IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 08TH DAY OF JUNE 2022

THE HON'BLE MR. JUSTICE M.SUNDAR

ARB APPLN Nos. 98 to 101 of 2022

In the matter of Section 9 of the Arbitration and Conciliation Act, 1996
and
In the matter of disputes arising out of the amended and restated debenture trust deed dated 26.05.2017

L AND T INFRA INVESTMENT PARTNERS
4th Floor, Brindavan, Plot No.177,
Vidyanagari Marg, CST Road,
Kalina, Santa Cruz (E),
Mumbai - 400 098. ..Applicant

-Vs-

1. MR.MADHUSUDAN KHEMKA,
Having his residence at:
Y 202, Anna Salai,
Chennai-600 040. ..1st Respondent

2. MR.R.SUNDARESH
Having his residence at
Flat 1/C, 6/23, Raghaviah Road,
T.Nagar, Chennai - 600 017. ..2nd Respondent

Arb Appln No.98 of 2022:

Arbitration Application praying that this Hon'ble Court be pleased to direct the 1st Respondents to disclose his personal assets inter-alia including but not limited to his investments, tangible and intangible assets, movables and immovables assets by way of an Affidavit.

Arb Appln No.99 of 2022:

Arbitration Application praying that this Hon'ble Court be pleased to direct the 1st Respondents to disclose a list of its personal assets inter-alia including but not limited to its investments, tangible and intangible assets, moveable and immoveable assets which have been sold by the 1st Respondent in the past 3( three) years by way of an Affidavit.

Arb Appln No.100 of 2022:

Arbitration Application praying that this Hon'ble Court be pleased to direct the 2nd Respondent to disclose his personal assets inter-alia including but not limited to his investments, tangible and intangible assets, moveable and immoveable by way of an Affidavit.

Arb Appln No.101 of 2022:



Arbitration Application praying that this Hon'ble Court be pleased to direct the 2nd Respondent to disclose a list of its personal assets inter-alia including but not limited to its investments, tangible and intangible assets, moveable and immoveable assets which have been sold by the 1st Respondent in the past 3( three) years by way of an Affidavit.

These Arbitration Applications are coming on this day before this court for hearing the court made the following order:-

This common order will govern the captioned four applications, all of which, have been filed under various clauses and sub-clauses of sub-section (1) of Section 9 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' [hereinafter 'A and C Act' for the sake of brevity, convenience and clarity].

2. 'L & T Infra Investment Partners' [hereinafter 'LTIIP' for the sake of brevity, convenience and clarity] is the applicant in all the four captioned applications. Madhusudan Khemka and R.Sundaresh are respondents 1 and 2 respectively in all the four captioned applications. Owing to the facts being common, Mr.A.K.Mylsamy, learned counsel assisted by Ms.Prerna Khatri of M/s.A.K.Mylsamy and Associates (Law Firm) made common submissions in all the four captioned applications which are in the Admission Board today.

3. The factual matrix in a nutshell is that LTIIP is registered with 'Securities Exchange Board of India' [hereinafter 'SEBI' for the sake of convenience and clarity] as an Alternate Investment Fund (Category 1 Infrastructure Fund); that LTIIP is an affiliate of 'L & T Finance Limited' [hereinafter 'LTFL' for the sake of convenience, clarity and brevity] and is a Debenture Holder qua 'Regen Infrastructure Services Private Limited' [hereinafter 'RISPL' for the sake of convenience and clarity]; that RISPL is a wholly owned subsidiary of 'Regen Powertech Private Limited' [hereinafter 'RPPL' for the sake of convenience, clarity and brevity]; that this means that RPPL is a Holding Company and RISPL is a Subsidiary Company; that the respondents 1 and 2 are Promoters-Directors of both the Holding and Subsidiary companies from incorporation; that Holding company (RPPL) and Subsidiary company (RISPL) have been subjected to 'Corporate Insolvency Resolution Process' [hereinafter 'CIRP' for the sake of convenience and clarity] before the 'National Company Law Tribunal, Chennai' [hereinafter 'NCLT' for the sake of convenience, clarity and brevity]; that both the respondents have since been suspended from directorship of both RISPL and RPPL i.e., Subsidiary and Holding companies respectively by virtue of orders made as part of CIRP; that the respondents in their capacity as promoters of RISPL and RPPL approached

