated 1 April 2009, which merely seeks to assign rights and obligations vested in Concept under Hotel Management Agreement dated 27 September 1999 to Evergreen.

53) Thus, the issue that is sought to be raised is whether mere assignment of rights and obligations under a contract in favour of a third party would also have the effect of creating an Arbitration Agreement between original grantor and the third party. Parties have canvassed elaborate submissions on the issue of existence of

Arbitration Agreement between the Petitioner and Evergreen for resolution of dispute relating to invoices for the period 1 April 2009 to 11 March 2011.

54) However, what is to be noted at once, and which is also rightly highlighted by Mr. Rai, is that this objection of absence of Arbitration Agreement is not pleaded by the Petitioner in the present Petition. It would be apposite to reproduce the grounds pleaded in the Arbitration Petition which read thus :-

GROUNDS:

5. In the above background, being aggrieved by the impugned award dated 28th November 2022, the Petitioner is, by way of the present petition, challenging the impugned award under Section 34 of the Arbitration and Conciliation Act, 1996.

5.1. It is submitted that the impugned award suffers from a patent illegality appearing on the face of the award and is therefore liable to be set aside.

5.2. The Ld. Arbitrator failed to appreciate that the Respondent had invoked arbitration by its letter dated 8th October, 2012 and to permit time to be excluded from that date onwards is fundamentally flawed and flies in the face of the order dated 12th March, 2019 passed by the Hon'ble Bombay High Court setting aside the previous Award dated 22nd December, 2015 in this regard and holding that the disputes for the period 1 April, 2009 to 11th March, 2011 could have been referred to arbitration only under the Concept Arbitration and not under the Evergreen Arbitration.

5.3. The Ld. Arbitrator ought to have appreciated that once the invocation dated 8th October 2012 was held to be bad in law vis-à-vis the claims for the period 1 April 2009 to 11th March 2011, that invocation was bad in law for all purposes including for the purposes of Section 43(4) of the Arbitration and Conciliation Act.

5.4. The Ld. Arbitrator ought to have appreciated that under Section 21 of the Arbitration and Conciliation Act, 1996,

arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by a party to an arbitration agreement from the other party to the same arbitration agreement. A reference to arbitration by a third party who is not a party to the arbitration agreement is non est and of no legal effect whatsoever. In the instant case, the request for reference to arbitration was received by the Petitioner on 8th October 2012 from Evergreen, who was not a party to the Concept Arbitration, and that being the case, the arbitration could never be said to have commenced on 8th October 2012. Consequently, there can be no question of exclusion of time from 8th October 2012 to 12th March 2019 (i.e the date of the High Court's Order setting aside the award) under Section 43(4) of the Arbitration and Conciliation Act.

5.5. The Ld. Arbitrator failed to appreciate that the invocation of arbitration by Evergreen made on 8th October 2012, insofar as the claims for the period 1 April, 2009 to 11th March, 2011 are concerned, was invalid and of no legal effect at all, as Evergreen had invoked the same under the Evergreen Arbitration, which did not cover the disputes pertaining to the period prior to 11th March 2011. Therefore, the first time that the Respondent invoked arbitration vis-à-vis the claims for the period 1 April, 2009 to 11th March, 2011 was vide its letter dated 31 May, 2019, by which time the claims were hopelessly barred by limitation, which is also evident from the Respondent's said letter itself.

5.6. It is submitted that the impugned award lacks application of mind as it has failed to navigate and notice the complex labyrinth of facts involved in the present case. The Ld. Arbitrator has not even considered the provisions of the Scheme of Amalgamation by virtue of which the Respondent came into existence, which is extremely crucial to understand the identity and rights of the Respondent herein.

5.7. The Ld. Arbitrator gravely erred in allowing the claim of the Respondent herein solely on the applicability of Section 43(4) of the Limitation Act. The Petitioner herein had argued before the Ld. Arbitrator that the said provision would only apply if the subsequent proceedings pertained to the same dispute, same agreement and same parties. While agreeing with the Petitioner on the validity of the test, the Ld. Arbitrator however was grossly mistaken in holding that the Respondent, a new and distinct amalgamated entity by the name of Concept Hospitality Pvt. Ltd., could be considered in law, to be the 'same party' as Evergreen, one of the two entities that amalgamated to form the Respondent company.

