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

Date of decision: 11th November, 2022

+ ARB.P. 973/2021

UMESH CIMECHEL CONSORTIUM

..... Petitioner

Through: Mr. Pankaj Kumar Singh,
Advocate.

versus

IIC LIMITED & ANR.

..... Respondents

Through: Mr. Rajat Navet with Mr.
Kushagra Pandit, Advocates
for R2.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

(Judgment released on : 26.11.2022)

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 11(6) of the Arbitration and Conciliation Act 1996 ('A&C Act 'for short), the petitioner prays as under:

- a) *appoint the Presiding Arbitrator, as the nominee Arbitrators of the parties could not reach a consensus regarding the appointment of the Presiding Arbitrator;*
- b) **appoint the nominee Arbitrator of IIC Limited as the Arbitrator of Indiabulls Power Ltd as well;**
- c) *pass such other orders or directions as deemed fit and proper in the facts and circumstances of the case and in the interest of justice and equity."*

(emphasis supplied)

2. The contract between the parties from which this matter arises, is comprised in a number of agreements/documents executed by and between the parties, which reflect the transaction between them. The attention of this court has been drawn to the following:

2.1 Letter of Intent dated 31.08.2012 issued by respondent No. 1 to the petitioner for “*supply, erection, testing and commissioning including civil works of Railway Overhead Electrification from Badnera to 5x 270 MW Thermal Power Plant at Nandgaonpeth, Amravati, Maharashtra.*”;

2.2 Letter of Award dated 10.09.2012 issued by respondent No. 1 in favour of the petitioner for “*design, engineering, procurement, shop inspection, packing, forwarding, supply, transportation, transit insurance, erection, testing, commissioning including civil works of Railway Overhead Electrification from Badnera station to Project Site with all associated equipment for 5X270 MW Thermal Power Plant at Nandgaonpeth, Amravati, Maharashtra.*”;

2.3 Contract dated 05.10.2012 for “*... design, engineering, procurement, shop inspection, testing, packing, forwarding, supply, transit insurance, transportation upto Site...*” (hereinafter referred to as ‘supply-contract’) entered into between the petitioner and respondent No. 1, which is governed by certain Special Conditions of Contract (SCCs) and General Conditions of Contract (GCCs);

2.4 Contract dated 05.10.2012 for “*... unloading, storage, handling, erection, commissioning including civil works for Railway Overhead Electrification...*”(hereinafter referred to as ‘work-

contract’) entered into between the petitioner and respondent No. 1, which is governed by a separate set of SCCs and GCCs;

2.5 The supply-contract as well as the work-contract were amended on 27.12.2012. Subsequently, the work-contract was further amended on 01.04.2013, thereby amending the scope of work of respondent No. 1 and revising the contract price.

2.6 Additionally, there was also a Supply Purchase order dated 29.10.2012 and a Work Order dated 29.10.2012 issued by respondent No. 1 in favour of the petitioner, which notably was also *signed only* by these parties.

For convenience the entire set of agreements and documents mentioned above are referred to as ‘contractual documents’ in the present judgment.

3. The arbitration agreement between the parties is contained in the following documents:

3.1 Clause 16 of letter of award dated 10.09.2012, requiring a three-member arbitral tribunal to be constituted for adjudication of disputes between the parties;

3.2 Clause 11 of the GCCs governing both the supply-contract as well as the work contract, again requiring a three-member arbitral tribunal to be constituted for adjudication of disputes between the parties;

3.3 Clause 1.0 of both the Supply Purchase order as well as Work Order dated 29.10.2012, which however provides for appointment of a sole arbitrator for adjudication of disputes that arise between the “*the Owner and the Supplier*”. Attention in this

behalf is drawn by the petitioner to the definition of ‘Owner’ in the GCCs both of the supply-contract and work-contract.

It is significant to note that all three arbitration clauses were executed / signed *only by and between the petitioner and respondent No. 1*; and respondent No. 2 was not signatory to any of them.