LTFL affiliate qua LTIIP for providing credit facilities; that credit facilities to the tune of Rs.310 Crores was provided *inter alia* vide an agreement styled/captioned 'Debenture Trust Deed dated 26.05.2017' [hereinafter 'primary contract' for the sake of convenience and clarity] by way of subscription and transfer of 310 Crores fully paid-up 'Optionally Convertible Debentures' [hereinafter 'OCD' for the sake of convenience and clarity]; that it will suffice for the purpose of applications on hand to say that LTIIP became Debenture Holder qua RISPL and RPPL; that Rs.310 Cores was disbursed in three tranches; that there is alleged default; that owing to the alleged default, respondents 1 and 2, (promoters/Directors of Holding and Subsidiary companies namely, RPPL and RISPL) being guarantors qua this 310 crores debentures i.e., OCD arrangement were issued notice dated 08.04.2021 by LTIIP through its counsel; that it is submitted at the Bar, on instructions, that 08.04.2021 notice was transmitted by electronic mail and therefore, service is instantaneous; that therefore, the noticees (respondents 1 and 2 in the captioned applications) received notices on the same day; that they have neither replied nor complied; that therefore, LTIIP/applicant is entitled to take recourse to Arbitration Agreement between the parties; that the Arbitration Agreement between the parties being Arbitration Agreement within the meaning of Section 2(1)(b)



read with Section 7 of A and C Act is in the form of a covenant in primary contract i.e., Debenture Trust Deed dated 26.05.2017; that this covenant is clause 66 captioned 'GOVERNING LAW'; that the most critical sub-covenant is 66.2; that admittedly, no notice invoking arbitration has been issued until this day; that NCLT proceedings against the Holding company (RPPL) has culminated in an order dated 01.02.2022 made by NCLT wherein Resolution plan under Section 30(6) of 'The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016)' [hereinafter 'IBC' for the sake of convenience] stood approved; that as regards the Subsidiary company (RISPL), an application under Section 9 of IBC has been admitted by NCLT way back on 19.02.2020; that it is submitted at the Bar that the acceptance of Resolution plan under Section 30(6) of IBC vide order under Section 31 of IBC dated 01.02.2022 has been carried in appeal to the Appellate Tribunal but those papers are not before this Court as part of case file; that under these circumstances, i.e., factual matrix captioned applications are before this Court.

4. This Court heard Mr.Mylsamy, learned counsel assisted by Ms.Prerna Khatri, examined the case file and after a careful analysis comes to the conclusion that the prayers in the captioned applications cannot be acceded to.

5. The discussion and dispositive reasoning (reasons) are as follows:

(a) Captioned applications have been presented in this Court before arbitral proceedings. Therefore, it is imperative that the applicant is able to demonstrate manifest intention to arbitrate. Owing to the chronology captured in the factual matrix supra this Court is unable to persuade itself to believe that the applicant is able to demonstrate manifest intention to arbitrate. The reason is more than obvious owing to the chronology and in other words, it is clear as daylight as the notice to two respondents i.e., aforementioned two respondents was issued on 08.04.2021 and it is stated at the Bar that the notice was served on both the respondents on the same day. One year and two months have elapsed thereafter. Admittedly, the arbitration clause has not been invoked;

(b) Learned counsel attempted to explain the above by adverting to the proceedings before NCLT which have been alluded to and captured in the factual matrix supra. The explanation turns on Section 14 of IBC. This does not impress this Court for more than one reasons. As already alluded to supra, as regards the Holding company, the Resolution plan submitted under Section 30(6) of IBC has been approved by

NCLT under Section 31 of IBC on 01.02.2022 itself. This means that the effect of Section 14 stood completely effaced on 01.02.2022. There is nothing before this Court to demonstrate that this order has been stayed. In the light of chronology or sequence of events captured supra, on a demurur, even if 01.02.2022 is taken as the reckoning date, more than 4 months have elapsed;