It is trite law that the identity of an amalgamated entity is separate and distinct from the sum of its parts. The arbitral award was further incorrect in holding that for the purposes of application of Section 43(4) of the Act, in order to bring the claims within the realm of limitation, it could be held that the Management Agreement of 1999 with Concept and the subsequent agreement of 2011 with Concept were the 'same agreement'. The two agreements, apart from being with two different corporate entities, also had completely different provisions. The Ld. Arbitrator failed to go into the details of each agreement to see their distinct nature. The Ld. Arbitrator further failed to see that the present situation did not even meet the third test to attract Section 43(4) which is the existence of the 'same dispute'. To say that they were the 'same dispute' solely because they pertain to allegedly unpaid invoices for the same period, would be a grave error.

5.8. The Ld. Arbitrator failed to consider the fact that the claims raised by the Respondent herein are extremely belated and barred by limitation.

5.9. The Ld. Arbitrator grossly erred in holding that the Respondent herein, "is Concept, with a new name and an entity merged into it". This understanding of the identity of the amalgamated entity goes against basic tenets of law that hold that the amalgamated entity is distinct.

5.10. It is humbly submitted that the true test to determine if Concept could be permitted to pursue its claims from almost a decade ago, would be to see if, sans the merger, it could still be permitted to do so. Since the answer to the same is clearly in the negative, Concept cannot be permitted to pursue time barred claims just because it amalgamated with an entity that happened to be pursuing an arbitration with the Petitioner herein. It will be a grave perversion of justice if the fact that just because Concept and the amalgamated entity i.e. the Respondent herein, share the same name, they are allowed to be treated as the same party.

5.11. It is submitted that in the absence of applicability of Section 43(4), the principle of issue estoppel would also apply to the present case. The Ld. Arbitrator in the first arbitral proceeding, has framed and dealt with and adjudicated upon this exact same issue regarding the disputes arising between 1 April, 2009 and 11th March, 2011. To permit the same to be re-litigated just because the said part of the award got set aside by this Hon'ble Court would make the impugned award illegal, perverse, bad in law and opposed to the basic tenets of equity and good conscience.

5.12. The Ld. Arbitrator further erred in proceeding on the basis that the Petitioner herein had not disputed the invoices despite there being a categorical statement in the Statement of Defence of the Petitioner that "the Respondent does not admit the alleged invoices and/or the veracity thereof and puts the Claimant to the strict proof thereof. The Ld. Arbitrator erred in holding that non-admission of the invoices could not be held to be the same as denial, in arbitral proceedings where the strict rules of pleadings do not apply.

5.13. The Impugned Award is even otherwise illegal, bad in law and liable to be set aside.

55) Thus, though Mr. Kumbhakoni has strenuously attempted to develop the argument of absence of Arbitration Agreement by contending that the arbitration clause in Concept Agreement of 1999 does not get incorporated in the Tripartite Assignment Agreement dated 1 April 2009, the award is not sought to be annulled by pleading that objection in the Petition.

56) As a matter of fact, Mr. Kumbhakoni already faces one uphill task of getting over the hurdle of failure to raise the issue of absence of Arbitration Agreement before the learned Arbitrator. This objection is sought to be argued before me for the first time as the Petitioner participated in the arbitral proceedings by accepting the position that there is agreement to resolve dispute through the mechanism of arbitration. Now it is seeking to take a *volte face* and question the very existence of Arbitration Agreement. As observed above, Petitioner had filed application under Section 16 of the Arbitration Act challenging the jurisdiction of the Arbitral Tribunal. However, it is an admitted position that in application filed under Section 16, Petitioner did not plead or argue the objection of absence of Arbitration Agreement between it and Evergreen for resolution of disputes pertaining to the invoices for the period from 1 April 2009 to 11 March 2011. Mr. Kumbhakoni seeks to perform this uphill

task and to surmount the hurdle of failure to raise the objection of absence of Arbitration Agreement before learned Arbitrator by relying on judgment of the Apex Court in *Gayatri Project Limited* (supra).

