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

\+ ARB.P. 1108/2023

RBCL PILETECH INFRA .....Petitioner

Through: Ms. Tanya Karnwal, Mr. Harshit Batra, Advs.

versus

BHOLASINGH JAIPRAKASH CONSTRUCTION LIMITED & ORS. .....Respondents

Through: Mr. Animesh Sinha, Mr. Shubham Budhiraja and Ms. Ishita Pandey, Advs. for R-2
Mr. K.K. Tyagi, Adv. for R-3

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% 22.07.2024

1. This is a petition under Section 11(6)[1] of the Arbitration and Conciliation Act, 1996[2], for reference of the disputes which have primarily arisen between the petitioner and Respondent 1 Bholasingh Jaiprakash Construction Ltd.[3] in the context of Work Order dated 4 April 2022 executed between them.

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[1] (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[2] "the 1996 Act" hereinafter

[3] "BJCL" hereinafter

2. Respondent 1 is BJCL, Respondent 2 is National Thermal Power Corporation[4] which is the owner of the site at which the project is being undertaken and Respondent 3 is Bharat Heavy Electrical Ltd[5], which is undertaking the project work and had contracted the work, of effecting certain constructions at a site belonging to NTPC, to BJCL.

3. By the Work Order dated 4 April 2022, BJCL sub-contracted part of the work to the petitioner.

4. The petitioner claims to have incurred idling charges, damages and the like, which, according to the petitioner, are payable by the respondents.

5. Clauses 12, 21, 28 and 33 of the Work Order are of relevance and may be reproduced thus:

> "12. Water for construction shall be tapped from NTPC water supply as located by NTPC. Water meter shall be installed and charges of water shall be paid by M/s RBCL Piletech Infra.
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> 21. Payment shall be released within 3 days of receipt of payment from BHEL for the portion/scope of works carried out by you and the quantities accepted/certified and paid by BHEL to BJCL, for your portion /scope of work. The payment shall be released to you after carrying out all deductions as per the work order/ contract conditions.
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[4] NTPC hereinafter
[5] BHEL hereinafter

> 28. Any amount put on hold/retained by BHEL due to any reason attributable to M/s RBCL Pilatech Infra shall also be held back/ retained back by BJCL. This held back amount shall be released M/ s RBCL Piletech Infra after the release of the same from BHEL to BJCL.
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> 33. All other terms and conditions mentioned in the contract between BJCL and BHEL for the entire work shall be applicable to M/s RBCL Piletech Infra. Technical specification, the technical condition of the contract, GCC and SCC, and other documents as per the signed agreement between BJCL and BHEL shall form an integral part of this work order."

6. Clause 36 of the Work Order envisaged resolution of disputes by arbitration by a sole arbitrator, to be appointed by mutual consent of both parties.

7. The petitioner addressed a notice under Section 21[6] of the 1996 Act, invoking arbitration, to the respondents on 15 July 2023. Various claims have been raised in the said notice, with which this Court is not required to concern itself in the present Section 11(6) proceedings.

8. By the notice, the respondents were called upon to appoint a sole arbitrator to arbitrate on the disputes.

9. The aforesaid notice was opposed by BJCL and BHEL, though NTPC did not condescend to issue a reply thereto.

10. The petitioner has, therefore, approached this Court under

[6] **21. Commencement of arbitral proceedings**. – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Section 11(6) of the 1996 Act, seeking appointment of an arbitrator by this Court to arbitrate the disputes between the parties.

11. BJCL has already, on 15 July 2024, agreed to the disputes between the parties being referred to arbitration.

12. NTPC and BHEL, however, oppose their inclusion in the arbitral proceedings as they submit, *inter alia*, that they have no privity of contract with the petitioner, and that the Work Order is in the nature of a bilateral agreement between the petitioner and BJCL, to which neither NTPC nor BHEL is a party.

