IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 11.02.2022

\+ **ARB.P. 1154/2021**

BHARAT PETRORESOURCES LIMITED ..... Petitioner

versus

JSW ISPAT SPECIAL PRODUCTS LIMITED ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Jayant K. Mehta, Senior Advocate with Mr Varghese Thomas, Mr Divyam Agarwal, Ms Aditi Deshpande and Mr Ashish Joshi, Advocates.

For the Respondent: Mr Ratnanko Banerji, Senior Advocate with Mr Rishi Agrawala, Mr Karan Luthra, Ms Aarushi Tiku, Ms Urmila Chakrobarty, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter '**BPRL**') has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act'**), *inter alia*, praying that the nominee arbitrator be appointed on behalf of the respondent, to enable constitution of an Arbitral Tribunal for adjudication of the disputes that

have arisen between the parties in relation to the Joint Operating Agreement dated 05.04.2013 (hereafter '**the Agreement**').

2. BPRL, GAIL (India) Limited, Engineers India Limited, BF Infrastructure Limited and the respondent (then known as Monnet Ispat and Energy Limited) had entered into a Production Sharing Contract dated 30.08.2012 (hereafter the '**PSC**') with the Government of India in respect of the Contract Area identified as Block: CB-ONN-2010/8.

3. Thereafter, the members of the consortium [BPRL, GAIL (India) Limited, Engineers India Limited, BF Infrastructure and the respondent] entered into the Agreement for carrying out joint operations under the PSC. BPRL and GAIL (India) Limited were jointly designated as Operators with BPRL being accepted as the Lead Operator to carry out the joint operations pursuant to the Agreement.

4. BPRL claims that the operations were required to be conducted in conformity with an approved work program and within approved budget. The finances for the operations were to be provided by the consortium partners including the respondent.

5. BPRL raised various Cash Calls on the consortium partners including the respondent. BPRL claims that the respondent failed to comply with the Cash Call of ₹12,11,62,887/- (Cash Call No.12) and the Cash Call of ₹17,03,72,749/- (Cash Call No. 14). As a consequence of the aforesaid defaults, BPRL issued a Default Notice dated 15.07.2016 notifying the respondent as a defaulting partner, in terms of Article 7.6.1 of the Agreement and further called upon the respondent

to cure the default. Thereafter, BPRL issued a further Cash Call being Cash Call Nos. 16, 17 and 18. BPRL claims that the respondent failed to comply with the said Cash Calls as well.

6. In view of the alleged failure on the part of the respondent to comply with the Cash Calls and payment of its dues, the non-defaulting consortium partners have assumed the respondent's 10% participating interest.

7. In the meanwhile, the respondent was admitted to Corporate Insolvency Resolution Process (hereafter '**CIRP**') under the Insolvency and Bankruptcy Code, 2016 (hereafter '**IBC**'). On becoming aware of the same, BPRL filed its claim as an operational creditor with the Insolvency Resolution Professional (hereafter '**IRP**') and claimed an amount of ₹9,58,88,886/- as due and payable prior to 18.07.2017 (the Insolvency Commencement Date - hereafter '**ICD**'). BPRL also furnished a proof of claim of an amount of ₹9,92,86,982/- in respect of future claims accruing after the ICD. While the IRP admitted the claim prior to the insolvency commencement date, it rejected BPRL's future claim of ₹9,92,86,982/-.

8. BPRL claims that further Cash Calls were made after the ICD (Cash Call Nos. 19, 20, 22, 22 Revised, 23, 24 and 25). BPRL claims that the respondent is liable to pay a total amount of ₹4,84,61,360.30/- in respect of the said Cash Calls.

9. A final resolution plan in respect of the respondent company was approved by the Committee of Creditors on 09.04.2018. Thereafter, the

National Company Law Tribunal, Mumbai (hereafter '**NCLT, Mumbai**') passed an order dated 24.07.2018 approving the Resolution Plan in respect of the respondent company, submitted by the consortium of AION Investment II Private Limited and JSW Steel Limited.

10. In view of the above, the CIRP in respect of the respondent was concluded on 24.07.2018 and the moratorium was lifted with effect from the said date.

11. The disputes between the parties essentially relates to the respondent's liability to pay its share of the Cash Calls.

