

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB. P. No. 315 of 2012

Reserved on: April 12, 2013

Decision on: May 3, 2013

BHUPINDER SINGH MACHRE & ANR.

....Petitioners

Through: Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Arijit Mazumdar, Mr. Anish Maheshwari, Ms. Ayesha Shervani & Ms. Eesha Mohapatra, Advocates

versus

VIVEK VARMA & ORS.

..... Respondents

Through: Mr. Jayant K. Mehta, Mr. Sukant Vikram & Mr. Abhimanyu Mahajan, Advocates

WITH

OMP No. 394 of 2011

BHUPINDER SINGH MACHRE & ANR.

....Petitioners

Through: Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Arijit Mazumdar, Mr. Anish Maheshwari, Ms. Ayesha Shervani & Ms. Eesha Mohapatra, Advocates

versus

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..... Respondents

Through: Mr. Jayant K. Mehta, Mr. Sukant Vikram & Mr. Abhimanyu Mahajan, Advocates

JUDGMENT
03.05.2013

1. Arbitration Petition No. 315 of 2012 has been filed by Mr. Bhupinder Singh Machre [Petitioner No.1] and Mrs. Rajinder Kaur ('RK'), wife of BSM, [Petitioner No.2] (hereafter collectively referred to as 'the BS Group') against Mr. Vivek Varma, Mrs. Sangita Varma, wife of Mr. Vivek Varma [Respondent Nos.1 and 2 respectively] and Mr. Manoj Sachdeva [Respondent No.3] (hereafter collectively referred to as 'the Varma Group') under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') praying, *inter alia*, for the appointment of a third/presiding arbitrator to adjudicate upon the disputes that have arisen between the parties in the course of implementation of an Award dated 7th August 2007.

2. Earlier the BS Group had filed OMP No. 394 of 2011 against the Varma Group on 19th May 2011 under Section 9 of the Act to restrain the Varma Group from initiating or continuing any proceedings against the BS group in any Court, whether domestic or international, in respect of the subject matter of the agreement dated 7th August 2007 and an Award of the same date "save and except through arbitration under the Agreement." A prayer was also made to restrain the Respondents from transferring or alienating or creating any interest in the shares held by them in Haikawa Industries Pvt. Ltd. ('HIPL') and Tristar Air-conditioning Pvt. Ltd. ('TAPL').

3. The case of the BS Group is that they have been engaged in the business of manufacturing and dealing in refrigeration equipment since 1972. Respondent No.1 was carrying on the business of manufacturing and sale of condensing

cooling coils and evaporator coils under the name and style of Pole Star Pvt. Ltd. ('PSPL'), having its manufacturing unit at Thane, Maharashtra. Respondent No.1 was one of the suppliers of the above components to the two companies promoted by the BS Group, i.e., Western Refrigeration Pvt. Ltd. ('WRPL') and Indo Western Refrigeration Pvt. Ltd. ('IWRPL').

4. According to the BS Group, Respondent No.1 approached them with a proposal for setting up of a manufacturing unit of condenser cooling coil and evaporator coils in Sri Lanka. It is stated that on the basis of the representations made by Respondent No.1 that Petitioner No.1 would be an investor and financier in the proposed venture, while Respondent No.1 would remain in the day-to-day management of the proposed entity in Sri Lanka, Petitioner No.1 agreed to enter into a business relationship with him.

5. In 2001, HIPL was incorporated in Sri Lanka with an authorized share capital of Sri Lankan Rupees ('SLR') 20,00,00,000 divided into equity shares of SLR 100 each. 64% of the issued and paid up share capital in HIPL was allotted to the family members and/or companies controlled by Petitioner No.1 along with Petitioner No.2. One of the sons of the Petitioners, Mr. Parmeet Singh, was a subscriber to the Memorandum of Association of HIPL. The remaining shares of HIPL were held by WRPL and IWRPL. On the side of the Varma Group, Respondent No.3 along with Respondent No.1 held the remaining approximately 36% shares of the total equity share capital of HIPL.