13. I have heard Ms. Tanya Karnwal**,** learned counsel for the petitioner, Mr. K. K. Tyagi, learned counsel for the BHEL, and Mr. Animesh Sinha, learned counsel appearing for NTPC at some length.

14. The only issue that survives for consideration is, therefore, whether the Court would be justified in including NTPC and BHEL in the proposed arbitral proceedings.

15. Mr. K. K. Tyagi, learned counsel for BHEL, emphatically contends that his client is a complete stranger to the Work Order, and that the Work Order is a bilateral agreement between the petitioner and BJCL. There is no arbitration agreement between the petitioner and BHEL. As such, he submits that there is no justification to unnecessarily drag his client into the arbitral proceedings.

16. As against this**,** Ms. Tanya Karnwal, learned counsel for the petitioner, has placed reliance on Clauses 21, 28 and 33 of the Work Order as justifying the inclusion of BHEL in the arbitration.

17. She has also cited the judgment of the Hon'ble Supreme Court in ***Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc***[7] She has particularly placed reliance on the following passages from the said decision:

> "69**.** We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45[8], the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the court shall refer them to arbitration. The use of the word "shall" would have to be given its proper meaning and cannot be equated with the word "may", as liberally understood in its common parlance. The expression "shall" in the language of Section 45 is intended to require the court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the prerequisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.
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> 73**.** A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in

[7] **(2013) 1 SCC 641**

[8] **45. Power of judicial authority to refer parties to arbitration**. – Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed.

exceptional cases. *The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.*"

(Emphasis supplied)

18. On the issue of when a third party non-signatory to an arbitration agreement can be included in the arbitral proceedings, the law is fairly settled.

19. One of the common circumstances in which a non-signatory can be included in an arbitral proceeding is where the said non-signatory and one of the signatories to the arbitration agreement are part of one "group of companies" – often known as the "Group of Companies" doctrine. The leading authority on this is, presently, the decision in ***Cox and Kings v. SAP India India Pvt Ltd***[9]. We are not, however, concerned with the Group of Companies doctrine here, as it is nobody's case that BHEL, or NTPC, and BJCL are part of one group of companies.

20. It is not, however, where the non-signatory is part of the same group of companies to which the signatory belongs, that alone the non signatory can be co-opted in the arbitral proceedings. In ***Ameet***

Lalchand Shah v. Rishabh Enterprises[10], the Supreme Court, relying on ***Chloro Controls***, held that as the non-signatory was a party to an inter-connected agreement, executed to achieve a common commercial goal, it was rightly included as a party in arbitration.

21. Equally, one of the circumstances which would justify the inclusion of a non-signatory to an arbitration agreement in arbitral proceedings is a contractual relationship which makes a non-signatory also responsible to one extent or the other to the obligations towards the claimants. In ***O.N.G.C. v. Discovery Enterprises Pvt Ltd***[11], the Supreme Court held that "a non-signatory may be bound by the operation of the group of companies doctrine *as well as by the operation of the principles of assignment, agency and succession*." The extent to which the clause, on which Ms. Karnwal places reliance, justifies inclusion of BHEL as a party to the arbitration, has to be assessed on the basis of the above legal position.

22. Clause 33, in my opinion, cannot justifiably be cited as a ground to include BHEL in the arbitral proceedings. All that it states is that the terms and conditions in the contract between BJCL and BHEL would apply *mutatis mutandis* to the petitioner. Specific reference has been made to the technical specifications and technical conditions of the contract as well as the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC) and other documents as per the agreement between BHEL and BJCL.

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[9] **(2024) 4 SCC 1**
[10] **(2018) 15 SCC 678**
[11] **(2022) 8 SCC 42**

23. The mere fact that the technical specifications and other details mentioned in the contract between BHEL and BJCL would apply to the sub-contract between BJCL and the petitioner cannot by itself justify inclusion of BHEL in the arbitral proceedings.

