

**In The High Court at Calcutta  
Original Civil Jurisdiction  
Original Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya**

**AP NO.67 OF 2023  
RITHWIK PROJECTS PRIVATE LIMITED  
VS.  
MBL INFRASTRUCTURES LIMITED**

For the petitioner : Mr. Sayantan Bose, Adv.,  
Mr. Arjun Mookerjee, Adv.  
Ms. Ankita Chowdhury, Adv.

For the respondent : Mr. Ratnanko Banerjee, Sr. Adv.,  
Mr. Shaunak Mitra, Adv.,  
Mr. Kanishk Kejriwal, Adv.,  
Ms. Pritha Bassu, Adv.,  
Ms. J. Sabbah, Adv.,  
Ms. Anita Agrahari, Adv.,  
Mr. D. Chakraborty, Adv.

Hearing concluded on : 11.05.2023

Judgment on : 05.06.2023

**The Court:**

1. The present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the 1996 Act") for reference to arbitration of the dispute which has arisen between the parties in connection with an Option Agreement dated October 18, 2010, as amended on July 29, 2011, which contains an arbitration clause.
2. Such contention is disputed by the respondent, *inter alia*, on the ground that the Agreement is insufficiently stamped. It is argued that as per Item No.5(b)(ii) of Schedule 1A of the West Bengal Amendment

of the Indian Stamp Act, the stamp duty payable for the Option Agreement is at least above Rs.23,00,000/-, whereas the said Agreement has been recorded on a stamp paper of Rs.100/- only. In view of Section 38 of the Indian Stamp Act, 1899 (in brief, “the 1899 Act”) the court cannot refer the matter to arbitration. In such context, the learned Senior Advocate appearing for the respondent cites *N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Ltd. And others*, reported at 2023 SCC OnLine SC 495.

3. Next, it is argued that the application is misconceived and bad for non-joinder of the Special Purpose Vehicle (SPV), namely Orissa Steel Expressway Private Limited, which a party to the Option Agreement containing the arbitration clause.
4. Clauses 5.2 and 7(b) imposes certain obligations and undertakings on the said SPV. Hence, it is argued that any order or award passed in an arbitration arising out of the Option Agreement would affect the SPV and its rights. The SPV may refuse to register any transfer of shares inter se the parties as under Section 58 of the Companies Act, 2013 (for the sake brevity, “the 2013 Act”) and the private company may refuse the transfer of any securities in pursuance of the company’s powers under its Articles or otherwise. Thus, the application is not maintainable in its present form for non-impleadment of the SPV.
5. The learned Senior Advocate for the respondent next argues that the claim sought to be referred to arbitration is *ex facie* barred by limitation. The right to exercise Option as per the Agreement-in-question accrued on January 13, 2017 with the termination of the

Concession Agreement with the National Highways Authority of India (NHAI), which initiated the project. The Option Period, as per the Option Agreement, also expired on the same date in terms of Clause 1.1.27 and 1.1.20 respectively, read with Clause 3.1 of the Agreement. Clause 10 of the Agreement clearly stipulates that the same would remain in force and in effect until expiration of the Option Period and it was clarified that the notice would have to be served on or prior to expiry of the Option Period, whereas the right of Option has been exercised first only on June 1, 2002, much after the expiry of the limitation period. Thus, in the absence of any invocation by a notice and/or claim being made by the petitioner during the relevant period or within the period of limitation, the claim stands *ex facie* time-barred. In such context, learned senior counsel cites *Vidya Drolia and others Vs. Durga Trading Corporation*, reported at (2021) 2 SCC 1.

6. It is next argued by the respondent that a Corporate Insolvency Resolution Process (CIRP) commenced on March 30, 2017, that is, after the Option Right accrued in favour of the petitioner on January 13, 2017. A Resolution Plan was ultimately approved by the National Company Law Tribunal (NCLT) on April 18, 2018. However, the petitioner did not file any claim during the course of the CIRP, thus leading to its claim being extinguished upon approval of the Plan. Hence, the subject-matter and claim are demonstrably 'deadwood'. Learned senior counsel places reliance, again, on *Vidya Drolia (supra)* in support of such proposition.
7. The learned Senior Advocate, while dealing with the petitioner's reliance on an order dated August 30, 2022 passed by the NCLT,

Cuttack Bench in an application under Section 8 of the 1996 Act, argues that the said proceeding and the order passed therein have no relevance to the instant case.