12. The respondent has, in terms of its various communications, disputed its liability and contended that it had forfeited its participating interest in the PSC as no provision has been made in the Resolution Plan for any liability for operating the PSC.

13. In the aforesaid context, BPRL issued a notice dated 09.07.2021 under Section 21 of the A&C Act invoking the Arbitration Clause (Article 19.3 of the Agreement) and appointed Justice (Retired) V.K. Gupta as its nominee arbitrator. BPRL also called upon the respondent to appoint its nominee arbitrator within a period of thirty days of the receipt of the notice. However, the respondent has failed to do so.

14. The respondent responded to the notice dated 09.07.2021 denying any liability for making any payments. The respondent claims that in terms of the approved Resolution Plan, all rights, obligations,

claims arising in respect of the Agreement stand extinguished and insofar as the respondent is concerned, the Agreement does not survive.

15. Article 19.3 of the Agreement embodies an Arbitration Agreement which reads as under:

> "19.3 Resolution of disputes through Arbitration:
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> 19.3.1 Subject to the provisions of this Agreement, the Parties hereby agree that any controversy, difference, disagreement or claim for damages, compensation or otherwise (hereinafter in this Clause referred to as a "Dispute") arising between the Parties in relation to, arising under or arising out of this agreement including termination or validity of this Agreement, which cannot be settled amicably, may be referred to an arbitral tribunal for final decision as hereinafter provided.
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> 19.3.2 Any Party desiring to refer any such difference for arbitration shall send a notice in writing to the Party against whom such dispute is raised, along with a Statement, specifying therein the facts, issues & claims for appointment of an Arbitrator to the Arbitral Tribunal under the provisions of Art. 19, along with a copy of the said notice to the Operator.
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> 19.3.3 The arbitral tribunal shall consist of odd number of Arbitrators in total. Each Party to the dispute shall appoint one arbitrator and the Party or Parties shall so advise the other Parties to the dispute. However, in the case of even number of Parties to the dispute, the Arbitrators so appointed shall appoint another Arbitrator, in order to make the total number of Arbitrators to the Arbitral Tribunal odd in number.
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> 19.3.4 If any Party fails to appoint an Arbitrator within thirty (30) days of receipt of the written request to

do so, or if the Arbitrators, so appointed by or on behalf of the Parties fail to agree on the appointment of the next Arbitrator within thirty (30) days of the appointment of the last arbitrator to the Arbitral Tribunal and if the Parties do not otherwise agree, at the request of either Party, the next arbitrator shall be appointed in accordance with Arbitration and Conciliation Act, 1996.

19.3.5 If any of the arbitrators fails or is unable to act, his successor shall be appointed by the Party who originally appointed such in the manner set out in this Article as if he was the first appointment.

19.3.6 The Arbitrators to the Arbitral Tribunal shall, from amongst themselves select a Presiding Arbitrator for conducting the arbitration proceedings. Arbitration proceedings shall be conducted in accordance with the rules for arbitration provided in the Arbitration and Conciliation Act, 1996 or any amendment or further enactments thereto.

19.3.7 The fees and expenses of the Arbitrator shall be payable as per schedule of Indian Council of Arbitration, Delhi, and shall be shared in equal proportion by the parties to the dispute.

19.3.8 The parties shall freeze the claim of interest, if any, and shall not claim the same for the period the proceedings are pending beforethe arbitral tribunal.

19.3.9 The decision of the arbitral tribunal shall be pronounced within four (4) months of the appointment of the last arbitrator to the Arbitral Tribunal unless otherwise extended by the Parties or by arbitral tribunal. The arbitral tribunal shall give a reasoned award in English in writing.

19.3.10 This arbitration agreement shall be governed by the Arbitration and Conciliation Act, 1996 and any

amendments thereto or further enactments thereof prior to submitting a dispute to arbitration, the Parties may by mutual agreement submit the matter for conciliation as per Art.19.2.1 of this Agreement and in accordance with Part III of the Arbitration and Conciliation Act,1996 and any amendments thereto or further enactments thereof.

19.3.11 The venue of the arbitration proceedings pursuant to this Article, unless the Parties agree otherwise, shall be New Delhi, India and shall be conducted in the English language.