6. It is stated that in 2003, Respondent No.1 suggested to the BS Group that a company could be incorporated in India for the purpose of assembling and

manufacturing air-conditioners by using the air-conditioners manufactured in semi knocked down ('SKD') or completely knocked down ('CKD') form by HIPL. Further, it was suggested that such company could market the said air-conditioner under its own brand name so that excise and other benefits could be availed of. Accordingly, TAPL was formed by Petitioner No.1 and Respondent No.1 with its registered office at Mahim, Mumbai. The office has since been shifted to Bhandup (West), Mumbai. In TAPL, Petitioner No.2, wife of Petitioner No.1, held 64% shares and Respondent No.2, the wife of Respondent No.1, held 36% shares. It is stated that it was agreed that the BS Group would have financial interest in the two companies while the Varma Group would be in charge of their day-to-day management. It is stated that at the time of incorporation of TAPL, Petitioner No.2 was inducted on the board of TAPL as a Director. However, in light of the agreement between the parties that the BS Group would have only financial interest in the two companies, Petitioner No.2 resigned from the board of TAPL.

7. The BS Group states that from 27th December 2004, Respondent Nos.1 and 2 were the only Directors on the board of TAPL and were managing its affairs. The BS Group claim that they had no knowledge that the affairs of TAPL were being grossly and severely mismanaged by the Varma Group. It is further averred that the Varma Group refused to share with the BS Group the accounts and other relevant particulars of TAPL. The BS Group contends that they learnt of a raid conducted on TAPL by the Directorate of Revenue Intelligence ('DRI') on the allegation that TAPL was indulging in the import of goods without license. Consequently, the BS Group filed Co. Pet. No. 101 of 2007 before the Company Law Board ('CLB') under Sections 397,

398,402,404,406 and 408 of the Companies Act, 1956 ('Companies Act') seeking, *inter alia*, the superseding of the board of TAPL. The said petition was filed by Petitioner No.2 in her capacity of a shareholder of TAPL.

8. It is stated that during the pendency of Co. Pet. No. 101 of 2007, a meeting was held on 2nd August 2007 between Petitioner No.1, Respondent No.1 and certain other advisors of the two groups and their well-wishers. *Inter alia*, it was decided that all the disputes between the parties would be resolved by arbitration. According to the BS Group, the minutes of the meeting dated 2nd August 2007 recorded, *inter alia*, that Respondent No.1 would transfer 36% shares of TAPL to the nominees of Petitioner No.1. Respondent No.1 also agreed to transfer the shares held by him and Respondent No.3 in HIPL to the nominees of Petitioner No.1. As a consideration for the aforementioned transfer of shares of TAPL, Petitioner No.1 agreed to pay Respondent No.1 Rs. 50 lacs net of tax. As against the transfer of shares of HIPL and the loans advanced by Respondent No.3, Petitioner No.1 agreed to pay him a sum of Rs. 380 lacs. However, this would be subject to adjustments towards the loans taken from HIPL by Respondent Nos.1 and 3 and the other amounts payable by Respondent No.1 to HIPL and/or to the Petitioners. The BS Group state that after such adjustments, they were to pay the Varma Group Rs. 285 lacs for the shares of HIPL.

9. The BS Group further states that they were only aware that TAPL would have contingent liabilities of around Rs. 3.3 crores in relation to the proceedings initiated by the DRI and that they would have to get the goods released by arranging to pay Rs. 76 lacs and by furnishing a bank guarantee

(‘BG’) of Rs. 2.6 crores. It is stated that the said BG was being kept renewed by the BS Group. According to the BS Group, it was specifically represented by the Varma Group that there was no other liability of TAPL. The BS Group further state that Respondent No.1 undertook to hand over all the papers relating to both the companies to them before 10th September 2007; to handover the transfer forms duly signed as per the provisions of the Companies Act in India and Sri Lanka to the two arbitrators simultaneous with the receipt of the consideration for such transfers; that no further action would be initiated by either party against each other and that the proceedings before the CLB would stand withdrawn. Mr. K.S. Chadha was nominated as the arbitrator by the BS Group and Mr. V.G. Prabhu was the nominee arbitrator of the Varma Group.