8. The subject-matter of the proceeding before the NCLT, Cuttack Bench was wholly different and did not relate to the purported Option Right of the petitioner, it is argued. It was the respondent herein who had filed proceedings under Sections 58, 59, 241 and 242 of the 2013 Act in relation to the affairs of the SPV, complaining of acts of oppression and mismanagement. The present application under Section 11, however, is founded on a totally separate and independent footing, that is, the exercise of Option Right by the petitioner under a private arbitration agreement.
9. Moreover, the order passed under Section 8 of the Cuttack Bench only refers some disputes in the Company Petition to arbitration, which do not pertain to the exercise of Option Right by the petitioner. It is further argued that the Company Petition was filed in 2020 whereas the exercise of Option Right purportedly took place only in the year 2022. Thirdly, it is argued that the NCLT order is at present under challenge in an appeal pending before the NCLAT and no finality can, thus, be attached to the same.
10. It is contended by the respondent that, on the above grounds, the application under Section 11 of the 1996 Act ought to be dismissed.
11. Learned counsel for the petitioner submits that the claim is not *ex facie* time-barred. It is argued that the obligations under the Option Agreement requiring the petitioner to exercise its Option stood novated by the petitioner's letter dated July 29, 2011, by which the petitioner

waived all rights or claims towards Option Premium paid to the respondent as consideration for acquiring the right to purchase the Option Shares, which were to be transferred by the respondent without any further act on the part of the petitioner.

12. Clause 10 of the Agreement provides that the Agreement would remain binding and effective until the fulfilment of obligations by the respondent, that is, by the transfer of the Option Shares to the petitioner. Hence, the said Agreement cannot be deemed to have lapsed but is alive till the said shares are delivered to the petitioner.
13. No time was fixed for completion of the transfer of the Option Shares in terms of the letter dated July 29, 2011. Hence, the stipulation of obligations of the parties under the Option Agreement, which were to come to an end on the expiry of the Option Period, stood novated.
14. It is further argued by the petitioner that the respondent had, at no material point of time, communicated its refusal to perform its obligations under the said agreement. Only upon the respondent initiating the company petition bearing CP No.09/TTB/2020 on or about January 6, 2020 before the NCLT, Cuttack Bench, it became apparent that the respondent was trying to avoid its obligations under the Option Agreement. The filing of the company petition was an implied refusal by the respondent to perform its obligation. Hence, the cause of action for enforcing the petitioner's right under the Agreement cannot be said to have arisen before January 6, 2020, the date of filing of the company petition. As such, the petitioner's invocation of the arbitration clause *vide* Notice dated October 29, 2022 cannot be said to be barred by limitation.

15. Article 54 of Schedule I of the Limitation Act, 1963 (for short, “the 1963 Act”), it is submitted, prescribes the period of limitation for specific performance of contract to be three years from the date fixed for performance or, in the absence of such date being fixed, when the plaintiff has notice that performance is refused.
16. In the present case, since the time fixed for performance under the Option Agreement stood novated by the letter dated July 29, 2011, there remained no fixed time for the performance of obligations by the respondent and the time for the petitioner started to run only when the petitioner first had the notice of refusal.
17. Hence, the limitation period started running from January 6, 2020 and not from January 13, 2017.
18. Learned counsel for the petitioner also places reliance on *Vidya Drolia (supra)* to argue that the court, at the reference stage, can interfere only when it is manifest that the claims are *ex facie* time-barred and dead or there is no succeeding dispute.
19. In the very least, the Option Agreement, as amended, including all documents executed pursuant to the amendment dated July 29, 2011, has to be interpreted to ascertain whether there was any fixed time for performance or whether the time originally fixed ceased to exist by reason of the amendment of July 29, 2011. The effect of the letter dated July 29, 2011 on the Option Period is also to be explored by interpreting the contract documents, which is beyond the scope of an application under Section 11 of the 1996 Act.
20. The claim of the petitioner, it is argued, cannot be classified as deadwood. Hence, the reliance placed by the respondent on the

judgment of this Court in *B.K. Consortium Engineers Private Limited Vs. Indian Institute of Management*, reported at AIR 2023 Cal 125, is misplaced.