4. As per the record, the petitioner *invoked arbitration against respondent No. 1 vide* Notice dated 26.10.2020; and also issued to respondent No. 2 notice dated 27.08.2021, making certain grievances, and now claiming that the said notice was also a notice invoking arbitration against respondent No. 2.
5. Arbitration against respondent No. 1 was invoked under clause 16 of the letter of award dated 10.09.2012 and clause 11 of the GCCs governing the supply-contract as well as the work-contract. The dispute raised in the invocation notice dated 26.10.2020 were as regards “*non-payment of amount due qua work done and/or withheld amount of Rs. 4,61,94,069 (rupees four crore sixty one lakh ninety four thousand sixty nine only), release of Performance Bank Guarantees and Advance Bank Guarantees amounting to Rs. 4,43,87,045/- (rupees four crore forty three lakh eighty seven thousand forty five only), mentioned herein above, payment of margin money qua extension of the Bank Guarantees and payment of interest from the due date of payment of the claimed amount till the date of payment and any other related issues/claims in connection with Letter of Intent dated 31.08.2012, Letter of Award dated 10.09.2012 and Supply and Service contract being Contract Res-IIICL/ATPP/Railway OHE/898/1 & 2 dated 5th October 2012 as amended time to time in terms of Clause 16 of the Letter of Award and Clause 11 of the*

General Conditions of Contract to Arbitration in accordance with the provisions of the Indian Arbitration Act, 1996 as amended upto date.”

The petitioner also nominated its arbitrator in compliance of the requirement for a three-member arbitral tribunal contained in the above-mentioned arbitration clauses.

6. Respondent No. 1 sent a reply dated 27.11.2020 to the invocation notice, addressing the claims made by the petitioner; and also invoked arbitration against the petitioner for its claims (counter-claims); and proceeded to appoint its nominee arbitrator.
7. Thereafter however, respondent No. 1 went under ‘moratorium’ as part of corporate insolvency resolution proceedings that were initiated against it under the Insolvency & Bankruptcy Code, 2016. *Vide* order dated 20.09.2021, an interim resolution professional was appointed for respondent No. 1 by the learned National Company Law Tribunal, New Delhi.
8. During this period, the petitioner issued a notice dated 27.08.2021 to respondent No. 2, making the following demands, and thereby also *purporting* to invoke arbitration :

“Therefore in the given facts and circumstances, RattanIndia Power Limited is requested to consent to appointment of Justice Surender Kumar (Retd.), former Judge, High Court of Allahabad, the nominee arbitrator of IICL, to be the nominee arbitrator of RattanIndia Power Limited as well regarding the disputes relating to non-release of Bank Guarantees, payment of margin money for extension of Bank Guarantees, non-payment of the amount due and outstanding, including the amount of final bill, loss of profit, payment on account of escalation and price variation and claim of interest and any other related issues/claims in connection with Letter of Intent dated 31.08.2012, Letter of Award dated 10.09.2012 and Supply and Service contract being Contract Ref-

IICL/ATPP/Railway OHE/898/1 & 2 dated 05th October 2012 as amended time to time. The present letter/notice is being sent by E-mail & Courier while retaining a copy.”

(emphasis supplied)

9. There is no cavil with the position that by way of the present petition, the petitioner seeks to initiate arbitral proceedings *against respondent No. 2*. As recorded in order dated 23.11.2021, it is the petitioner’s case that respondent No. 1 is only the alter-ego of respondent 2. Subsequently, in the course of the hearings, the petitioner has, in essence, confirmed this stand; although in the rejoinder, the petitioner has called respondent No. 2 the alter-ego of respondent No. 1.
10. Notice on this petition was issued on 01.10.2021; consequent to which respondent No. 2 has filed its reply dated 12.01.2022. The petitioner has also filed rejoinder dated 02.03.2022. Mr. Pramod Kumar Gupta, the Resolution Professional appointed for respondent No. 1 has also been impleaded as respondent No. 3 in the present proceedings; and has filed an affidavit confirming the moratorium imposed upon respondent No. 1.