10. It is stated that since certain differences arose regarding the interpretation of the understanding as recorded in the minutes dated 2nd August 2007, the parties entered into an agreement dated 7th August 2007 for reference of the disputes to arbitration. The terms of reference, as recorded in the agreement dated 7th August 2007, read as under:

“All dispute or differences between the parties to this Agreement, touching or concerning sale of shares of Varma Group in Haikawa Industries (P) Ltd. to Bhupinder Singh Group and repayment of loan of Varma Group and touching and concerning Tristar Air-conditioning (P) Ltd. including the disputes which are the subject matter of the Company Petition No. 101 of 2007 pending before the Hon’ble Company Law Board and the respective rights and liabilities of the parties in relation to the said companies shall be referred to the arbitration of Sh. V.G. Prabhu and Sh. K.S. Chadha who shall decide the disputes or differences and their award shall be final and binding on the parties hereto. It is also agreed by the parties that the Ld. Arbitrators need not assign any reasons for their award.”

11. It is stated that on the same date, the Arbitral Tribunal ('AT') comprising Mr. V.G. Prabhu and Mr. K.S. Chadha passed an Award in which, *inter alia*, it was decided as under:

(i) In terms of what had been agreed between the parties and stated in the arbitration agreement, the AT was were not bound to assign any reasons in the Award.

(ii) The Varma group would sell their 36% shareholding in TAPL to the BS Group and/or their nominees and the BS group shall either by themselves or through their nominees purchase the said 36% shareholding of the Varma group for a consideration of Rs. 50,00,000 net of tax.

(iii) The said consideration was to be paid in the following manner:

(a) Rs. 25,00,000 forthwith in the name of Ms. Sangeeta Kochhar upon passing of the Award.

(b) BS group to deposit Rs. 25,00,000 in the joint account of the arbitrators upon passing of the Award and the same would be released at the time of dispatch of all the finished goods lying at the factory of TAPL at Himachal Pradesh and handing over the possession of the incomplete goods to the BS group. The process of dispatch of the finished goods and/or of handing over the unfinished goods shall be completed by 27th August 2007. The arbitrators were to hold the said amount in trust for the Varma group till it was paid to the Varma group as aforesaid.

(iv) The Varma group shall sell its 36% shareholding in HIPL, Sri Lanka to BS group and/or their nominees and the BS group shall either by themselves or through their nominees purchase the said 36% shareholding of the Varma group. The BS group shall also repay the loans advanced by the Varma group in HIPL. The total consideration for both the aforesaid transactions shall be Rs. 380 lacs which was to be paid in the name of Mr. Manoj Sachdeva in the following manner:

(a) A post dated cheque ('PDC') dated 10th September 2007 for the said amount to be handed over to the arbitrators by the BS group immediately upon passing of the Award which has to be deposited in an interest bearing joint account of the arbitrators. The arbitrators were to hold the said amount in trust for the Varma group.

(b) The said amount to be paid to the Varma group latest by 30th November 2007 along with interest that may have accrued on the said amount or getting the show cause notice from DRI for both the companies whichever is earlier.

(v) Both the aforesaid transactions as in (i) and (ii) above and actions incidental thereto "shall be interlinked and cannot be given effect to separately and independently. Thus, if one falls the other shall necessarily fail. And if one is completed and the other is not then the completed transaction shall be reversed."

(vi) Mr. Vivek Varma was to forthwith appoint two members of the BS group and/or their nominees additional as directors of TAPL and

authorize them to operate the bank accounts of TAPL and the partnership firm, M/s. International Corporation.

(vii) After the signing of the balance sheet of TAPL, members of the Varma group were to retire as directors of TAPL for the year ending 31st March 2007.

(viii) Mr. Vivek Varma was not to set up any unit in Sri Lanka for manufacture of air-conditioners and refrigeration products up to 31st December 2009.

(ix) Mr. Vivek Varma was to handover all the papers relating to TAPL and HIPL to the BS group on or before 10th September 2007.

(x) At the time of payment of the aforesaid sum of Rs. 380 lacs to the Varma group, the Varma group was to handover to the arbitrators the forms for the transfer of shares in both TAPL and HIPL duly signed as per the provisions of the Companies Act, both in Sri Lanka and India.

(xi) Varma group was not to be liable for the liabilities of TAPL, HIPL and M/s. International Corporation and the same shall be the liability of the BS Group.

(xii) On the fulfillment of the respective obligations none of the group shall be responsible for the liabilities of the other group in respect of TAPL, HIPL and M/s. International Corporation.

(xiii) The expenses incurred by Mr. Vivek Varma for the following months would be reimbursed to him subject to his taking approval for the said expenses from the either arbitrator.