21. Learned counsel for the petitioner reiterates reliance on the letter dated July 29, 2011 whereby the petitioner expressly undertook to exercise all its obligations under the Option Agreement, as amended. It is argued that the effect of the letter was that the parties agreed that the respondent would be obligated to transfer the Option Shares without the petitioner being required to undertake any further act. Hence, the same was sufficient exercise of the option. In any case, it is contended, the question as to whether the said letter constitutes a valid exercise of option or a novation of the provisions of the original Option Agreement is required to be adjudicated by the Arbitral Tribunal and not the Court on an application under Section 11 of the 1996 Act.
22. The petitioner next deals with the argument of the respondent that the Option Agreement was not enforceable in view of the respondent having been admitted to CIRP and Resolution Plan having been approved. Such contention is misconceived for two reasons :
23. First, the petitioner was not a creditor of the Company, either financial, operational or otherwise on the date of commencement of the CIRP within the contemplation of *Committee of Creditors of Essar Steel India Limited through authorised signatory Vs. Satish Kumar Gupta and others*, reported at (2020) 8 SCC 531.

- 24.** Secondly, the petitioner does not fall within the classes of persons mentioned in Section 31 of the IBC who are bound by the Resolution Plan, once sanctioned.
- 25.** In order to qualify as a creditor, the petitioner had to have a 'debt' due to it by the respondent on the date of admission of the respondent to CIRP. To be a creditor, the debt had to arise as a result of liability or obligation arising out of a claim within the meaning of the IBC. The definition of claim under Section 3(6) of the IBC does not apply to the present case.
- 26.** The petitioner is a holder of an option to call upon the respondent to effect delivery of certain shares, which does not give rise to a claim in money, especially since the Option Agreement itself provides that it is specifically enforceable (Clause 8 of the Agreement).
- 27.** Section 31 of the IBC is also not satisfied inasmuch as the petitioner is neither an employee nor a member nor a creditor, nor the Central or State Government or local authority to whom a debt in respect of the payment of dues under law in force has arisen. The petitioner is also not a guarantor or stakeholder of the respondent involved in the Resolution Plan. Hence, Section 31 does not operate as a bar against the petitioner's claim against the respondent.
- 28.** As such, the judgments of *Ghanashyam Mishra and Sons Private Limited through the authorised signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director and others*, reported at 2021 SCC OnLine SC 313 and *Essar Steel India (supra)*, it is argued, do not affect the petitioner's claim.

- 29.** The agreement between the parties forming the subject of the present dispute is not rendered unenforceable by reason of the CIRP. Learned counsel for the petitioner also places reliance on the definitions of ‘creditor’ in Section 3(10), ‘debt’ in Section 3(11) and ‘claim’ in Section 3(6) of the IBC. In addition, it is argued that in CP No.09/CTB/2020, the NCLT, Cuttack Bench recorded in the order dated August 30, 2022 that the petitioner had sent a letter for effecting the Option Shares to the respondent and that the respondent had filed a Company petition in retaliation. The NCLT, despite having noticed the CIRP and approval of Resolution Plan, had expressly held that the disputes between the parties were arbitrable and fell within the scope of the arbitration agreement in Clause 11(f) of the Option Agreement dated October 18, 2010.
- 30.** As regards the argument of non-joinder of the SPV, it is contended that the SPV is neither a necessary nor a proper party to the present petition. The dispute herein arises solely on account of breach of obligations on the part of the respondent under the Option Agreement and the petitioner does not, at the present juncture, have any claim against the SPV.
- 31.** Moreover, as per the Option Agreement, reciprocal obligations and duties were agreed between the petitioner and the respondents specifically, and no contractual relationship was established between the petitioner and the SPV.
- 32.** Clause 8 of the Option Agreement contemplates only the petitioner and the respondent suffering due to non-fulfilment of the respective

obligations vis-à-vis the other. The SPV is neither affected, nor has any right or liability under the Agreement.

- 33.** As regards the respondent's contention of insufficient stamp duty, the same is argued to be fallacious by the petitioner. In terms of Section 4 of the 1899 Act, in case of several instruments used for completing a sale, only the principal instrument is chargeable with applicable duty and the remaining documents are chargeable with a duty of Re.1. Sub-section (2) of Section 4 of the said Act also provides that the parties shall determine for themselves which of the instruments shall be treated as a principal instrument. In the present case, the transfer of shares pursuant to the Option Agreement and the share transfer agreement is to be given effect to by execution of transfer deeds which have been treated, if not expressly, by implication, as the principal instrument chargeable with duty. The share transfer agreement, the Option Agreement and the transfer deeds are all documents constituting a single transaction and cannot be treated as independent transactions.
- 34.** Without prejudice to the above argument, the petitioner also undertakes to produce the original agreement for impoundment in terms of Sections 33 and 35 of the 1899 Act, if so directed.
- 35.** As such, it is argued that none of the objections of the respondents are tenable in the eye of law. The dispute arisen between the parties is squarely arbitrable as per Clause 11(f) of the Option Agreement dated October 18, 2010 and the respondent does not have any cogent ground for refusing to nominate its Arbitrator.