Petitioner’s Submissions

11. The petitioner argues that the present petition seeking to proceed in arbitration against respondent No. 2 be allowed *inter-alia* for the following reasons:
 - 11.1 That respondent No. 2, which is referred to as the ‘Owner’ in the GCCs had participated in the negotiations that culminated in the formation of the main contracts. This, the petitioner seeks to show *inter-alia* by the following :
 - 11.1.1 Letter of intent dated 31.08.2012 and the letter of award dated 10.09.2012, to point-out that these were issued on

the letterhead of Respondent No. 2, thus indicating respondent No. 2's direct involvement in the transactions.

11.1.2 Clauses 3.1.25 of the GCCs governing the supply-contract and the corresponding clause in the GCCs relating to the work-contract, to say that respondent No. 2 is defined therein as 'Owner'.

11.1.3 Clause 8 of the Advance Bank Guarantees and clause 8 of the Performance Bank Guarantees, to point-out that these stipulate that respondent No. 1 *could assign* the benefits of the bank guarantees to respondent No. 2.

11.1.4 Clause 11 of the SCCs governing the supply-contract, under which respondent No. 2 had reserved the right to increase or decrease the quantity of items under that contract.

11.1.5 Annexure-V to the GCCs governing the work-contract, which provides a format for letter of credit, in which respondent No. 2's name appears as the 'applicant'.

11.2 That respondent No. 2 is an alter-ego of respondent No. 1 (or *vice-versa*), in support of which, the petitioner enlists several communications, including those exchanged between the petitioner and respondent No. 2, to indicate that it was in fact respondent No. 2 and not respondent No. 1 (or respondent No. 2 acting through respondent No. 1) which executed the agreements in favour of the petitioner. Some of the communications highlighted in the petition are :

- 11.2.1 Communication dated 16.02.2013, issued *by the petitioner* to respondent No. 2 seeking variation in the quantity of height gauge.
- 11.2.2 Communications dated 06.08.2013, 27.08.2014 and 02.07.2015, issued *by the petitioner* to respondent No. 2 seeking extension of time for completion of works under the contracts.
- 11.2.3 Communications dated 13.08.2015 and 31.08.2015, issued *by the petitioner* to respondent No. 2 seeking release of Advance Bank Guarantees.
- 11.2.4 Communication dated 15.12.2016, issued *by the petitioner* to respondent No. 2 giving target dates for completion of works.
- 11.2.5 Letter dated 12.12.2017, issued *by respondent No. 2 to the Sr. DEE (TRD), Central Railway, Bhusawal Division* intimating about completion of works.
- 11.2.6 Letters dated 26.12.2017, 24.04.2018, 14.08.2019 and 22.11.2019, issued *by the petitioner* to respondent No. 2 seeking release of Performance Bank Guarantees.
- 11.2.7 Letter dated 25.09.2018, issued *by the petitioner* to respondent No. 2, submitting the final bill of supply and final bill of erection; and requesting respondent No. 2 to process the bills and release the payments due.
- 11.2.8 The statement of reasons issued *by the petitioner* to respondent No. 2 *vide* letter dated 15.03.2019, explaining the causes for delay in completion of works.

- 11.2.9 E-mail dated 06.12.2012 sent *by respondent No. 2 to the petitioner*, confirming that respondent No. 2 would pay the excise duty for the work carried out by the petitioner.
- 11.2.10 Several other e-mails sent *by respondent No. 2 to the petitioner* about technical and financial matters and various updates concerning the project.
- 11.3 That respondent No. 2 is the *direct beneficiary* of the work executed by the petitioner since the petitioner's obligations under the contractual documents were with respect to the project being developed by respondent No. 2.
- 11.4 That respondents Nos. 1 and 2 are related parties and also have 'a' common director on their respective boards, indicating direct relationship between the respondents and also the influence that respondent No. 2 has over respondent No. 1. The petitioner thus seeks to invoke 'group of companies' doctrine in relation to the respondents to seek reference of respondent No. 2 to arbitration.
- 11.5 That in separate proceedings bearing ARB. P. No. 209/2021, involving the same respondents, though not the same petitioner, respondent No. 2 consented to be referred to arbitration. It is therefore submitted that respondent No. 2 may be referred to arbitration in the present case as well.
- 11.6 That in the proceedings in O.M.P.(I)(COMM.) No. 172/2020, which petition was filed by the petitioner seeking stay on encashment and refund of performance bank guarantees, and for alleged fraud perpetuated by respondent No. 1 upon the petitioner, respondent No. 2 was also a party and invocation of the subject bank guarantees was stayed by a Co-ordinate Bench

of this court *vide* order dated 10.07.2020; which order has thereafter been continued. The petitioner contends that in the said proceedings, respondent No. 2 never sought deletion from the array of party-respondents since it was a necessary party thereto.