24. However, Clauses 21 and 28 of the Work Order do make out, *prima facie*, a case for inclusion of BHEL in the proposed arbitration. Clause 21 envisages release, by BJCL, of payment to the petitioner, *within three days of receipt of payment from BHEL for the portion of the works carried out by the petitioner and the quantities accepted/certified and paid by BHEL to BJCL for that portion of the work. The entitlement of the petitioner to payment, for the work sub-contracted to the petitioner by BJCL is, therefore, made contractually dependent on acceptance/certification by BHEL of that portion of the work and consequent payment by BHEL to BJCL in that regard.* It is that payment which is received from BHEL to BJCL which in turn is forwarded by BJCL to the petitioner. This aspect is further emphasised in Clause 28 which indemnifies BJCL from releasing, to the petitioner, any amount which is put on hold or retained by BHEL due to any reason attributable to the petitioner. *The power conferred on the BHEL to withhold or retain amounts otherwise payable to the petitioner owing to the reasons allegedly attributable to the petitioner, also confers on BHEL a degree of supervisory control over the activities of the petitioner.*

25. These two clauses, seen in conjunction, leave no manner of

doubt that, sans the approval by BHEL and release of payment by BHEL to BJCL, BJCL would not release the payments to the petitioner.

26. I hasten to observe, at this juncture, that these observations are not being made by me as reflective of the right of the petitioner to any payment which it claims from BJCL or the right of BHEL to withhold any such payment. They are only intended to indicate the extent to which BHEL also has a role to play in the petitioner being paid by BJCL for the work undertaken by it.

27. In that view of the matter, no exception can be taken to the petitioner choosing to include BHEL in the present arbitral proceedings.

28. Having said so, this order shall not inhibit BHEL from, at any appropriate stage, seeking to convince the arbitral tribunal that its further continuance in the arbitral proceedings is not justified, or that it may be dispensed from further participation therein. Any such application if made, shall be considered on its own merit by the Arbitral Tribunal.

29. Insofar as NTPC is concerned, Ms. Tanya Karnwal is candid in her submission that there is no direct covenant in the Work Order which renders NTPC responsible towards the petitioner, except Clause 12, which requires the petitioner to tap water for construction from the NTPC water supply, and renders the petitioner responsible for

installation of the water meter and payment of charges for the water that is tapped.

30. Apart from this, she draws attention to the fact that gate passes, to enable the petitioner to enter the project site and carry out the contracted work, have to be issued by NTPC. She has drawn attention to an email dated 11 August 2022 from BHEL to BJCL, which reads as under **:**

> "On 11-Aug-2022, at 6:30 PM, Roshan Lal Sahu (Manager/KORBAFGD_PLN/PS-WR) <roshan@bhel.in> wrote:
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> Dear Mr. Saurabh,
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> We refer your trailing reply email and would like to intimate you that gate passes of manpower's having validity up-to 21.08.2022 have been issued to M/s BJCL in-line with the request made by your Shri Anil T Singh (Senior Project director) as per attachment.
>
> Please note that 48Nos Manpower gate passes have been issued to M/s BJCL by NTPC (attached) and all these gate passes are valid up-to 22.08.2022.
> In spite of several communication by site BHEL you are not doing the works.
> It is very unfortunate that you are making wrong communication to your agencies.
>
> Regards
> Roshan Lal Sahu
> Manager/Planning
> BHEL site NTPC Korba FGD"

31. She has also drawn my attention to para 17 of the notice attempting conciliation of the proceedings prior to invoking arbitration, issued by the petitioner to the respondent on 30 March 2023 and paras 6 to 9 and 12 of the Section 21 notice issued by the petitioner thereto, on 15 July 2023, which read as under:

Para 17 of notice dated 30 March 2023

"17. That moreover due to non-issuance of the gate passes for manpower and machines, our Client had to also incur the costs of the staff's salaries, fooding, logging and other operational expenses. That moreover, for the entire period from July 2022- Feb 2023, when no gate pass for machinery (till Sep 2022) and for setup (for remaining period) was issued by you, the addressees, there has been theft of the tools, equipment, and machinery of Our Client, which has gone unaccounted for, till date, all of which, has caused huge losses to Our Client."

