

THE HIGH COURT FOR THE STATE OF TELANGANA:: AT HYDERABAD

ARBITRATION APPLICATION No.106 of 2018

Between:

Tecpro Systems Limited,
A company incorporated under the Companies Act, 1956
having its Registered Office at Tecpro Towers, 11-A-17,
5th Cross Road, WSIPCO IT Park, Siruseri-603103,
Chennai.

Through its authorized representative
Mr.D.Venkatasubramaniam

Duly authorized by the Resolution Professional
Mr.Venkatesan Sankaranayanan, appointed by the
National Company Law Tribunal (NCLT) Vide order
dt.07-08-2017 in CP.C.A.No.(1B) 197 (PB)/2017.

..... Applicant.

And

Telangana State Power Generation Company Limited, A
Company incorporated under the Companies Act, 2013,
having its Registered Office at TSGENCO, 3rd Floor, A-
Block, Vidyut Soudha, Khairatabad, Hyderabad –
500082.
Represented by its Chief Engineer (Generation) Thermal
Projects Construction-II.

..... Respondent.

Date of Judgment pronounced on : 25-09-2019

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO**ARBITRATION APPLICATION No.106 of 2018**

25-09-2019

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Versus

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..... Respondent.

< **GIST:**> **HEAD NOTE:**

!Counsel for the Applicant : Sri Mohammed Omer Farooq, learned counsel for
Sri Avinash Desai, counsel for applicant.
^Counsel for respondent : Sri Y. Rama Rao

? Cases referred

1. 2009 SCC OnLine Del 2964
2. (2013) 1 SCC 641
3. (2015) 15 S.C.C. 622
4. MANU/DE/3689/2017
5. (2018) 15 S.C.C. 678
6. MANU/SC/1057/2019 = 2019 (10) SCALE 619

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO**ARBITRATION APPLICATION No.106 of 2018****ORDER :**

This application is filed by the applicant, M/s Tecpro Systems Limited, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**for short ‘the Act’**) to appoint an Arbitrator for the respondent as per clause-22.2 of the General Conditions of Contract signed by the parties contained in the Invitation to Bid and General Conditions of Contract issued by the Telangana State Power Generation Corporation (the respondent) (vide tender notice No.Apgenco/PCT/K&R/03/2009 and tender specification No.TCT-B-02/2009 for the Kakatiya Thermal Power Project Stage-II, Unit-II).

2. Two agreements fall for consideration in this case :

(i) The agreement dt.17.8.2010 among the members of the Consortium consisting of (a) the applicant M/s Tecpro Systems Limited, (b) M/s Gammon India Limited and (c) M/s VA Tech Wabag Ltd ; and

(ii) Letter of Intent dt.30.10.2010 issued by the respondent Telangana State Power Generation Corporation to the applicant, M/s Tecpro Systems Limited (as leader of the above Consortium) together with the Bid Document and General Conditions of Contract, on behalf of the Consortium.

The Bid document

3. The respondent issued Tender Notice No.APGENCO/PCT/K&R/3/2009 comprising of the Bid document and the General Conditions of Contract.

4. The Scope of the work as per the bid document included design, engineering, manufacture, procurement, supply, delivery, transportation to the site, transit and site storage insurance, storage, construction, erection, testing, commissioning and handing over of the specified works for the balance plant including civil works, training of operation and maintenance personnel of a Complete Coal Steam Power Plant, the Kakatiya Thermal Power Project Stage-II, Unit #2 at Chelpur Village, Ghanpur Mandal, Warangal in the erstwhile State of Andhra Pradesh. The terms of this document and the General Conditions of Contract will be discussed more in detail later.

5. The last date for submission of sealed tenders for short-listing of pre-qualified bidders was 20-08-2009.

The Letter of intent dt.30-10-2010

6. As leader of the Consortium, the applicant submitted its bid on behalf of the consortium, for the project and this was accepted by the respondent by its Letter of Intent dt.30-10-2010.

7. The value of the project mentioned therein was Rs.723.00 crores and the completion period was 30 months from the date of Letter of Intent and it was stated that the applicant will work in close

coordination with the EPC main contractor i.e. M/s.Bharat Heavy Electricals Limited.

The Purchase Orders dt.25-11-2010

8. Thereafter the respondent issued three Purchase Orders to the applicant, representing the consortium, for supply, erection and civil works on 25-11-2010 pursuant to the Letter of Intent, and in the said Purchase Orders, the schedule of prices, payment terms and other terms were agreed between the parties.

The Consortium Agreement dt.17-8-2010

9. Before the Bid was submitted by the applicant, the three entities, namely, (1) the Applicant, (2) M/s.Gammon India Limited and (3) M/s.VA Tech Wabag Limited, had entered into a Consortium agreement on 17-08-2010 for this project.

10. Admittedly, the Consortium Agreement contemplated in Appendix I, *different* scope of work for each of the Consortium partners.