(xiv) Co. Pet. No. 101 of 2007 before the CLB shall be disposed of in terms of the Award immediately.

(xv) The statements of both the groups were recorded to the effect that they would withdraw the complaints against the other group and would in future also not resort to any complaints, action, deeds or things against each other whatsoever without the express consent of the arbitrators.

12. Further, in para 8(xiv) of the Award, it was stated as under:

“We also make it clear that in the event any party has any reservation or misunderstanding or clarification regarding any of the matters relating to or arising out of this award, the same shall be referred to the arbitration for clarification, guidance or direction. It is further directed that all such clarification or direction shall be final and binding on the respective parties without any excuse, demur or delay whatsoever.”

13. The parties filed a joint application being C.A. No. 314 of 2007 before the CLB seeking disposal of Co. Pet. No. 101 of 2007 in terms of the Award dated 7th August 2007. On 9th August 2007 the CLB disposed of the said petition in terms of the said Award and directed that “the parties shall strictly abide by the terms of the Award.” The original arbitral Award was taken on record by the CLB.

14. The BS Group states that it paid Rs. 25,00,000 as part payment for the shares of TAPL on the signing of the arbitration agreement. The balance Rs. 25,00,000 was deposited with the arbitrators, which according to the BS Group was released to the Varma Group even before they performed their obligations in terms of the Award. The BS Group contend that their representatives were sent to the office of Respondent No.1 for obtaining his digital signature for the purpose of resignation from the Board of Directors ('BoD') of TAPL but he kept postponing the same on some pretext. It is alleged that in breach of their obligations, the Varma Group did not transfer any shares of HIPL or TAPL to the Petitioners despite receiving Rs. 50,00,000. They also failed to comply with various other directions in the Award. A meeting was held between the parties on 28th September 2007. It was reiterated that the arbitrators would release the amount of Rs. 380 lacs after Respondent No.1 fulfilled his commitments. This was not done even in November 2007. At a meeting held on 28th November 2007, Respondent No.1 is stated to have assured the BS Group that he would hand over all the documents and digital signature kit to Mr. V.G. Prabhu by 29th November 2007. However, this was not done. According to the BS Group, when even after the expiry of three months after the passing of the Award the Varma Group did not perform their obligations, the BS Group approached the arbitrators in January 2008. It is alleged that since Mr. Prabhu, nominee arbitrator of the Varma Group failed to perform his functions, no proceedings could take place.

15. The Varma Group filed an application, being CA No. 95 of 2008, before the CLB under Section 634 A of the Companies Act, *inter alia* praying for the

enforcement of the Award. The BS Group in their reply *inter alia* reiterated that they were willing to comply with all the obligations under the Award, subject to the Varma Group complying with their obligations. However, the BS Group raised objections to the maintainability of the said application under Section 634 A of the Companies Act. The BS Group also objected to HIPL and Respondent No.3 herein, to whom the payment of Rs. 380 lakhs had to be made, not being made parties to the proceedings.

16. On 26th June 2008, the CLB disposed of the said application by a detailed order. The objections of the BS Group were negated by holding that since the order dated 9th August 2007 was a consent order and the main petition had been disposed of in terms of the Award dated 7th August 2007 the jurisdiction of the CLB under Section 634 A of the Companies Act could be invoked by either party for enforcement of the order dated 9th August 2007 and thereby the Award dated 7th August 2007. The issue of non-implementation of one part of the Award regarding transfer of the shares of HIPL to the BS Group could be decided without making either HIPL or Respondent No.3 party to the proceedings. The CLB observed that the “main dispute appears to be in relation to removal of defects in the air-conditioners.” The BS Group contended that the Varma Group had failed to remove the defects in the unfinished goods before handing them over and their value was about Rs. 1.5 crores. It was held that for enforcement of the order dated 9th August 2007, “the issue relating to defective goods has to be decided.” The CLB referred to clause 8 (xiv) of the Award which permitted the parties to approach the AT in the event any clarification in regard to any of the matters relating to or arising out of the Award was required. Accordingly, the CLB directed “both the

parties to approach the arbitrators to seek whatever clarifications they need in regard to the terms of the Award.” After such clarification, which in terms of the Award was binding on the parties, they were at liberty to approach the CLB for enforcement in terms of Section 634 A of the Companies Act.