11.7 That additionally, clause 1.0 of the Supply Purchase Order and Work-Order dated 29.10.2012 contemplates reference of disputes between ‘Owner’ and ‘Supplier’ to arbitration. The petitioner pegs its case on the interpretation of word ‘Owner’ as defined in clause 3.1.25 of the GCCs governing the Supply Purchase Order and the corresponding clause in the Work-Order, to submit that the said clause *constitutes* an arbitration agreement between the petitioner and respondent No. 2. Clause 3.1.25 of the GCCs governing the Supply Purchase Order reads as under:

Clause 3.1.25:

“Owner or “IPL” shall mean Indiabulls Power Limited and shall include their legal representative, successors and assigns.”

It is urged on behalf of the petitioner that the above provision constitutes a valid arbitration agreement between the petitioner and respondent No. 2, *even though this agreement has not been signed by respondent No. 2*. To support the proposition that an arbitration agreement need not necessarily be signed, learned counsel for the petitioner draws the attention of this court to the judgments in ***Caravel Shipping Services***

Pvt. Ltd. vs. Premier Sea Foods Exim Pvt. Ltd.¹, SPML Infra Limited vs. East India Udyog Limited²; Vidya Drolia & Ors. vs. Durga Trading Corp.³

11.8 The petitioner also relies upon the following precedents to support, what appears to be its contention in the alternative, that even without an arbitration agreement between them, the petitioner can yet proceed against respondent No. 2 in arbitration:

11.8.1 ***Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. and Ors.⁴; Ameet Lalchand Shah and Ors. vs. Rishabh Enterprises and Ors⁵; and Purple Medical Solutions Pvt. Ltd. vs MIV Therapeutics Inc. & Anr.⁶***: On the point that even non-signatory parties to an arbitration agreement can be referred to arbitration as a result of implied or specific consent or judicial determination. It is argued that respondent No. 1 herein is an alter-ego of respondent No. 2 (or *vice-versa*), and therefore, respondent No. 2 may be referred to arbitration.

11.8.2 ***Shapoorji Pallonji and Co. Pvt. Ltd. vs. Rattan India Power Ltd. and Ors.⁷***: To highlight that in another case

¹ (2019)11 SCC 461; para 8.

² 2022 SCC OnLine Cal 145; paras 7 and 8.

³ (2021) 2 SCC 1; para 244.

⁴ (2013)1 SCC 641; para 107.

⁵ (2018)15 SCC 678; paras 24 and 25.

⁶ (2015)15 SCC 622; paras 12 and 14.

⁷ 2021 SCC OnLine Del 3688; paras 2, 19, 25-32, 41, 42-46, 54-62, 64-66.

involving respondent No. 2 itself, in similar circumstances, despite not being a signatory to the arbitration agreement, Rattan India was referred to arbitration on the ground that Rattan India was directly involved with the contract.

11.8.3 *Ashav Advisory LLP vs. Patanjali Ayurveda Ltd. & Ors.*⁸:

On the point that the ‘group of companies’ doctrine may also apply to cohesive groups for the purpose of reference to arbitration.

11.8.4 *Nea Agrex SA vs. Baltic Shipping Co Ltd & Anr.*⁹: On the point that a letter requesting arbitration should not be construed strictly.

11.8.5 *Cox & Kings Ltd. vs. SAP India Pvt. Ltd*¹⁰. : On the point that the ‘group of companies’ doctrine may be interpreted by examining the impression that was conveyed to the contracting parties by the third party.