- (a) *For M/s. Gammon India Ltd.... Cooling Tower and Chimney;*
- (b) *For M/s.VA Tech Wabag Ltd.... Water Systems for the BOP*
- (c) *For the applicant ... Coal Handling System, Ash Handling System, Auxiliary Systems and balance portion of work.*

11. The salient terms of the Consortium agreement were that :

- (a) the bid will be made by the Consortium (clause-2);

- (b) the applicant shall be the leader of the Consortium. The division of work between the parties, proposed management structure and the contribution of each member to the Consortium operation was set out in Appendix-I to the said agreement (clause-2(a));
- (c) the bid will be based on the premise that in the event the bid is accepted by the respondent, the respondent shall award the contract to the Consortium and the Consortium shall accept the award unconditionally (clause-2(b));
- (d) the parties to the Consortium shall fully cooperate with each other to fulfill their respective obligations with respect to the said project during the term of the agreement (clause-3);
- (e) the Consortium shall “not be considered” by the parties to constitute an entity having independent legal personality; and the parties to it, except as provided therein, shall act as *independent contractors* and their activities shall be coordinated by the leader of the Consortium (clause-4);
- (f) nothing in the agreement would entitle any of the parties to it to pledge the credit of or incur any liabilities or obligations binding upon the other party, except in so far as may have been expressly agreed to by all the parties in writing thereunder (clause-4);
- (g) the applicant shall, as lead bidder, sign the bid *on behalf of the Consortium, but all the members of the Consortium shall be jointly and severally responsible to the respondent* (clause-6);

(h) that the leader of the Consortium was authorized to receive instructions, incur liabilities and principally *deal for and on behalf of any and all the parties* and coordinate the entire execution of the contract; and such instruction received, liability incurred and dealings made shall be construed on behalf of all the other partners/members (clause-8(c)); and

(i) that the leader shall “*correspond*” directly with the respondent with regard to all matters “*in connection with the execution*” of the project (clause-8(d)).

The substitution of the applicant by M/s.VA Tech Wabag Limited as leader of Consortium in 2014

12. The applicant entered into an agreement with one of the three members of the Consortium, namely, M/s.VA Tech Wabag Limited on 1-06-2014, wherein it was agreed that the latter would complete the balance work and the applicant was required to issue a Work Order to the latter; and that the latter would ‘replace’ the Applicant as the leader of the Consortium. The applicant states that it continued to raise invoices on the respondent, as permitted in that agreement dt.1.6.2014.

13. The respondent accepted vide its letter dt.31-05-2014, the proposal to change the Consortium leader from the applicant to M/s.VA Tech Wabag Limited.

The disputes that arose in 2017

14. The project was partly executed by the Consortium subsequent to the Letter of Intent dt.30-10-2010 and as stated above, during that

period, the applicant, one of the Consortium members, was substituted on 1.6.2014 by M/s VA Tech Wabag as leader of the Consortium. At that stage, disputes arose between the applicant and the respondent in 2017.

15. The applicant alleged in the present application that as per the General Conditions of Contract, the respondent was required to fulfill its contractual obligations immediately on the release of Letter of Intent; the delay in execution of the project was solely attributable to the respondent and the same has caused huge losses to the applicant; that the respondent had delayed:

(a) the release of basic engineering details which were required to be released within 21 days from the award of the contract,

(b) the release of mobilization advance to the applicant,

and as a result of the delay, the applicant had to incur costs towards market interest as the funds had to be procured from elsewhere.

It was further contended that the respondent delayed granting approvals for the vendors, suppliers and sub-contractors of the applicant, and that the running account bills for the work done were also not cleared by the respondent within the time specified in the contract.

16. On 27-12-2017, the applicant submitted a letter to the Chief Engineer (Generation), Thermal Projects Construction-II of the respondent lodging its claim of Rs.573.78 crores with the respondent as per the terms of the contract and requested the respondent to release the

amounts that have become due and payable to it. No reply was received by the applicant for the same.

The invocation of the arbitration clause in the GCC by the applicant on 2.5.2018

17. On 02-05-2018, the applicant invoked clause 22.2 of the General Conditions of Contract invoking arbitration and appointed a former Judge of the Supreme Court as its arbitrator and called upon the respondent to appoint its arbitrator in terms of the said clause.

Reply dt.26.5.2018 of the respondent to the above notice

18. The respondent replied to the above notice dt.2.5.2018 of the applicant contending that:

(a) the applicant had been declared as an insolvent by the National Company Law Tribunal (for short 'the NCLT'), that the Purchase Order had also been amended on 1.5.2018 because of the said event, and that an Interim Resolution Professional was appointed under the Insolvency and Bankruptcy Code,2016 (for short 'the IBC');

(b) the Consortium agreement therefore ceased to operate;

(c) as per Clause 8(d) of the Consortium agreement dt.17.8.2010, only a leader of the Consortium can 'correspond' with the respondent, and that since 3.4.2014, M/s VA Tech Wabag had been substituted as leader of the Consortium in the place of the applicant, and any correspondence regarding the appointment of the arbitrator by the applicant is not tenable;

(d) that the applicant has no enforceable right under the agreement to invoke the provisions of the Arbitration and Conciliation Act,1996 much less can it appoint an Arbitrator of it's choice;

(e) that the inaction of the applicant in implementing the project as per the contract has put the respondent to huge loss, and nothing more is required to prove the applicant's inefficiency, since it had handed over the leadership to M/s VA Tech Wabag Limited; and

(f) that any proceedings initiated pursuant to the notice dt.2.5.2018 of the applicant are not binding on the respondent.