Paras 6 to 9 and 12 of notice dated 15 July 2023

"6. That it is a matter of fact that it was the obligation of you, the addressees, to get the Gate Passes issued to Our Client for both Man Power and machinery for the NTPC Work Site in order to allow Our Client to initiate the Piling Work at the work site and its continuation thereof.

7. That on 22.07.2022, the gate passes so issued to Our Client had expired and you, the addressees, miserably failed to renew the said Gate Passes which led to Our Client not having access to their own tools, machinery & equipment at the NTPC Korba Worksite.

8. That Our Client sent you, the addressee, countless e-mails seeking the renewal of the said "Gate Passes" in order to get access to their own tools, machinery, and equipment so that Our Client could continue with the Piling Work at the NTPC Work Site, however, you the addressee, failed to do the needful.

9. That because of the said non-issuance of gate passes on your part, and the non-continuation of the work, Our Client was forced to demobilize all the manpower, machinery and tolls related to piling since July 2022 and all the machinery, tools and Materials had to sit idle at the said Work Site causing an opportunity loss and loss of project to Our Client over and above the harassment, and mental agony that Our Client had to go through.

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12. That after having abandoning the Project and not allowing the carrying of the work at site, the Machinery from the site had to be demobilised, however, you, the addressee, issued only manpower pass in May 2022 and not the passes for the machinery.

> The machinery could only be taken out from your possession in October 2022 and the remaining piling setup was taken in February 2023."

32. The above paragraphs, too, do not, in my view, make out a case at this stage to include NTPC in the arbitral proceedings. Admittedly, there is no contractual responsibility of NTPC towards the petitioner. The mere fact that the petitioner has included NTPC in an omnibus fashion in the allegations contained in the Section 21 notice and also claimed the demanded amounts jointly and severally from all the respondents cannot, *prima facie*, justify inclusion of NTPC in the arbitral proceedings, applying the principles laid down by the Supreme Court in that regard.

33. As such, for the present, I am of the opinion that Ms. Karnwal has not succeeded in making out a case to include NTPC in the arbitral proceedings.

34. This, however, shall not disentitle the petitioner from moving the learned Arbitral Tribunal in that regard and convincing the learned Arbitral Tribunal that NTPC is a necessary party. Any such application if moved, shall be considered by the learned Arbitral Tribunal on its own merits needless to say in accordance with law.

35. As per the decision of the Supreme Court rendered last week in ***SBI General Insurance Co Ltd v. Krish Spinning***[12], a Section 11(6) Court can only look into whether there is an arbitration agreement.

36. Within the limited scope of jurisdiction conferred in this Court by Section 11(6) of the 1996 Act, a clear case for referring the dispute between the parties to arbitration exists.

37. Inasmuch as the parties have not been able to arrive at any consensus regarding the arbitrator who should arbitrate on the disputes, this Court has to exercise jurisdiction under Section 11(6).

38. Accordingly, this Court appoints Mr. Anant V. Palli, Sr. Advocate (Mob: 9810199102) as the arbitrator to arbitrate on the dispute between the parties.

39. The learned Arbitrator shall be entitled to charge fees as per the agreement between the Arbitrator and the parties. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

40. This Court has not expressed any opinion on the merits of the matter or on any other aspect. The observations contained in this order are strictly limited only to the issue of whether a case for referring of dispute to arbitration exists and whether, at the Section 11(6) stage, the petitioner is justified in including BHEL and NTPC as parties in the arbitration.

41. All the parties would be at liberty to contest their inclusion/non-

[12] **2024 SCC OnLine SC 1754**

inclusion as parties in the arbitration before the learned Arbitral Tribunal and, in that event, the learned Arbitral Tribunal would take a dispassionate view in the matter.

42. The petition stands disposed of in the aforesaid terms.

C. HARI SHANKAR, J

JULY 22, 2024
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Click here to check corrigendum, if any