19.3.12 The right to arbitrate disputes under this Agreement shall survive expiry or the termination of this Agreement and the Contract. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of proceedings before the Joint Experts Committee (JEC) or Arbitral Tribunal and any pending claim or dispute."

16. It is relevant to note that there is no dispute that the respondent was a party to the Agreement and that BPRL has invoked the Arbitration Agreement.

Submissions

17. Mr Ratnanko Banerji, learned senior counsel appearing for the respondent referred to Clause 1(e)(ii) of the Resolution Plan, which reads as under:

> "**<u>(e) Proposal for other stakeholders (including other creditors)</u>**

(ii) Any and all claims or demands in connection with or against the Company (other than against the Existing Promoters or any existing or former members of the management of the Company) and all liabilities or obligations of the Company to any other stakeholder (including from GAIL (India) Private Limited or any other actual or potential creditor, if any or any counter-party, including any subsidiary, joint venture or associate) whether under law, equity or contract, whether admitted or not, due or contingent, crystallised or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the AIL Statement, the balance sheets of the Company or the profit and loss account statements of the Company or the February 21 Creditor List, in relation to any period prior to the Acquisition or arising on account of the Acquisition, will be written off in full and will be deemed to be permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan, and the Company and/ or the Consortium shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. It is clarified that extinguishment of any claims or demands in connection with or against the Company and all liabilities or obligations of the Company to any stakeholder as set out in this section 1(e)(ii) shall not prejudice any claims or demands and all liabilities or obligations, whether under law, equity or contract, whether admitted or not, due or contingent, crystallised or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, against the Existing Promoters or any existing or former members of the management of the Company. It

> is clarified that if any claims or demands are raised, or any liabilities or obligations are imposed, on the Existing Promoters of the Company or any existing or former members of the management of the Company, in relation to any period prior to the Acquisition or arising on account of the Acquisition, then by virtue of the order of the NCLT approving this Resolution Plan, any subrogation or other rights or claims that such Existing Promoters or existing or former members of the management of the Company may have against the Company at any time in respect of such claims, demands, liabilities or obligations, whether under law, equity or contract, whether admitted or not, due or contingent, crystallised or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the AIL Statement, the balance sheets of the Company or the profit and loss account statements of the Company or the February 21 Creditor List, in relation to any period prior to the Acquisition or arising on account of the Acquisition, shall stand automatically waived and extinguished in full and the Company and/ or the Consortium shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto."

18. He submitted that in terms of the said clause, all existing as well as future claims against the respondent company which were not expressly noted in the Resolution Plan, stood extinguished. He submitted that the Resolution Plan was approved by the NCLT, Mumbai by its order dated 24.07.2018 and, therefore, is binding on the parties.

19. He submitted that the liability under Clause 7.6.5 of the Agreement which is a subject matter of the dispute sought to be raised by BPRL, had arisen on the date of default being 07.03.2016. Merely because the Cash Call notices were issued subsequently, did not in any way indicate that the liability to pay the same had arisen after the ICD, that is 18.07.2017.

20. He also submitted that in terms of Section 3(6) of the IBC, the expression 'claim' is defined in broad terms and would include the claims raised by BPRL.

21. Next, Mr Banerji submitted that BPRL had challenged the order dated 24.07.2018 passed by the NCLT, Mumbai, approving the Resolution Plan, by filing an appeal before the National Company Law Appellate Tribunal (NCLAT). He submitted that one of the grounds for preferring the appeal was that the Resolution Plan did not accept BPRL's claim. BPRL had contended that it was left remediless in respect of its claims and had prayed that the order approving the Resolution Plan be set aside. He pointed out that BPRL had made an alternative prayer praying that the claim submitted by it to the IRP, be provided for in the Resolution Plan. He submitted that BPRL's appeal was dismissed by the Hon'ble NCLAT by an order dated 19.08.2019 and therefore, it was not open for BPRL to seek recourse to arbitration for re-agitating its claim.