Counter of the Respondent in this Application

19. Respondent filed a Counter raising the following contentions:

- (a) that the order of the NCLT under the IBC is a bar to invoke the arbitration clause contained in the General Conditions of Contract;
- (b) the claims of the applicant are barred by limitation;
- (c) that the applicant, as a mere member of the Consortium (and not as a leader of the Consortium) cannot invoke the arbitration clause.

The arbitration clause

20. The relevant portion of the clause dealing with Resolution of disputes in the General Conditions of Contract states as under:

“22.2.3. All disputes or differences in respect of which the decision, if any, of the Purchaser's representative has not become final or binding as aforesaid, shall be referred for arbitration in

accordance with The Indian Arbitration and Conciliation Act, 1996, or any statutory modification or enactment thereof for the time being in force.

22.2.5 The Arbitrator Panel shall consist of three (3) arbitrators, one to be appointed by the Purchaser and Contractor respective and a third one to be appointed by the two arbitrators so appointed by the Purchaser and the Contractor and the third arbitrator shall be appointed in accordance with the provisions of the Indian Arbitration and Conciliation act, 1996. It is to be noted that when one party appoints as Arbitrator, the other party should appoint their Arbitrator within thirty (30) days. The arbitration shall be held in Hyderabad and the Courts in Hyderabad shall have jurisdiction on any matter connected with any Arbitration under this clause 22.2.

... ..

22.2.6 Arbitration shall be sole and exclusive remedy between the parties regarding the dispute referred to Arbitration and any claims, counterclaims issues or accountings presented or plead to the arbitrators in connection with such dispute.”

The proceedings against the applicant under the IBC before the NCLT

21. It is also to be noted that the a financial creditor of the applicant by name M/s Edelweiss Assets Reconstruction Company filed before the NCLT (Principal Bench) at New Delhi an application under Section 7 of the IBC in 2017 vide C.A.No.(IB) 197(PB)/2017 for initiating Corporation Insolvency Resolution Process against the applicant alleging defaults of more than Rs.2000.00 crores of its financial liabilities by the applicant as on 23-06-2017; and on 07-08-2017, the NCLT (Principal Bench) at New Delhi admitted the application of the Financial Creditor against the applicant, appointed an Interim Resolution Professional (for short ‘IRP’) and directed under Section 13(2) of the Code, public announcement to be made by the IRP with

regard to admission of the said application. It also declared moratorium in terms of Section 14 of the Code.

The filing of Sec.11(6) application by applicant through it's representative

22. It is also important to note that this Arbitration Application u/sec.11(6) of the Act was filed on 03-10-2018 by the applicant through its authorized representative D.Venkatasubramaniam, authorized on behalf of the IRP appointed under the above order of the NCLT to file on his behalf. To this application is enclosed letter dt.02-05-2018 of the IRP *ratifying and approving* specifically the letter dt.02-05-2018 issued on behalf of the applicant invoking the arbitration clause in the dispute against the respondent vide Ex.A-1. The said authorization is as under:

“This is to certify that ‘Mr.D.Venkatasubramaniam, S/o.Dhandapany, Chief Restructuring Officer (CRO), to Tecpro Systems Limited aged 49 years to hereby authorized on behalf of Resolution Professional to sign all the documents in arbitration proceedings including invoking of arbitration as per the arbitration clause of GCC and appointment of arbitrator and to appear, verify, declare, affirm, make present, submit and file all necessary notices, complaints, petitions, written statements, affidavits, undertakings, vakalatnamas, Appeals, Revisions, statements, and documents etc., pertaining To Telangana State Power Generation Corporation Limited in the matter of Kakatiya Thermal Power Project (KTPP).

It is also certified that the above officer is handling the case since the initial state of CIRP process and hence the communication done to initiate Arbitration Proceedings by way of letter dated 02.05.2018 is also ratified and approved.”

23. Learned counsel for the respondent has also placed before this Court order dt.15-05-2019 in C.A. No.503 (PB) / 2019 in C.P.No.(IB)-

197(PB)/2017 passed on an application filed by IRP under Section 30(6) of the Code r/w Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 seeking approval of the resolution plan which had been approved by the Committee of Creditors.

The points for consideration

24. The following points arise for consideration in this case:

(a) Whether the proceedings of the NCLT taken against the applicant operate as a bar for invoking the arbitration clause and for maintaining this Arbitration Application?

(b) Whether the claims of the applicant against the respondent are barred by limitation?

(c) Whether the applicant as a member of the Consortium (and not as a leader of the Consortium) can invoke the arbitration clause?

Point (a) :

25. Under this point, the question to be considered is ‘whether the proceedings of the NCLT taken against the applicant operate as a bar for invoking the arbitration clause and for maintaining this Arbitration Application ?’