57) In *Gayatri Project Limited* the Apex Court has discussed the issue of permissibility to raise the issue of jurisdiction directly in Section 34 Petition without raising it before the Arbitrator and has held after noting the views expressed in *M.P. Road Development Authority & Anr v. L.G. Chaudhary Engineers & Contractors*¹⁰ and *Lion Engineering Consultants v. State of Madhya Pradesh*¹¹ in para-35 as under :-

35. Thus, what can be discerned from the aforesaid is that although a plea of lack of jurisdiction, being a question of law, can be raised even for the first time in the proceedings under Section 34 as held in *Lion Engineering* (supra), yet such a plea ought not to be allowed to be raised as it is deemed to have been waived in view of Section 4 of the Act, 1996 as per *Pam Development* (supra), unless the party makes out a strong and good reason for its failure to take such a plea before the arbitral tribunal as per *Gas Authority of India* (supra), and as per the dictum of *L.G. Chaudhary (II)* (supra) any failure to raise the issue of applicability of the MP Act, 1983 before the arbitral tribunal is not a strong and good reason to permit raising such a plea in the proceedings under Section 34 of the Act, 1996.

58) Thus, the Apex Court has held that though the plea of lack of jurisdiction, being a question of law, can be raised even for the first time in proceedings under Section 34 as held in *Lion Engineering* (supra), yet such plea ought not to have been raised as it is deemed to have been waived unless parties make out a strong

¹⁰ (2018) 10 SCC 826

¹¹ (2018) 16 SCC 758

and good reason for its failure to take up such plea before the Arbitral Tribunal. The Apex Court concluded in paras-36 and 37 as under :-

36. What emerges from the foregoing is that although Lion Engineering (supra) affirms that a plea of lack of jurisdiction, being a question of law, may be raised for the first time under Section 34 of the Act, 1996, yet such a plea is nevertheless subject to the waiver as held in Pam Development (supra). Furthermore, as per Gas Authority of India (supra), such a plea may only be entertained if the party demonstrates a strong and sufficient reason for not raising it before the arbitral tribunal. However, L.G. Chaudhary (II) (supra) makes it clear that a failure to raise the issue of applicability of the MP Act, 1983 at the appropriate stage cannot be regarded as a sufficient reason, and therefore the plea cannot be permitted at the stage of Section 34 proceedings.

37. L.G. Chaudhary (II) (supra) carved out the aforesaid limited exception to the general rule laid down in Lion Engineering (supra) that a plea of lack of jurisdiction, being a pure question of law, may be raised for the first time under Section 34 of the Act, 1996. The failure of L.G. Chaudhary (II) (supra) to take into consideration the decision of this Court in Lion Engineering (supra) does not render the former per incuriam, as there exists no direct conflict between the two. **While Lion Engineering (supra) permits a jurisdictional plea to be raised under Section 34 of the Act, 1996 even if not urged under Section 16, L.G. Chaudhary (II) (supra) merely clarifies that an arbitral award will not be annulled solely on that ground, particularly where the issue was not raised before the tribunal.** On the contrary, the aforesaid observations of L.G. Chaudhary (II) (supra) had been consciously made by this Court keeping in mind the ratio of Lion Engineering (supra), even though the latter was never explicitly referred to. L.G. Chaudhary (II) (supra) cannot be termed to be per incuriam, as the very factum that the aforesaid observations were made by L.G. Chaudhary (II) (supra) in paras 16, 17 and 19 respectively shows that this Court was well aware of the decision of this Court in Lion Engineering (supra), and accordingly chose to carve out an exception to the ratio of Lion Engineering (supra) keeping in mind the cleavage of judicial view that was prevailing earlier.

(underlining and emphasis added)

59) Thus, in a case involving a strong and good reason for not raising the plea before the Arbitral Tribunal of absence of jurisdiction, such plea can be raised before the Court deciding proceedings under Section 34 of the Arbitration Act. Since, the plea is subject to waiver concept recognized under the Arbitration Act, demonstration of existence of good and strong reason to rebut the presumption of waiver is mandatory. If good and strong reason for not raising the objection of lack of jurisdiction is not demonstrated, the presumption of waiver would kick in.