17. Aggrieved by the order dated 26th June 2008 of the CLB, the Varma Group filed Company Appeal No.11 of 2009 before the High Court of Bombay on the issue of the validity of the directions issued by the CLB to the parties to approach the AT for clarifications. The BS Group also filed an appeal against the order dated 26th June 2008 of the CLB to the extent that its objections had been negated. By an order dated 17th March 2010 the High Court of Bombay admitted Company Appeal No.11 of 2009 filed by the Varma Group and framed for consideration two questions, which will be referred to in some detail hereafter. The appeal filed by the BS Group was dismissed as being barred by limitation with liberty to file cross-objections in the appeal filed by the Respondents. There was no stay granted of the order dated 26th June 2008 of the CLB.

18. In the meanwhile the BS Group filed OMP No. 575 of 2008 in this Court under Sections 14 and 15 of the Act seeking the substitution of Mr. V.G. Prabhu the nominee Arbitrator of the Varma Group who, according to the BS Group, had expressed his inability to act as an arbitrator. The said OMP was disposed of by this Court an order dated 16th December 2010 by noting that during the pendency of the said OMP, Mr. V.G. Prabhu once again expressed his willingness to act as an arbitrator. The Court held that in view of Section 10 of the Act, it would not be appropriate to have further arbitral proceedings

conducted only by two arbitrators. Accordingly, a direction was issued to both the nominee arbitrators to appoint a presiding arbitrator within thirty days.

19. Thereafter, the Varma Group filed IA No. 3542 of 2011 for recall of the order dated 16th December 2010 passed in OMP No. 575 of 2008. IA No. 3542 of 2011 was disposed of by this Court on 1st September 2011 by recalling a portion of the order dated 16th December 2010 to the extent it required the two arbitrators to appoint a third arbitrator. This was on the basis of the law explained in *Narayan Prasad Lohia v. Nikunj Kumar Lohia (2002) 3 SCC 572*. The Court directed that AT consisting of Mr. V.G. Prabhu and Mr. K.S. Chadha “should now proceed to issue the requisite clarification.”

20. In February 2011, the BS Group filed Arb. Pet. No. 54 of 2011 under Section 11 of the Act since the two arbitrators failed to agree upon the third arbitrator. However, this petition was withdrawn subsequently by the Petitioners in light of the order passed by the Court on 1st September 2011.

21. In the meanwhile, the BS Group received legal notice dated 8th March 2011 issued by one Mr. Thomas E. Coughlin, Attorney at the instance of the Varma Group demanding that a sum of US Dollar (‘USD’) 9,75,000 together with interest in the sum of USD 3,80,250 be paid by them to the Varma Group in terms of the Award failing which the Varma Group would file a suit against the BS Group in the United States District Court for Eastern Michigan. In those circumstances, the BS Group filed OMP No. 394 of 2011 in this Court under Section 9 of the Act on 16th May 2011, *inter alia*, praying as under:

“For an order restraining the Respondents either by themselves or through any other person or entity from directly or indirectly initiating or continuing any proceedings in any court whether domestic or international, in relation to the subject matter of the agreement or award, save an except through arbitration under the agreement.”

22. While directing notice to issue in O.M.P. No. 394 of 2011 by order dated 20th May 2011 the Court restrained the Varma Group from instituting proceedings against the BS Group in any court including any American court and further directed the Varma Group to act in terms of the arbitration agreement and Award dated 7th August 2007. That interim order has continued since.

23. On 19th December 2011 the BS Group wrote to their nominee Arbitrator Mr. K. S. Chadha enclosing a copy of the order dated 1st September 2011 passed by this Court and stating that they would be “shortly filing an application for clarification/modification/amendment of the Award dated 9th August 2007 “as well as certain additional reliefs.” Apprehensive that the BS Group might expand the scope of the arbitration proceedings and overreach the High Court at Bombay before which the question of validity of the order of the CLB directing the parties to approach the AT was pending, the Varma Group filed I.A. No. 2565 of 2012 for clarification that the order dated 1st September 2011 was not a direction to the AT to issue any clarification an that the said observations were without prejudice to the rights and contentions of the parties in the appeal pending in the High Court at Bombay. The said

application was dismissed by this Court by an order dated 10th February 2012 stating that if the Varma Group was aggrieved by any order that may be passed by the AT, they could seek appropriate remedies in accordance with law.