26. It is the contention of the respondent that the IRP, without taking consent of Committee of Creditors, had given authorization for filing of this Application by the applicant and therefore this application is not maintainable.

27. Applicant however contended that such consent of Committee of Creditors is not required for the purpose of filing a suit or filing an

application in a Court of law. Reliance is placed on Section 28 of the IBC and it is contended that though consent of Committee of Creditors for initiating certain actions as mentioned in the said provision is required, the said provision does not require obtaining of such consent for filing of an Arbitration Application.

28. Section 28 of the Code states:

“28. (1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:—

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as maybe decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of seventy five per cent. of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code.”

29. A reading of the above provision does not indicate that consent of the Committee of Creditors is required by the IRP to give authorization to another person for filing of an Arbitration Application under Section 11 of the Act. Clause 28(10(h) of the IBC does not apply as the Resolution Professional has not delegated his duties of ‘resolution’ to the applicant. No other provision of the Code is brought to the notice of

this Court by the respondent in support of its submission that such consent of Creditors is required for filing of an Arbitration Application under Section 11 of the Act.

30. In the absence of any such requirement prescribed by the Code, it is not open to the respondent to oppose this Application on the ground that the authorization given by the IRP to the representative of the applicant to file this application is not valid, and that this application should be dismissed on the said ground.

31. Moreover, the order of the National Company Law Tribunal, Principal Bench, New Delhi passed on 07-08-2017 only prohibits initiation of suits or continuation of pending suits or proceedings *against* the Corporate Debtor (the applicant) including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration Panel or other Authority (Clause 15(a) of the said order). It does not prohibit initiation of proceedings *by the Corporate Debtor (applicant)* against third parties like the respondent for amounts due to it from the respondent.

32. Any recoveries of amounts from respondent would benefit all the creditors of the applicant in the proceedings under the Code and no reasonable creditor would oppose steps initiated for recovery of amounts if due to the applicant, through the process of arbitration.

33. The order dt.15-05-2009 of the NCLT in C.A.No. No.503 (PB) / 2019 in C.P.No.(IB)-197(PB)/2017 passed on an application filed by IRP under Section 30(6) of the Code r/w Regulation 39(4) of the

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016, approving the resolution plan submitted by one of the creditors of the applicant by name M/s.Kridhan Infrastructures Private Limited, makes it binding on the creditors of the applicant as well.

34. Therefore this point is answered in favor of the applicant and against the respondent and I hold that the proceedings of the NCLT do not bar the applicant from invoking the arbitration clause.

Point (b) :

35. Under this point the question to be considered is ‘whether the claims of the applicant are barred by limitation?’

36. In my opinion, the question of limitation raised by the respondent cannot be gone into by this Court in the application filed under Section 11 of the Act in view of the amendment to the Act by Arbitration and Conciliation (Amendment) Act, 2015. The said amendment introduced Section 11(6A) now prohibits the High Court from going into any other aspect other than examination of the existence of the arbitration agreement.

37. Since in the instant case, there is in existence an arbitration clause, which was invoked in May 2018 after the said amendment came into effect, I am precluded from going into the issue of limitation and I leave it open to be agitated by the respondent in the arbitration.

38. Point (b) is answered accordingly against the respondent and in favor of the applicant.

Point (c)

39. Under this point, the question is whether the applicant *as a member of the Consortium (and not as a leader of the Consortium) can invoke the arbitration clause.*

40. It is the contention of the respondent that the applicant has no locus to invoke the arbitration clause in the General Conditions of Contract.

41. According to the respondent though the applicant was the leader of the Consortium which had bid for the contract initially, subsequently, the applicant was replaced as the leader of the Consortium in May, 2014 as per agreement dt.01-06-2014 between the applicant and M/s.VA Tech Wabag Limited, one of its Consortium partners; this had been accepted by the respondent in its letter dt.31-05-2014 also and a Supplementary Amendment Consortium Agreement dt.17-05-2014 was executed among the Consortium partners; that Purchase Orders replaced the name of the applicant with that of M/s.VA Tech Wabag Limited as the leader of the Consortium; and as per clause 8(d) of the Consortium Agreement, only the leader of the Consortium should 'correspond' directly with the respondent with regard to all matters in connection 'with the execution' of the project. It is contended by the respondent that M/s.VA Tech Wabag Limited, which is the leader of the

Consortium, has not raised any dispute in respect of the project, and so, this Arbitration Application is misconceived.

42. It is also contended that there is no arbitration agreement between the applicant and the respondent and therefore no relief be granted to the applicant. Reliance is placed on the decision of the Delhi High Court in **M/s.Jai Prakash Advocates Ltd., Vs. M/s.National Hydroelectric Power Corporation Ltd¹ (2009).**

43. In response thereto, the applicant contends that the Consortium agreement is only an internal arrangement amongst the Consortium partners and the respondent is not a party to it; it is for the Consortium partners to enforce or waive the application of Clause 8(d); and the respondent cannot seek to enforce any clause in the Consortium agreement. Clause 8(d) only requires the leader to correspond with regard to the day-to-day execution of the project.