60) It is Mr. Rai's contention that the judgment of the Apex Court in *Gayatri Project Limited* does not envisage annulment of arbitral award on the ground of absence of Arbitration Agreement after the Award is made. Alternatively, according to Mr. Rai, there were no strong or good reasons for the Petitioner for not raising the ground of absence of Arbitration Agreement during the course of arbitral proceedings. In my view, it is not necessary to delve deeper into this aspect, and I could have proceeded to grant some leeway to the Petitioner by permitting it to raise the ground of absence of Arbitration Agreement directly in Section 34 Petition filed before this Court. However, I am unable to do so because of the second difficulty which has crept up for Mr. Kumbhakoni, which cannot be surmounted by him. The difficulty is that the Petitioner has not pleaded the ground of absence of Arbitration Agreement in the present Petition filed under Section 34 of the Arbitration Act. Even if it is to be assumed that the ratio of judgment of the Apex Court in *Gayatri Project Limited* permits direct raising of the objection of jurisdiction in Section 34 Petition without raising it before the Arbitrator, the same cannot be overstretched to mean that the judgment obviates even the need of pleading the objection in Section

34 Petition. In fact the ratio of judgment in *Gayatri Project Limited* envisages compulsory pleading of objection of lack of jurisdiction or absence of Arbitration Agreement in Section 34 Petition. This is because what needs to be pleaded is not just the objection of lack of jurisdiction but also the existence of good and strong reasons to rebut the presumption of waiver. If 'good and strong reasons' are not even pleaded, existence of same cannot be proved and the presumption of waiver would automatically apply.

61) In *Ravi Ragnath Khanzode Vs. Harsiddh Corporation*¹² I have held by referring to the Apex Court judgment in *State of Chhattisgarh And Another Versus. Sal Udyog Private Limited*¹³ and *State of Maharashtra v. Hindustan Construction Co. Limited.*¹⁴ that while examining the objection of conflict with public policy or patent illegality, Section 34 Court may not always insist on pleading of ground on account of use of the expression 'if court finds that' in clause (b) of sub-section (2) and in sub-section (2A) of Section 34. However, when it comes to the objection of absence of Arbitration Agreement, the judgment in *Gayatri Project Limited* opens a very narrow window for a party, who had a good and strong reasons for not raising that objection before the Arbitrator to raise the same before Section 34 Court. Also, *Gayatri Project Limited* clarifies that the plea of lack of jurisdiction is subject to the waiver principle as per the judgment in *Union of India v. Pam Development (P) Ltd*¹⁵.

62) In the instant case, apart from the fact that Petitioner has not pleaded existence of good and strong reason, it actually does

¹² 2025 SccOnline Bom 4505

¹³ (2022) 2 SCC 275

¹⁴ (2010) 4 SCC 518

¹⁵ (2014) 11 SCC 366

not have any good or strong reason for not raising the objection of absence of Arbitration Agreement before the arbitral tribunal. Petitioner is a seasoned player in the business and already has exposure to three arbitral proceedings relating to management of its hotel. It had filed application under Section 16 of the Arbitration Act and could have raised the objection of absence of Arbitration Agreement, but it did not. Petitioner possessed the required wherewithal to oppose the claim of Respondent and it has used every possible trick to frustrate the claim of Respondent. Petitioner is not a poor or illiterate litigant. Therefore it cannot be presumed that it had any particular reason for not raising the objection of lack of jurisdiction before the Arbitral Tribunal.