24. On 9th April 2012 Mr. K.S.Chadha, the Arbitrator nominated by the BS Group addressed a letter to both parties informing that he and Mr. V.G.Prabhu, the other Arbitrator nominated by the Varma Group, were “unable to agree on the next steps in the arbitration.” The said letter was responded to by the Varma group by a letter dated 15th June 2012 claiming *inter alia* that the AT had, after the passing of the Award, become *functus officio* and that there were no arbitral proceedings pending between the two groups. Further, it was only after the decision of the High Court of Bombay in the pending appeal that the question if any of further arbitration proceedings would arise.

25. The above correspondence led the BS group to file Arbitration Petition No. 315 of 2012 in this Court under Section 11 (6) of the Act praying for the appointment of a third/presiding Arbitrator.

26. Both parties have placed on record voluminous material concerning the affairs of HIPL and the proceedings for its winding up in the Commercial High Court in Sri Lanka. It is not in dispute that by an order dated 5th April 2013 passed by the said the Commercial High Court HPIL has been ordered to be wound up. The voluminous pleadings and documents filed by both parties in the present petitions pertain to the allegations by one group against the

other as regards compliance with their respective obligations under the Award. For reasons set out hereafter the Court does not propose to examine any of the said allegations in these proceedings and therefore does not consider it necessary to set them out.

27. One of the objections raised by the Varma Group to this Court entertaining the petition of the BS Group under Section 11 (6) of the Act is that the order dated 26th June 2008 passed by the CLB is pending in an appeal before the Bombay High Court and the issues pending consideration in the said appeal are no different from those arising out of the contentions of the BS group in these proceedings. The answers to the said issues by the Bombay High Court would determine whether the arbitral proceedings can go on. Independent of the above submission, the Varma Group maintains that the AT has become *functus officio* and with neither party challenging the Award dated 7th August 2007, it had attained finality and there was no occasion for seeking any clarification. According to the Varma Group, there is no binding subsisting arbitration agreement between the parties. Reliance is placed on the decision in *Nathani Steel Ltd. v. Associated Constructions 1995 Supp (3) SCC 324* to argue that the remedy available to the BS group was to have the Award executed. There were no further arbitral disputes in terms of the Award dated 7th August 2007. Relying on the decision in *State of Goa v. Praveen Enterprises 2011 (3) Arb LR 209* it is contended by the Varma Group that the Agreement dated 7th August 2007 did not contemplate the reference of future disputes to arbitration.

28. The response of the BS Group to the above submission is that no stay has been granted of the order of the CLB or the resultant arbitration proceedings by the Bombay High Court. Secondly, it is alleged that the Varma group was not getting the said appeal heard. Thirdly, with the two nominated arbitrators being unable to agree on further hearing the matter, there was a requirement for appointing a third arbitrator. It is submitted that in view of clause 8(xiv) of the Award, there was no question of the AT being *functus officio*. Reliance is placed on the decision in ***Dolphin Drilling Limited v. Oil & Natural Gas Corporation Ltd. (2010) 3 SCC 267*** which held that the arbitration clause is not a one-time measure. Reference is made to the decision in ***Indian Oil Corporation Limited v. SPS Engineering Limited (2011) 3 SCC 507*** in which it was held that the plea of *res judicata* could be examined by the AT itself. It is submitted that the events subsequent to the passing of the Award have necessitated the BS Group seeking further clarification from the AT. The fact that the transactions envisaged in the Award as regards the shares of HIPL and even the formal transfer of shares of TAPL in favour of the BS Group have not been completed meant that the transactions thus far would have to be reversed as envisaged in the Award itself. Even this would require clarification from the AT. It is submitted that inasmuch as the Varma group has not challenged the Award which contains the reopener clause 8(xiv), they cannot object to having the future disputes between the parties referred to the AT for clarification. It is submitted that the terms 'relating to and arising out of' are of widest amplitude and would include all disputes and differences between the parties as was held in ***Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641***. Reliance is also placed in ***Anil Kumar v. B.S. Neelakanta (2010) 5 SCC 407***.