44. It is further contended that in the letter dt.31-05-2014 addressed by the respondent accepting the amendment to the Purchase Order substituting in the place of the applicant, namely M/s.VA Tech Wabag Limited, the active role of the applicant in several aspects continued to be envisaged. Following portion of the said letter is quoted and relied upon:

“(1) M/s.Tecpro Systems Ltd., Chennai shall continue to raise the invoices for the Project on M/s.APGENCO and all Consortium Partners will submit their bills to M/s.Tecpro Systems Ltd., Chennai as is being done now. Sri S.Venugopalan of M/s Tecpro Systems Ltd,

¹ 2009 SCC OnLine Del 2964 which was rendered before the judgement of the Supreme Court in Chloro Controls India pvt Ltd v. Severn Trent Water Purification Inc. and others (2012)

Chennai shall verify and sign all the invoices and the same shall also be signed by Sri K.Sridhar of M/s.VA Tech Wabag Ltd., who is authorized to sign all the documents, invoices, receive payments, execute receipts and do necessary acts, as maybe required for smooth execution of the Project.

(2) All the payments towards the invoices raised by M/s.Tecpro Systems Ltd., Chennai shall be made directly to each Consortium Partner as per the Billing Break Up.

(3) M/s.VA Tech Wabag Ltd., Chennai, the lead Consortium Partner may have to support the Consortium Partners in the form of LC/Cash. M/s.VA Tech Wabag Ltd., will submit a proposal to APGENCO, duly agreed by the respective Consortium Partner for recovery of such advances from the respective Consortium Partner for recovery of such advances from the subsequent due payments of the respective Consortium Partner.”

45. From the facts narrated above, it is clear that though initially the Letter of Award dt.30.10.2010 was issued to the applicant as leader of the Consortium on behalf of the members of the Consortium, namely M/s Gammon India ltd and M/s VA Tech Wabag Ltd, and 3 Purchase Orders were also issued to it on 25.11.2010, there was a change of the leader of the Consortium in 2014 and the applicant was replaced by M/s.VA Tech Wabag Ltd as leader of the Consortium.

46. Then the questions arise (i) whether the applicant, would be a third party to the arbitration agreement and (ii) whether it can still invoke the above arbitration clause in the General Conditions of Contract?

The Chloro Controls (2012) Case and General Principles:

47. Here it is necessary to consider the decision of the Supreme Court in **Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and others**², relied upon by the learned counsel for the Applicant.

48. In **Chloro Controls'** (2 supra), multiple agreements were signed between different parties and some agreements contained an arbitration clause and others did not; and further the parties were not identically common in proceedings before the Court (in the suit) and the arbitration agreement. The Court held that a reference of disputes as a whole or in part can be made to the arbitral tribunal under Section 45 of the Act where the parties to an action are claiming under or through a party to the arbitration agreement. It applied the "Group of Companies" doctrine. The said case related to international arbitration under Part II of the Act. It was referred therein to the general principles under which third parties to arbitration agreements can in certain circumstances invoke the arbitration clause or be sued in arbitration proceedings.

49. I shall now refer to these general principles mentioned in **Chloro Controls** (2 supra) which were applied under part II of the Act dealing with international arbitrations, to enable third parties to the arbitration clause to invoke the arbitration clause or be sued in arbitration proceedings.

² (2013) 1 SCC 641

50. In para 71 (pg.682 of SCC) of the decision in **Chloro Controls** (2 supra), the Supreme Court referred to the doctrine of “Group of Companies” in the following passage:

“71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the “group of companies doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)”

51. Further in para 103.1 and 103.2 of the **Chloro Controls** (2 supra), the Supreme Court enumerated the various other principles which can be applied under Part II to enable third parties to the arbitration clause to invoke the arbitration clause or be sued in arbitration proceedings:

*“103.1. The first theory is that of implied consent, **third-party beneficiaries**, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.*

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called “the alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of the applicable law.”

In Chloro Controls, the Supreme Court refers to composite and multiple agreements

52. The Supreme Court held that, where various agreements constitute a composite transaction, then Court can refer disputes to arbitration existing between signatory or non-signatory parties if (a) all ancillary agreements between them are relatable to principal agreement, and (b) performance of one agreement is so intrinsically interlinked with other agreements that they are incapable of being beneficially performed without performance of others or severed from the rest.

53. In para 76 (at pg.684 of SCC) the Supreme Court held:

“76. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of “composite performance” would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

54. The following illustrations were given by the Supreme Court in para 70 (of SCC at pg.682) quoting *Law and Practice of Commercial Arbitration in England (2nd edition)* by Sir Michael J. Mustill:

“(1).The claimant was in reality always a party to the contract, although not named in it.