22. He referred to the decision of the Supreme Court in ***Ghanshyam Mishra and Sons (P.) Ltd. v. Edelweiss Asset Reconstruction***

Company: 2021 SCC OnLine SC 313, whereby the Supreme Court had set aside the order of the NCLAT granting permission to an operational creditor to file a suit in respect of a claim which was not included in the resolution plan. He submitted that the Court had reiterated the "Clean Slate" principle, which postulated that not only all claims but also all causes of action against the company admitted to CIRP would stand extinguished on approval of the Resolution Plan. He also referred to the decision of the Supreme Court in ***Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta: (2020) 8 SCC 531*** in support of his aforesaid contention.

23. Mr Jayant Mehta, learned senior counsel appearing for BPRL countered the aforesaid contentions. He submitted that the scope of examination under Section 11 of the A&C Act was limited and it was not necessary for this Court to examine the disputes between the parties since the arbitration agreement was not disputed. Thus, an arbitrator was required to be appointed for constitution of an Arbitral Tribunal.

24. Mr Mehta referred to paragraph 11 of the order dated 24.07.2018 passed by the NCLT, Mumbai. He stated that said order expressly indicated that only the liabilities and obligations of the respondent prior to the ICD were extinguished. He submitted that there was no dispute that a creditor is precluded from initiating any proceedings in respect of a claim which is not a part of the Resolution Plan or one that was not preferred at the relevant time. However, the said principle is not applicable to claims that become due after the ICD. He submitted that since the claims raised by BPRL related to a period after the ICD, it was

not precluded from seeking adjudication of its claim and recovery of the amounts claimed by it. He also submitted that the order passed by the NCLAT dismissing its appeal also recorded that all future claims of BPRL arising after the ICD cannot be considered by the Resolution Professional. He also referred to the decision of the NCLAT in ***Andhra Bank v. M/s. F.M. Hammerle Textile Limited: Company Appeal (AT) (Insolvency) No. 61 of 2018, decided on 13.07.2018*** in support of his contention that the claims arising after the ICD would not be automatically extinguished.

25. He also referred to the decision of this Court in ***Nitin Fire Protection Industries Limited v. Gail (India) Limited***: ***OMP (COMM) 332/2017, decided on 05.09.2017*** in support of his contention that forfeiture of the participating interest of the respondent did not absolve the respondent of its liability. He further submitted that in terms of Article 7.8 of the Agreement, the forfeiture of the respondent's participating interest in the PSC is without prejudice to other remedies.

Reasons and Conclusion

26. It is well settled that in terms of sub-section (6A) of Section 11 of the A&C Act, the scope of examination under Section 11 of the A&C Act is limited to the existence of an arbitration agreement between the parties. Notwithstanding the same, in cases where it is *ex facie* clear that the disputes cannot be entertained, the courts would refrain from entertaining the petition to appoint an arbitrator as the same would be an exercise in futility. (See: ***Vidya Drolia v. Durga Trading***

Corporation: (2021) 2 SCC 1, N. N. Global Mercantile Private Limited v. Indo Unique Flame Limited & Ors.: 2021 SCC OnLine SC 13 and ***Bharat Sanchar Nigam Limited and Anr. v. Nortel Networks India Pvt. Ltd.: 2021 5 SCC 738***).

27. Having stated the above, it is also trite law that it is only in exceptional cases where it is absolutely clear that the disputes cannot be entertained that the court will decline to entertain a petition under Section 11 of the A&C Act. The standards of examination under Section 11 of the A& C Act do not permit the court to carry out any adjudicatory exercise in respect of any contentious issue.

28. In ***NCC Limited v. Indian Oil Corporation Limited: (2019) SCC OnLine Del 6964***, a Coordinate bench of this Court had set out the principle in the following words:

> "107. In my view, the scope of examination as to whether or not the claims lodged are Notified Claims has narrowed down considerably in view of the language of Section 11(6-A) of the 1996 Act. To my mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that is required to examine is as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in sub-section (6-A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its

> examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the arbitrator to form a view in the matter.
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> 108. Thus, unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the court concerned hearing Section 11 petition should follow the more conservative course of allowing parties to have their say before the Arbitral Tribunal."

29. The aforesaid passage was also referred by the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation*** (*supra*).