29. Having considered the above submissions, the Court is of the view that the prayer in Arbitration Petition No. 315 of 2012 filed by the BS Group under Section 11 (6) of the Act ought not to be entertained. The submissions of the parties require the Court to determine if in terms of clause 8 (xiv) of the Award, a further reference can be made to the AT for clarification/modification of the Award. It is seen that while the Varma Group approached the CLB for enforcement of the Award, the BS Group urged it to refer the further disputes that had arisen to the AT for determination. This is evident from the fact that the BS Group accepted the order dated 26th June 2008 of the CLB to the extent it directed the parties to approach the AT. The BS Group has challenged the CLB order only to the extent of not making HIPL and Respondent No.3 parties to the proceedings. It was the Varma Group which was dissatisfied with the order of the CLB to the extent that the parties were directed to approach the AT. The contention of the Varma Group in their appeal pending before the Bombay High Court is that the CLB ought to have proceeded with the enforcement of the Award in exercise of its powers under Section 634 A of the Companies Act.

30. The two questions framed by the High Court at Bombay in Company Appeal No. 11 of 2009 filed by the Varma Group against the order dated 26th June 2008 of the CLB read as under:

“(a) Whether the Company Law Board was right in its conclusion that the Award can be enforced by means of an application made to it. Assuming the Application was maintainable, then instead of giving effect to the Award as it is, whether it erred in directing the parties to seek clarifications from the Arbitrators who rendered the Arbitral Award.

(b) The second question of law would be as to whether the Company Law Board could have given any such direction and more particularly, as issued in para 11 once the arbitral proceedings had concluded and in any event whether that jurisdiction can be exercised only by a Court, competent to do so, under the Arbitration and Conciliation Act, 1996.”

31. There can be no manner of doubt that the High Court at Bombay, in answering the above questions in the pending appeal will be required to consider the very contentions of the parties that have been urged before this Court. In particular the scope of clause 8(xiv) of the Award and whether it can be invoked to refer the further issues that have arisen between the parties to the AT will have to be examined. The incidental question whether the two arbitrators have been rendered *functus officio*, and if not, whether they should appoint a third arbitrator in light of the order passed by this Court on 1st September 2011, will also have to be considered by the said Court.

32. The submission that because there is no stay of the CLB’s order dated 26th June 2008 this Court can and should appoint a third member of the AT notwithstanding the pendency of the appeal in the Bombay High Court does not impress this Court. The questions raised before this Court are already seized of by the Bombay High Court and it is but proper that its views should be awaited. If the Bombay High Court agrees with the Varma Group then the question of further proceedings before the AT may not arise. If it disagrees, then in light of the developments subsequent to the Award, and subsequent to the order of the CLB under challenge before it, that High Court will issue appropriate directions as to the scope of further arbitral proceedings. Any attempt by this Court to express any view on the said issue would amount to

overreaching the pending appeal in the Bombay High Court. It might lead to overlap of orders which could cause avoidable confusion.

33. With both parties having chosen a certain course of action, by filing their appeal and cross objections respectively before the Bombay High Court, they should await the decision therein. Significantly, the BS Group has accepted the order passed by the Bombay High Court dismissing its appeal and permitting it to file cross objection in the Varma Group's appeal. It ought not to multiply proceedings on the same subject matter in different courts. The orders passed thus far by this Court can well be harmonised with the orders that may be passed by the High Court at Bombay.

34. For the above reasons, this Court does not consider it appropriate to entertain the present application of the BS Group under Section 11 of the Act for appointment of a third arbitrator of the AT. Arbitration Petition No. 315 of 2012 is dismissed. It is, however, clarified that this court has not expressed any view on the contentions of either party in relation to the questions pending consideration before the Bombay High Court or on any issue incidental thereto or on merits.

35. As regards the prayer in OMP No. 394 of 2011, it is but appropriate that the Varma Group should also not initiate proceedings against the BS Group in other courts till such time the High Court at Bombay does not decide the appeal pending before it. Accordingly, OMP No. 394 of 2011 is disposed of by restraining the Varma Group from instituting any proceedings against the BS Group in any Court, including any American Court, except to the extent of

pursuing their appeal pending in the Bombay High Court and any proceedings consequent upon or incidental thereto and till such time such proceedings or any proceedings consequent upon or incidental thereto do not conclude.

S. MURALIDHAR, J.

May 3, 2013

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