11.8.6 *Oriental Insurance Co. Ltd. vs. Sanju Bai & Ors.*¹¹; and *Gujarat Narmada Valley Fertilizers Co. Ltd. vs. Commissioner of Central Excise & Customs*¹²: On the point that if a decision of the Supreme Court has been referred to a larger Bench, it would still hold the ground until set aside or varied.

⁸ 2022 SCC OnLine Del 328; paras 53-54.

⁹ [1976] 2 All ER 842; page 848.

¹⁰ (2022) 8 SCC 1; paras 102-103.

¹¹ 2015 SCC OnLine MP 7565; para 5.

¹² 2013 SCC OnLineGuj; para 3.

Respondent No. 2's Submissions

12. Responding to the petitioner's case, respondent No.2 has made the following submissions:
- 12.1 That there is no arbitration agreement between the petitioner and respondent No. 2. It is argued that since the disputes raised by the petitioner arise from letter of intent dated 31.08.2012, letter of award dated 10.09.2021 and contracts dated 05.10.2012, to which respondent No. 2 was admittedly not signatory, the said respondent cannot be made to participate in the arbitration proceedings sought to be initiated by the petitioner in respect of those disputes. It is further stated that the petitioner has produced no documents that would demonstrate respondent No. 2's consent to arbitrate.
- 12.2 That rebutting the communications produced by the petitioner, respondent No. 2 states that the said communications *firstly*, show no arbitration agreement between the petitioner and respondent No. 1; and *secondly*, these communications have happened post the execution of the contractual documents and thus cannot bind respondent No. 2 to arbitration.
- 12.3 That the 'group of companies' doctrine sought to be invoked by the petitioner is not applicable to the present case, since respondent No. 1 is an independent contractor and the contracts executed between the respondents do not constitute any 'partnership' or 'joint-venture' between them. Attention in this behalf is drawn to Article 8 of the Supply Contract Agreement entered into between the two respondents, which recites to that effect.

- 12.4 That the petitioner's contention that respondent No. 2 exercised control over respondent No. 1 company since the two respondents had a common director, is untenable, since at best, that would make respondent No. 2 a 'related party' with respondent No. 1 in terms of section 2(76) of the Companies Act, 2013, which however does not indicate *control* of respondent No. 2 over the affairs of respondent No. 1, and is also insufficient to invoke 'group of companies' doctrine to seek reference of respondent No. 2 to arbitration.
- 12.5 That notice dated 27.08.2021 issued by the petitioner to respondent No. 2 is an afterthought, is belated and not tenable. In this behalf, attention is drawn to invocation notice dated 26.10.2020, which was issued by the petitioner *only* to respondent No. 1. It is stated that the invocation notice does not contain any allegation connecting respondent No. 2 with the disputes raised therein, and no claims have been made against respondent No. 2 in that notice. Further, it is stated that even notice dated 27.08.2021 does not disclose any 'arbitrable dispute' with respondent No. 2.
- 12.6 That the present petition cannot proceed in the absence of respondent No. 1, since a perusal of the documents produced by the petitioner shows that the claims sought to be raised in arbitration *relate only* to respondent No. 1.
- 12.7 That the petitioner's contention that since in ARB.P. No. 209/2021 respondent No. 2 had agreed to be referred to arbitration, respondent No. 2 must be sent to arbitration in the present case as well, is baseless, since the case referred to was a

consent order, on a different fact situation and has no precedential value.

12.8 Supporting its case, respondent No. 2 has relied upon the following decisions:

12.8.1 *Reckitt Benckiser (India) (P) Ltd. vs. Reynders Label Printing (India) (P) Ltd.*¹³, *STCI Finance Ltd vs. Sukhmani Technologies Pvt. Ltd.*¹⁴, *Prize Petroleum Company Ltd vs. ABG Energy Ltd. & Anr.*¹⁵, and *S Sivagurunathan vs. R Mennan*¹⁶: On the point that the correspondence exchanged between the petitioner and respondent No. 2 after the execution of the contractual documents would not bind respondent No. 2 to any arbitration agreement; and that the intention to agree for arbitration is necessary, to be referred to arbitration.