(2). *The claimant has succeeded by operation of law to the rights of the named party.*

(3). *The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.*

(4). *The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence.”*

55. Summarizing the said paragraphs, the following general principles have been referred to in **Chloro Controls** (2 Supra) and were applied to International arbitrations under Part II of the Act to enable third parties to the arbitration clause to invoke arbitration or be sued in arbitration proceedings, namely :

- (i) Member of a Group of Companies
- (ii) implied consent
- (iii) third party beneficiaries
- (iv) guarantors,
- (v) assignment and other transfer mechanisms of contractual rights
- (vi) agent-principal relations
- (vii) apparent authority
- (viii) piercing of veil (also called “the alter ego”),
- (ix) joint venture relations,
- (x) succession and
- (xi) estoppel.
- (xii) Composite and multiple agreements and transactions

56. But the instant case is one of domestic arbitration under Part I of the Act.

Recent Developments in law applying the general principles of law in Chloro Controls to Part I of the Act

57. The question is whether the said general principles applicable to Part II of the Act are attracted also to Part I of the Act in order to enable

third parties to invoke the arbitration clause or be sued in arbitration proceedings?

58. In **Ameet Lal Chand Shah vs. Rishabh Enterprises**³, the Supreme Court invoked the 'Group of Companies' doctrine in a domestic arbitration under Part I of the Act.

59. In **Ameet Lal Chand Shah (3 Supra)**, the respondent Rishabh Enterprises had entered into four agreements i.e. (i) Equipment and material supply Contract, and (ii) Engineering, Installation and Commissioning Contract (1-2-2012) with Juwi India; (iii) Sale and Purchase Agreement (5-3-2012) with Astonfield; and (iv) Equipment Lease Agreement (14-3-2012) with Dante Energy. Dispute arose between the parties when the respondent alleged that Appellant no.3 Dante Energy had defaulted in payment of rent and that Astonfield committed fraud by inducing Rishabh Enterprises to purchase the Photovoltaic products by investing huge amount. The Respondents preferred a civil suit against all the appellants leveling various allegations including fraud and misrepresentation and in the said suit, appellant-defendants preferred an application under S.8, seeking reference of the dispute to arbitration pertaining to all the four agreements. An arbitration clause existed only in the agreements (i), (ii) with Juwi India and (iv) mentioned above with Dante Energy, but the agreement (iii) between Rishabh Enterprises and Astonfield Renewables did not contain the arbitration clause.

³ (2018) 15 S.C.C. 678

The question posed expressly was (see pg.680 of SCC) whether all the four agreements were interconnected to refer the parties to arbitration *though there was no arbitration clause in the Sale and Purchase agreement between Rishabh Enterprises and Astonfield ?* i.e whether the arbitration agreement between Rishabh Enterprises and Dante Energy could be extended to the agreement between Rishabh Enterprises and Astonfield Renewables even though the separate Sale Purchase agreement signed by Aston Renewables with the former did not contain any arbitration clause.

The Supreme Court held that all the four agreements were for the single purpose of commission 2 MWp Photovoltaic Solar Plant at Dongri, to be purchased by Rishabh Enterprises and for leasing the equipments to Dante Energy; further, averments in the plaint also prima facie indicated that all the four agreements were inter-connected; also, clauses in the Equipment and Material Supply Contract, Engineering, Installation and Commissioning Contract indicated that the agreement was entered into for the purpose of commissioning Photovoltaic Solar Plant; equally, the Sale and Purchase Agreement (5-3-2012) between M/s Astonfield and Rishabh Enterprises was also for onward leasing of goods to Dante Energy; that the Equipment Lease Agreement for commissioning of the Solar Plant was the principal/main agreement and two agreements of Rishabh Enterprises with Juwi India and Rishabh Enterprises's Sale and Purchase Agreement with Astonfield were ancillary agreements; and all parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease

Agreement. Thus, parties can be referred to arbitration and the single Judge as well as Division Bench of the High Court of Delhi erred in dismissing the application filed under Sec.8 of the Act in the civil suit by the appellants. The Supreme Court relied on the decision in **Chloro Controls'** (2 supra) and applied the principle that if *the transaction is of a composite nature* where performance of the mother-agreement may not be feasible without aid, execution and performance of the supplementary or ancilliary agreements, for achieving the common object and collectively having bearing on the dispute, and if the Court is of the opinion that a composite reference of such parties would serve the ends of justice, even non-signatory parties can be subjected to arbitration without their prior consent.

Ameet Lal Chand Shah applies arbitration agreement to agreement in a Group of Agreements and goes beyond the 'parent-subsidiary' relationship.

I may point out that in the above case, though Astonfield was not in any Group of Companies and though it was a non-signatory to the agreement between Rishabh Enterprises and Dante Energy, all the agreements were held to be interconnected and therefore it was held that it is a fit case to refer all of them including Astonfield to arbitration.

60. **Ameet Lal Chand Shah** (3 Supra) therefore shows that for the application of the doctrine of Group of Companies, it is not necessary that it should be only among a parent Company and Subsidiaries, but the said principle can be applied even if one of the parties is not in the

Group as such but is outside the Group but is involved and connected in the execution of the same project.