30. In a recent decision of the Supreme Court in ***InterContinental Hotels Group (India) Pvt. Ltd. & Anr. v. Waterline Hotels Pvt. Ltd: Arbitration Petition (Civil) No. 12 of 2019, decided on 25.01.2022***, the Supreme Court had highlighted that as a matter of default, the parties must be referred to arbitration and it is only in cases where it is clear that the disputes are deadwood that the courts would refrain from appointing an arbitrator. The court had once again reiterated the principle 'when in doubt refer'.

31. The controversy in the present petition is required to be considered bearing the aforesaid principle in mind.

32. In ***Andhra Bank v. M/s. F.M. Hammerle Textiles Limited*** (*supra*), the NCLAT had observed that "*the debt which the 'Corporate Debtor' owes for payment in future, if not taken into consideration in the 'Resolution Plan' does not extinguish automatically and the creditors, including the 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor' has rights to claim the same*."

33. It is relevant to refer to the common order dated 19.08.2019 passed by the NCLAT in respect of the appeals preferred against the order dated 24.07.2018 passed by the NCLT, Mumbai approving the Resolution Plan in respect of the respondent company. The said appeals include Company Appeal (AT) (Insolvency) No. 550 of 2018 preferred by BPRL. The said appeal was dismissed. However, the following paragraphs which *prima facie* indicate the reasons for dismissing the appeal, are relevant:

> "30. From 'I&B Code', it is clear that on initiation of 'Corporate Insolvency Resolution Process' (after admission), the public announcement of the 'Corporate Insolvency Resolution Process' is made under Section 15. Thereafter, the 'Interim Resolution Professional' is empowered under Section 18(1) (b) to receive and collate all the claims submitted by creditors.

> 31. The aforesaid claim(s) relates to the debt payable to a creditor(s) before initiation of the 'Corporate Insolvency Resolution Process' and do not relate to any amount payable during the 'Corporate Insolvency Resolution Process'.
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> 32. 'Bharat Petroresources Limited' submitted its claim on 5th January, 2018 towards the 'operational debt' amounting to Rs.9,58,88,886/- as on the Insolvency Commencement Date, which has been admitted by the 'Resolution Professional'. Therefore, any claim of the Appellant towards future claim accrued after the Insolvency Commencement Date, cannot be considered under Section 18(1) (b) by the 'Resolution Professional'.
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> 33. If any cost incurred during the 'Corporate Insolvency Resolution Process' that cannot be treated to be the claim of an 'Operational Creditor' and therefore, further claim amounting to Rs.9,92,86,892/- towards future claim made by 'Bharat Petroresources Limited' was rightly not collated by the 'Interim Resolution Professional'/ 'Resolution Professional'.
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> 34. For the reason aforesaid merely on the ground that the future claim has not been collated by the 'Resolution Professional', the Appellant- 'Bharat Petroresources Limited' cannot assail the order of approval of plan (dated 25th July, 2018) passed under Section 31 of the 'I&B Code'.

34. It is apparent from the above that NCLAT was of the view that BPRL's appeal was in respect of claims arising post the ICD and could

not be accepted by the Resolution Professional. Therefore, its grievance that the same had not been considered was not sustainable.

35. Thus, the question whether the liability sought to be enforced by BPRL against the respondent stands extinguished is a contentious issue.

36. In view of the above, this Court is unable to accept that the controversy involved in the present case falls within the standards of examination under Section 11 of the A&C Act. The Supreme Court in its recent decision in ***Mohammed Masroor Shaikh v. Bharat Bhushan Gupta & Ors: Civil Appeal No. 874 of 2022, decided on 02.02.2022*** while referring to the decision in ***Vidya Drolia v. Durga Trading Corporation*** (*supra*) held that "*the Court by default would refer the matter when contentions relating to nonarbitrability are plainly arguable*."

37. As noticed above, this Court is not required to examine and adjudicate any contentious issue and the parties must be relegated to the forum of their choice for adjudication of their disputes.

38. In view of the above, the present petition is allowed. Justice (Retired) Pankaj Naqvi, former Judge of the Allahabad High Court (Mobile No. 9415236770) is appointed as the Arbitrator on behalf of the respondent.

39. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act. The two

nominated Arbitrators are required to concur on appointment of the third Arbitrator for constitution of the Arbitral Tribunal in terms of Article 19(3) of the Agreement.

VIBHU BAKHRU, J

FEBRUARY 11, 2022
RK/v