12.8.2 *Indo Wind Energy Ltd. vs. Wescare (I) Ltd. &Anr.*¹⁷, *S.N Prasad vs. Monnet Finance Ltd.*¹⁸: On the point that in the absence of an agreement to arbitrate, a non-signatory cannot be bound to an arbitration agreement.

12.8.3 *Alchemist Asset Reconstruction Co. Ltd. Vs. Hotel Gaudavan Pvt. Ltd. &Ors.*¹⁹: To submit that no

¹³ (2019) 7 SCC 62; paras 12 & 13.

¹⁴ 2016 SCC OnLine Del 6650; paras 29-32.

¹⁵ 2017 SCC OnLine Del 10627; para 11.

¹⁶ 2022 SCC OnLine Mad 5501; paras 19-30.

¹⁷ (2010) 5 SCC 306; paras 11, 14,15, 20.

¹⁸ (2011) 1 SCC 320; paras 7-11.

¹⁹ (2018) 16 SCC 94; paras 4 & 5.

proceedings against a company under moratorium can proceed.

12.8.4 *Essar Oil Ltd. vs. Hindustan Shipyard Ltd.*²⁰, *Zonal General Manager, Ircon International Ltd. vs. M/s Vinay Heavy Equipments*²¹: On the point that even if a principal-employer has made payments to a sub-contractor, the same would not establish privity of contract between the principal-employer and the sub-contractor.

Discussions and Conclusions

13. Now, the broad contours for deciding a petition under section 11, which are well accepted, are :
- (i) Whether the party against whom disputes are sought to be raised is bound by an arbitration agreement with the party seeking appointment of an arbitrator;
 - (ii) Whether arbitrable disputes have arisen with the party against whom arbitration is sought to be invoked;
 - (iii) Whether the party that has approached the court has ‘invoked arbitration’; and of course;
 - (iv) Whether the court which is moved has territorial jurisdiction to entertain and decide such petition.
14. In the present case, admittedly, the contractual documents from which the petitioner says that disputes have arisen, were signed by and between the petitioner and respondent No. 1. However, since

²⁰ (2015) 10 SCC 642; paras 24-25.

²¹ (2015) 13 SCC 680.

respondent No. 1 is presently undergoing corporate insolvency resolution process and a ‘moratorium’ is in force against respondent No. 1, the petitioner’s legal remedy against respondent No. 1 is restricted for the time being and the petitioner can only file a claim before the Resolution Professional and/or avail remedies before the learned NCLT per *Alchemist Asset Reconstruction Co. Ltd. vs. Hotel Gaudavan (P) Ltd.*²².

15. It is in this backdrop that the petitioner seeks to invoke arbitration against respondent No.2, premised on the allegation that respondent No.2 is equally bound by the arbitration agreement between petitioner and respondent No.1, since the project on which the petitioner was working was respondent No.2’s project; and therefore, to use the petitioner’s words, Respondent No.2 is “ ... *the alter-ego of Respondent No. 1* ...”. To support this submission, the petitioner places reliance upon the decision of the Supreme Court *inter-alia* in *Chloro Controls* (supra), which enunciates the law on when, and in what circumstances, a non-signatory party can be held bound by an arbitration agreement.
16. As held by a Co-ordinate Bench of this court in *STCI Finance Ltd.* (supra), a situation where (i) a **non-signatory party** to an arbitration agreement invokes arbitration against a **signatory party** is different from a situation where a (ii) **signatory party** invokes arbitration against a **non-signatory party**. In situation (i) where arbitration is invoked by a non-signatory party against a signatory party (even though signatory with a third party), on the basis that the non-

²² (2018) 16 SCC 94; para 4.

signatory party is claiming through or under such third party, the *consent of the signatory party to refer the disputes to arbitration is a given*. In situation (ii) however, when a signatory party invokes arbitration against a non-signatory party, since the non-signatory party has never consented to the remedy of arbitration itself, there is a heavy burden on the signatory party to establish that the non-signatory party had agreed to arbitration. In this regard, the Supreme Court has held in *Reckitt Benckiser* (supra) that the burden to establish that a non-signatory party had consented to arbitration is on the applicant, in the following words:

“12. In the backdrop of the averments in the application and the correspondence exchanged between the parties adverted to by the applicant, it is obvious that the thrust of the claim of the applicant is that Mr Frederik Reynders was acting for and on behalf of Respondent 2, as a result of which Respondent 2 has assented to the arbitration agreement. This basis has been completely demolished by Respondent 2 by stating, on affidavit, that Mr Frederik Reynders was in no way associated with Respondent 2 and was only an employee of Respondent 1, who acted in that capacity during the negotiations preceding the execution of agreement. Thus, Respondent 2 was neither the signatory to the arbitration agreement nor did have any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever. If the main plank of the applicant, that Mr Frederik Reynders was acting for and on behalf of Respondent 2 and had the authority of Respondent 2, collapses, then it must necessarily follow that Respondent 2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if Respondent 2 happens to be a constituent of the group of companies of which Respondent 1 is also a constituent, that will be of no avail. For, the burden is on the applicant to establish that Respondent 2 had an intention to consent to the arbitration agreement and be party thereto, maybe for the limited purpose of enforcing the indemnity Clause 9 in the agreement, which refers to Respondent 1 and the supplier group against any claim of loss, damages and expenses, howsoever incurred or suffered by the applicant and arising out of or in connection with matters specified therein. That burden has not been discharged by the applicant at all.

On this finding, it must necessarily follow that Respondent 2 cannot be subjected to the proposed arbitration proceedings. Considering the averments in the application under consideration, it is not necessary for us to enquire into the fact as to which other constituent of the group of companies, of which the respondents form a part, had participated in the negotiation process.”

(emphasis supplied)

17. Upon a considered interpretation of the transaction in the documents cited by the petitioner in the present case, this court is of the opinion that the petitioner has failed to discharge the burden to establish consent on the part of respondent No. 2 to have any disputes arising from the transaction to arbitration. The petitioner's emphasis on certain documents and correspondence exchanged with respondent No. 2, are all post the execution of the contractual documents between the petitioner and respondent No. 1; and most importantly, even such *post-hock* correspondence does not establish the existence of an arbitration agreement between the petitioner and respondent No. 2. From another perspective, the petitioner's reliance upon the later documents and correspondence is also destructive of the petitioner's own averment that respondent No. 2 was involved in the negotiations between the petitioner and respondent No. 1.
18. Accordingly, in the opinion of this court, the requirement of there having to be an arbitration agreement between the petitioner and respondent No. 2 is not fulfilled.
19. To add to this, in the present case, evidently invocation notice dated 26.10.2020 was issued by the petitioner *only* to respondent No. 1, without even a copy being marked to respondent No. 2; and the invocation notice is founded upon the contractual documents, all of

which have been signed *only* between the petitioner and respondent No. 1 and not with respondent No. 2.

20. There is yet another glaring factor upon which the decision of the present petition hinges. And that is, that in invocation notice dated 26.10.2020, which was addressed *only* to respondent No. 1, the claims raised by the petitioner also relate only to respondent No.1. These claims are:

- (i) Regarding alleged non-payment for work done and amount of Rs.4,61,94,069/- withheld by respondent No. 1;
- (ii) Disputes relating to bank guarantees furnished by the petitioner to respondent No. 1;
- (iii) Disputes as to payment of margin money for extension of the bank guarantees in question, and for payment of interest in connection therewith;
- (iv) Disputes relating to payment of interest on amounts claimed by the petitioner to be due from respondent No. 1.

21. It is noteworthy that the subject performance bank guarantees and advance bank guarantees, were issued at the instance of the petitioner *only* in favour of respondent No. 1. Clearly therefore, *invocation notice dated 26.10.2020 does not even purport to raise any claim against respondent No.2*, much less does it purport to raise any arbitrable dispute against the said respondent.