63) Also, provisions of Sections 4 [waiver of right to object], Section 7 (4)(c) [presumption of existence of Arbitration Agreement by exchange of pleadings] and Section 16 [impermissibility to raise objection of jurisdiction after submission of statement of defense] would apply in the present case. This is not a situation akin to Proviso to Section 12(5) [ineligibility of arbitrator] where the waiver requires an express agreement in writing. Waiver of objection of absence of Arbitration Agreement can also be by conduct. It is only on account of express language used in Proviso to Section 12(5) of the Arbitration Act that few judgments have propounded a view that the objection of unilateral appointment of Arbitrator can be urged in absence of pleadings in Section 34 Petition. (SEE *Mahavir Prasad Gupta and sons Versus. Govt. of NCT of Delhi* ¹⁶) However that exposition of law would not apply in the present case as principle of waiver applies to the objection of lack of jurisdiction. In any case, the application of principle of waiver is

¹⁶ 2025 SCC Online Del 4241

expressly recognised by the Apex Court in Judgments in *UoI Vs. Pam Development* and *Gayatri Project Limited*. Therefore, the presumption of waiver would come into play. Petitioner has waived the objection of absence of Arbitration Agreement in the facts and circumstances of the present case.

64) In the present case Petitioner does not reach the stage of demonstration of existence of good and strong reasons as it has not even crossed the threshold of pleading the ground of absence Arbitration Agreement between it and Evergreen. It has always acted on presumption of existence of Arbitration Agreement and raising of the objection of absence of Arbitration Agreement is nothing but counsel's ingenuity across the bar. It must also be borne in mind that in *Gayatri Project Limited* the Apex Court has also concluded that once the award is made, the same should not ordinarily be set aside only on the ground of absence of Arbitration Agreement.

65) Since the objection of absence of Arbitration Agreement between the Petitioner and Evergreen for resolution of disputes relating to invoices for the period 1 April 2009 to 11 March 2011 is neither raised before the Arbitral Tribunal nor is pleaded in the present Arbitration Petition, I find it unnecessary to delve into the issue as to whether arbitration clause in Concept Agreement of 1999 is 'incorporated' in the Tripartite Assignment Agreement dated 1 April 2009 or whether there is mere 'reference' to the Concept Agreement of 1999 in the said Tripartite Assignment Agreement. Therefore, it is not necessary to discuss the ratio of the Apex Court judgments in *M.R. Engineers and Contractors* (supra), *NBCC India Ltd.* (supra) relied upon by Mr. Kumbhakoni and in *Shinhan Bank*

relied upon by Mr. Rai. It is also not necessary to discuss the ratio of the judgment of Single Judge of this Court in *Vishranti CHSL* ruling that mere assignment of rights under the agreement does not tantamount to incorporation of arbitration clause in the agreement of assignment. Even otherwise, the Award cannot be set aside on the basis of such non-pleaded objection of absence of Arbitration Agreement. I accordingly reject the oral submissions sought to be raised on behalf of the Petitioner about non-existence of Arbitration Agreement between the Petitioner and Evergreen for resolution of dispute relating to invoices for the period 1 April 2009 to 11 March 2011.

CONCLUSIONS

66) The conspectus of the above discussion is that the Arbitral Tribunal has rightly excluded the period spent in previous arbitral proceedings while computing the period of limitation for invocation of the present arbitral proceedings under provisions of Section 43(4) of the Arbitration Act. The merged entity of CHPL is entitled to the benefit of such limitation exclusion provision even though the earlier arbitral proceedings were at the behest of Evergreen. The objection of absence of Arbitration Agreement between Petitioner and Evergreen (CHPL), having not urged before the arbitral Tribunal and having not pleaded in the Petition, cannot be permitted to be orally urged before this Court. The Award otherwise cannot be set aside by entertaining the oral plea of jurisdiction. The objection is otherwise waived. On merits, no ground is urged before me and apparently there is no real dispute about liability of the Petitioner to pay the invoices raised by the Respondent/Evergreen for operation and management of the Hotel

during the period 1 April 2009 to 11 March 2011. The Award, to my mind, appears to be unexceptionable, warranting dismissal of the Petition.

ORDER

67) The Arbitration Petition accordingly fails and is **dismissed**. Considering the facts and circumstances of the case, I deem it appropriate not to impose any further costs on the Petitioner. With dismissal of the Petition nothing would survive in the Interim Application and the same is also disposed of.

[SANDEEP V. MARNE, J.]