61. Recently in **Mahanagar Telephone Nigam Ltd. vs. Canara Bank and others**⁴, the doctrine of “Group of Companies” was invoked and applied by the Supreme Court in a case of domestic arbitration under Part I of the Act. The Supreme Court reiterated in this decision that a non-signatory can be bound by an arbitration agreement on the basis of the ‘Group of Companies’ doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. It held that courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract. It explained that the said doctrine was invoked where an arbitration agreement is entered into by one of the companies in the group, and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group.

The Court explained that the ‘Group of Companies’ Doctrine could also be invoked to bind the non-signatory affiliate of a parent company, or include a third party to an arbitration if there is a direct relationship with the party which is a signatory to the arbitration

⁴ MANU/SC/1057/2019 = 2019 (10) SCALE 619

agreement, direct commonality of the subject matter, and the composite nature of the transaction between the parties.

Mahanagar refers to ‘Composite transaction’, ‘single economic unit’ or ‘single economic reality’

It explained a ‘composite transaction’ to be one which is inter-linked in nature, or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

It held that the ‘Group of Companies’ doctrine has also been invoked in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a *single economic unit, or a single economic reality*. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group.

62. The Delhi High Court in **GMR Energy Limited Vs. Doosan Power Systems India Private Limited**⁵ held while dealing with arbitration under part I of the Act that the arbitration agreement signed by a subsidiary Company is binding on its parent company, applying the ‘alter ego’ and ‘Group of Companies’ doctrines.

⁵ MANU/DE/3689/2017

Ameet Lal Chand Shah goes beyond the ‘parent-subsiary’ relationship and extends the rule to one among a group of Contracts

63. In my considered opinion, like in **Ameet Lal Chand Shah** (3 supra) in the instant case also though the applicant is not part of any Group of Companies as Parent and Subsidiary, still, the applicant is a member of a Consortium; the agreement entered into on behalf of the Consortium with the respondent contains an arbitration clause; and the applicant, as a member of the Consortium can invoke the arbitration clause as it is involved as part of a single economic reality consisting of all the members of the Consortium.

64. More reasons for this view are given below.

65. The Consortium Agreement specifically stated in Clause (4) that each of the Consortium partners would be independent contractors, it also mentioned that *their activities shall be coordinated by the leader of the Consortium*. Clause (6) also stated that all the members of the consortium shall be *jointly and severally responsible to the respondent*.

66. Clause 8(a) states that all parties will interface with each other for day-to-day project management; Clause 8(b) states that all parties participate in periodic project review with the respondent; Clause 8(c) states that the leader is authorized to receive instructions, incur liabilities and principally deal for and on behalf of any and all the parties *and co-ordinate the entire execution of the contract*; Clause 8(f) states that all parties shall provide without recourse to the other, all financing, personnel and resources which are required for the proper execution and completion of the scope; Clause 8(h) states that each

party shall adhere to any time schedule agreed to by the parties for the completion of the scope and shall throughout the term of the agreement, cooperate with the leader of the Consortium to avoid any delays in completion of the project; and Clause 8(i) states that the parties agree that the Contract is a *turn-key contract* with a lump sum Fixed Price and that *they shall be jointly and severally be bound by the terms and conditions of the Contracts considered together* covering the Scope and for fulfilling all the obligations, liabilities under these Contracts including Performance Guarantee, Warranties, Liquidated damages (LDs) etc., and none of the parties shall vary, or seek to vary the same, without prior written consent of the other Parties and the Purchaser.

67. Clause 15 stated as under :

“15. *Other Terms and Conditions :*

The terms and conditions applicable to each party for Bidding and execution of the project (in the event of an award), are as under :-

- (d) *The Leader of the Consortium shall co-ordinate and ensure that all obligations under the Contract are fulfilled by the respective parties whether together or otherwise.*
- (e) *All the parties shall be responsible for attending to the equipment supplied under the Contract in case any damage / deficiency occurs during the Guarantee / Warranty and Latent Defect period. However, the parties may, with mutual consent, agree to share the work with a view to reduce the overall cost of repair / replacement of the damaged / deficient part.*

- (f) *All parties shall be liable to the other for any direct, indirect, special incidental or consequential loss or damage.”*

68. A reading of all these Clauses of the Consortium Agreement indicates that as a Team, the Consortium intended to bid for the project with a leader, which was the applicant initially at the time of award of the project by the respondent; and subsequently M/s.VA Tech Wabag Ltd. was substituted in the place of the applicant as leader of the Consortium on 31.05.2014. The project was to be a turn-key project and though the scope of work of each of the Consortium partners was different, they had to work together in tandem, and complete the project. The transaction of execution of the contract was in essence thus, a “composite transaction” because the execution of different works by the three Consortium partners was interlinked and the performance of the contract would not be feasible without the coordinated execution by each of the consortium partners. The Consortium is a ‘single economic reality’ comprising of its members.