22. Insofar as separate notice dated 27.08.2021 issued by the petitioner to respondent No. 2 is concerned, in the said notice, the petitioner *does not call upon* respondent No. 2 to *refer* any disputes to arbitration; but only seeks the *consent* of respondent No. 2 to agree upon the person nominated by respondent No. 1 as its arbitrator, meaning thereby that

it only calls upon respondent No. 2 to accept respondent No. 1's nominee arbitrator as its own nominee. In notice dated 27.08.2021 the petitioner claims that despite not being a signatory to the contractual documents containing arbitration agreement with respondent No. 1, respondent No. 2 is yet a necessary and proper party to the arbitration *inter-alia* for the following reasons :

- “v) *RattanIndia Power Ltd. was a direct beneficiary of the work that was executed by my client.*
- vi) *There is plethora of documents to show that RattanIndia Power Limited was directly involved in the work that was executed by my client.*
- vii) *From the facts and circumstances, and from the numerous documents and communications on record, it is an established case that IICL is an alter-ego(sic)RattanIndia Power Ltd (formerly known as IndiabullsPower Ltd.)”*

23. In the opinion of this court, notwithstanding the above allegations, notice dated 27.08.2021 issued by the petitioner to respondent No. 2 does not raise any independent disputes with respondent No. 2; and does not call upon respondent No. 2 to refer any disputes to arbitration. The disputes sought to be raised by the petitioners and the claims made by it *relate only to respondent No. 1*; and there is nothing to show that respondent No. 2 was liable to pay the petitioner's dues if respondent No. 1 defaulted in doing so. The subject bank guarantees, in relation to which relief is sought by the petitioner, were admittedly issued by the petitioner *only* in favour of respondent No. 1; and the petitioner cannot therefore seek release of the subject bank guarantees from respondent No. 2.
24. It is settled law that a petition under section 11 of the A&C Act is founded upon a party validly invoking arbitration as a remedy in

relation to arbitrable disputes with another. It has also been held by a Co-ordinate Bench of this court in *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*²³ that a notice under section 21 of the A&C Act is not an empty formality but is a critical step in the arbitral process, since it puts the party against whom a claim is made in arbitration, to notice as to what the claims are; whether the party accepts some or all of those claims; and also provides to the other party an opportunity to point-out if some of the claims are time-barred; or are barred by any law; or are untenable in fact and also to raise its counter-claims, if any. On a plain reading of section 21, arbitration proceedings get ‘triggered’ only upon issuance of a valid invocation notice under section 21.

25. In the present case therefore, there is no valid invocation notice issued by the petitioner to respondent No.2 under section 21, which could be the foundation of the present petition under section 11.
26. In the above view of the matter, the requirements that the petitioner should establish the existence of an arbitration agreement with respondent No. 2; that there should be arbitrable disputes between those two parties; and that a valid invocation notice should have been issued by the petitioner to respondent No. 2, are not satisfied.
27. For completeness, it may be mentioned that as far as territorial jurisdiction of this court is concerned, both parties are *ad-idem* that this court is entitled to entertain and decide the present petition since, parties to the contractual documents had agreed that arbitration proceedings are to be conducted at New Delhi.

²³ 2017 SCC OnLine Del 7228; paras 25-30.

28. Although the petitioner also lays some emphasis on the earlier proceedings in O.M.P.(I) (COMM.) 172/2020, which petition was filed by the petitioner seeking relief in relation to the performance bank guarantees, the orders made in the said matter relate only to respondent No. 1; and though the petitioner had impleaded respondent No. 2 also as a party-respondent, no order was made against respondent No. 2 since the performance bank guarantees in question were held only by respondent No. 1.
29. As a sequitur to the above, the present petition cannot be allowed against respondent No.2, much less only for the reason that respondent No.1 is presently under moratorium.
30. The present petition is accordingly dismissed.
31. Pending applications, if any, also stand disposed of.
32. To be sure, the dismissal of the present petition would not bar the petitioner from invoking any other remedies available to it, whether against respondent No.1 and/or respondent No.2, before the appropriate court/forum, in accordance with law.

ANUP JAIRAM BHAMBHANI, J

NOVEMBER 11, 2022

Ne/uj