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

\+ CO.APP. 35/2014 & CM No. 11894/2014

VIJAY TANKS & VESSELS LTD. ..... Appellant

Through: Mr.S.Santanam Swaminadhan, Advocate alongwith Ms. Nishtha Khurana and Ms. Mishika Singh, Advocates.

versus

NAFTOGAZ LTD. & ORS. ..... Respondents

Through: Mr. Siddharth Khattar, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

O R D E R

% **25.02.2016**

The present appeal is directed against an order of the learned Single Judge whereby an application under Section 446 of the Company's Act to continue with arbitration proceedings against the respondent (Naftogaz India Pvt. Ltd.), a Company in liquidation was declined.

It is urged that the appellant was a sub-contractor for a work awarded by Bharat Oman Refineries Ltd. (hereinafter referred to as " BORL). The work pertained to erection of tanks; the company in liquidation was a principal contractor and the appellant was an approved sub-contractor. It is contended that the agreement between the appellant and the company in liquidation contained an arbitration Clause. Since winding up proceedings were initiated under a citation order, the appellant was compelled to approach the Court under Section 446 of the Company's Act.

Mr. S. Santanam, learned counsel for the appellant relies upon the order of the learned Single Judge dated 06.02.2014 in CO. Pet. 128/2011 in C.A. 2279/2013 where leave was granted to the appellant to institute a suit and claim the amount due from BORL as well as the company in liquidation.

The Court had then pertinently observed as follows:-

> *"In view of the fact that the claims made by the applicant are not only against the respondent company but also against a third party, it is not appropriate that the said proceedings be stayed. It is also pointed out that the claims made by the applicant are being stoutly contested.*
>
> *It is therefore, expedient that the claims be finally adjudicated. In view of the above, the present application is allowed.*
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> *It is however, clarified that all objections to the said suit are available to the company in liquidation (through Official Liquidator) including the contention that the said suit is not maintainable on account of an arbitration agreement."*

Mr. Siddharth Khattar, learned counsel appears on behalf of the erstwhile Management. The Official Liquidator though served, but is not represented today. However, the Official Liquidator had entered appearance and had also represented in these proceedings on earlier occasions.

Although the material on record shows that the appellant was a sub-contractor of the company in liquidation and the arrangement was more or less apparently on principal to principal basis, nevertheless significantly, the owner i.e. the BORL issued two *"letters of Comfort"* which are part of the record. In terms of these letters dated 27.08.2009 and 07.09.2009, BORL agreed to pay approximately Rs. 19 crores to the appellant.

It is submitted that this would really be the basis for the claim to be made against BORL and that the suit or the proceedings initiated would only implead the company in liquidation i.e. the respondent in this case as the proper party and that no claim against the said respondent would be pursued.

In view of the statements made, appellant is permitted to institute appropriate legal proceedings-including a suit by which it can urge its claims against BORL. Since the respondent company would be a proper party, it would have to be impleaded in those proceedings and to that extent leave is granted. At the same time, this Court is of the opinion that the suit should subsequently contain an averment that the leave of this Court has been granted for that purpose and that no relief would be claimed against the respondent company.

Leave to this extent is granted under Section 446 of the Company's Act.

The appeal is allowed in the above terms.

Dasti.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

FEBRUARY 25, 2016
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