69. The contention of the respondent based on Clause 8(d) of the Consortium Agreement dt.17.08.2010 that the applicant, having ceased to be the leader of the Consortium cannot invoke the arbitration clause, the said contention, is not correct for the following reasons:

Clause 8(d) merely states that leader shall *correspond* directly with the respondent with regard to *all the matters in connection with the execution of the project*. In my opinion, it deals thus only with issue relating to the day-to-day execution of project. It does not exclude the statutory right to invoke the arbitration clause by application of the

general principles in **Chloro Controls** (2 Supra) to Part I of the Act. Nowhere does it state that only the leader can invoke the arbitration clause.

70. Also, the respondent, not being a party to the Consortium Agreement cannot rely on it and if any objection is to be taken, it ought to be taken only by the other parties to the Consortium.

71. More importantly, in the letter dt.31.05.2014, addressed by the respondent to M/s. VA Tech Wabag Ltd., consequent to the substitution of the said member of the Consortium as leader of the Consortium in the place of the applicant, the respondent itself agreed that the applicant *shall continue to raise the invoices for the project on the respondent and all Consortium partners will submit their bills to the applicant as was being done then; all payments towards the invoices raised by the applicant would be made directly by the respondent to each Consortium partner as per the billing breakup; M/s. VA Tech Wabag Ltd., may have to support the Consortium partners in the form of LC / Cash.*

72. Thus, even after the substitution of the applicant by M/s. VA Tech Wabag Ltd., it is not as if the applicant ceased to be a part of the Consortium or that its capacity to deal with the respondent was totally taken away. The applicant still had a substantial role to play as regards its Consortium partners (raising invoices etc) and also as regards the respondent because of the ‘composite’ nature of the transaction of execution of the project.

73. Thus applying the ratio of **Ameet Lal Chand Shah** (3 Supra), notwithstanding that the applicant may not be a Group Company of the other members of the Consortium, there was a mutual intention of all parties to bind both the signatories and the non-signatory parties in the Consortium and the latter can also thus invoke the arbitration clause.

74. In this regard it is also to be noted that the term “Contractor” was defined in Clause 1.1.18 of the General Conditions of Contract (which apply to the main contract between the respondent and the leader of the Consortium) as meaning *“the person whose bid has been accepted by the purchaser and the legal successors in title to such person who satisfies the qualification criteria set forth in the tender documents.* The term “Person” was defined in the General Conditions of Contract in Clause 1.1.68 to mean “any individual, corporation, partnership, association, joint stock company, trust, un-incorporated organization, Hindu Undivided Family, Joint Venture, Government or political subdivision or agency thereof.” Moreover, Clause 1.3 of the General Conditions of Contract which deals with “*Interpretation*” stated that *“words importing persons or parties shall include related firms, consortiums, and corporations and any organization having legal capacity.”*

75. In the light of the above terms of the General Conditions of Contract, it has to be construed that though the award of the contract by the respondent was to the applicant as leader of the Consortium, the award was to the Consortium itself, as the other party to the contract /

award of work; and so, every member of the Consortium is a party to the contract with the respondent.

76. In my opinion, a Consortium Agreement where several parties join together in common purpose to contract with another party is yet another illustration of the **Chloro Controls** (2 Supra) principle.

77. The Consortium Agreement and the Arbitration Clause that is in it, binds all the Consortium members; and in such a contract it is necessary to ensure that even though the lead member of the Consortium might alone be party to an Arbitration agreement with the other party, all the Consortium members are bound by the Arbitration agreement and the Arbitrator's Award.

78. I am also of the opinion that the applicant, was in reality always a party to the main agreement (which is one of the categories mentioned in para 70 of **Chloro Controls** (2 supra) where a non-signatory to the arbitration agreement was held to be able to invoke it) although by virtue of substitution which occurred in 2014, it is no longer the leader of the Consortium. For this reason also it is entitled to invoke the arbitration clause contained in the GCC.

79. Whether or not the other parties to the Consortium Agreement have any dispute with the respondent or initiate proceedings against it for the benefit of the applicant, the applicant cannot be prevented by the respondent from invoking the arbitration clause contained in the GCC because its scope of work under the Consortium agreement was different from that of other parties to the Consortium agreement. So it

ought to be allowed to do so without reference to other parties to the Consortium agreement.

80. No doubt in **M/s. Jai Prakash Associates Ltd.** (1 supra), the Delhi High Court in 2009 held that only parties to an arbitration agreement can invoke it and non-signatories to it are not entitled to invoke it. The said view cannot be said to be correct in the light of the decision of 2012 of the Supreme Court in **Chloro Controls** (2 supra). I am therefore not inclined to follow it.

81. Since the respondent did not appoint any arbitrator on its behalf in spite of receipt of the letter dt.02.05.2018 issued by the applicant to it invoking the arbitration clause and nominate its arbitrator, its lapse / failure would confer jurisdiction under Section 11(6) of the Act to appoint an arbitrator on behalf of the respondent.

82. Accordingly, this application is allowed; Justice A.K. Sikri, Former Judge of the Supreme Court of India is appointed as an Arbitrator on behalf of the respondent and Justice Madan B Lokur, Former Judge of the Supreme Court of India is appointed as the Presiding Arbitrator. No costs.

83. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 25-09-2019

Note :- L.R. Copy to be marked.

B/o.
VSV/MRKR