(c) As regards the Subsidiary company (RISPL) as set out in the factual matrix supra, an application at the instance of the creditor under Section 9 of IBC has been admitted by order dated 19.02.2020 more than two years ago. On a demurrer, even if Section 14 of IBC Moratorium was operating, it is very clear that it would not apply to guarantors i.e., the two respondents in captioned applications. Therefore, there was no impediment for LTIIP in taking recourse to arbitration agreement i.e., clause 66.2 of primary contract i.e., Debenture Trust Deed dated 26.05.2017. To be noted, this primary contract is captioned 'AMENDED AND RESTATED TRUSTEE AGREEMENT'. This is mentioned only for making capturing of factual matrix as complete and comprehensive as



possible to the extent necessary for appreciating this order;

(d) As regards both the above points turning on Section 14 of IBC, as the two respondents are admittedly guarantors qua Corporate Debtor, there was no impediment whatsoever for LTIIP to resort to arbitration agreement between the parties. There is nothing to demonstrate as to why LTIIP has not resorted to invocation of arbitration agreement between the parties and has gone into slumber;

(e) As already alluded to supra, the only explanation that was attempted (at the Bar) to explain aforementioned slumber is NCLT proceedings and this is no argument for the reasons that have been alluded to supra;

6. 'Manifest intention to arbitrate', in the considered view of this Court, is a jurisdictional fact when it comes to Section 9 applications which are moved before the arbitral proceedings. Law is well settled that a jurisdictional fact should precede the proceedings and it cannot be *ex post facto* i.e., post presentation. Manifest intention to arbitrate is jurisdictional fact qua Section 9 applications which are presented before the commencement of arbitral proceedings for the simple reason that this was considered by Hon'ble Supreme Court in ***Firm Ashok Traders*** case [***Firm Ashok Traders and Another Vs. Gurumukh Das Saluja and others***



reported in ***(2004) 3 SCC 155***]. ***Firm Ashok Traders*** case has now been codified on and from 23.10.2015 by way of sub-section (2) of Section 9 of A and C Act which reads as follows:

> *'(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.'*

7. A careful perusal of ***Firm Ashok Traders*** principle makes it clear that it has now been crystallized numerically as 90 days. On a demurer, even if 90 days is applied, it is still beyond this 90 days and therefore, this Court has no hesitation in coming to the conclusion that LTIIP has not been able to demonstrate manifest intention to arbitrate. No interim orders are granted in Section 9 applications when the applicant is unable to demonstrate the manifest intention to arbitrate and that is the very purpose and objective of ***Firm Ashok Traders*** principle being codified by way of sub-section (2) of Section 9 of A and C Act which kicked in on and from 23.10.2015.

8. The two other facets of ***Firm Ashok Traders*** principle which is now sub-section (2) of Section 9 of A and C Act in codified form is absent, interim order under Section 9 snaps when manifest intention to arbitrate

proximate cause snaps and interim order will become an order in perpetuity with no arbitration. It is not necessary to dilate more on this and it is reserved for another matter where elucidation of these facets becomes imperative for deciding the legal tussle. The case on hand fails to pass the test even for issue of notice qua Rule 6 of the Madras High Court (Arbitration) Rules, 2020.

9. The sequitur is captioned applications fail and the same are dismissed.

10. Though the captioned applications are dismissed, if the applicant/LTIIP chooses to invoke the arbitration agreement between the parties i.e., clause 66.2 of primary contract being the Debenture Trust Deed dated 26.05.2017, it is still open to the applicant to come before this Court with same prayers or go before Arbitral Tribunal with same/similar prayers under Section 17 of A and C Act.

11. This Court having provided the requisite window, concludes the matter leaving it open to the applicant/LTIIP to take recourse to do ADR mechanism which has been put in place vide clause 66.2 of primary contract being the Debenture Trust Deed dated 26.05.2017. As already mentioned

supra, captioned applications fail and the same are dismissed albeit with the aforementioned window. There shall be no order as to costs.

Sd/.M.S.J.
08.06.2022

//Certified to be a true copy//

Dated at Madras this the day of 2022.

SU/17.06.2022 COURT OFFICER(O.S.)

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