- 36.** Upon hearing learned counsel for the parties, it is of utmost importance to look into the plain meaning of the relevant clauses of the Option Agreement dated October 18, 2010.
- 37.** In Clause 1.1.26, “Option Period” is defined as the period starting from Option Start Date and ending immediately after the completion of the Concession Period.
- 38.** Clause 1.1.27 provides that “Option Start Date” shall mean the earlier of the date (a) immediately after the completion of the lock-in period, (b) on which NHAI permits the transaction contemplated in the agreement and/or (c) of termination of the Concession Agreement.
- 39.** Clause 1.1.32 defines “settlement date” as a date on which the Option Shares are transferred from the respondent and/or its affiliate/associates to the exercising party and the exercising party is registered as the owner of such Option Shares in the Registrar of the Company and shall not be later than two days from the Notice Date.
- 40.** Clause 2.1 of the Agreement provides that the exercising party shall have the right but not the obligation to acquire all the Option Shares, *during the Option Period*, from the respondent and/or its affiliates/associates in accordance with the terms and conditions of the agreement.
- 41.** Clause 3.1 provides that the petitioner *shall exercise the Option during the Option Period*.
- 42.** Clause 3.2 stipulates that the issuance of the Notice shall constitute an irrevocable binding obligation on the respondent and its affiliates/associates to sell to the exercising party the identified Option

Shares, simultaneously with the payment of the residual Option Price by the exercising party.

- 43.** Clause 4.1 provides that, subject to the completion of the undertaking by the parties, the sale and purchase of the identified Option Shares shall take place on the Settlement Date.
- 44.** Clause 8 stipulates that both parties agree that either party would suffer irreparable loss and injury in the event any provisions of the Agreement were not performed in accordance with the terms and conditions therein. The parties also agreed to be entitled to an injunction to prevent breach of agreement or to enforce specifically the terms and conditions thereof in any court of competent jurisdiction.
- 45.** Importantly, Clause 10 provides for Effective Date and Duration of the Obligations.
- 46.** Sub-clause (a) of Clause 10 stipulates that the agreement shall be effective from the date of execution and shall remain in full force and effect until the earlier of (i) the expiration of the Option Period, (ii) the settlement date on which the entire Option Shares are transferred by the respondent and its associates/affiliates, (iii) the mutual termination, in writing, by the parties.
- 47.** Sub-clause (b) of Clause 10 provides that if a *notice has been served on or prior to the expiry of the Option Period*, the agreement shall continue in force until the fulfilment of all obligations by the parties in relation to the notice (even though such obligations may fall beyond the Option Period).
- 48.** Clause 11(f) contains the arbitration clause which can be invoked if the dispute cannot be settled within thirty days of mutual conciliation.

- 49.** The petitioner has repeatedly asserted its claim on the basis of the letter dated July 29, 2011 (Annexure D at page 130 of the application). The same was a unilateral undertaking and irrevocable confirmation by the petitioner that if the petitioner and/or AMRCL fails to make the payment of the balance amount of Option Premium to the respondent on the same business day on which the petitioner and AMRCL respectively receives payment from the Rithwik-AMR-MBL JV/OSEPL out of the first disbursement made by the Senior Lenders to OSEPL, the Rithwik-AMR-MBL JV shall not release any further funds/payments to the petitioner, AMRCL and/or on their behalf, till the payment of the aforesaid balance amount of Option Premium is paid to the respondent. Certain other related undertakings were also made by the petitioner.
- 50.** The next relevant communication by the petitioner is Annexure E at page 132 of the application, dated July 2, 2022, whereby the petitioner sought to invoke the provision of mutual conciliation as per Clause 11(f) of the Option Agreement and indicated that in case of failure, the petitioner would seek resolution of the dispute by invoking arbitration.
- 51.** Another communication dated October 29, 2022 has been annexed by the petitioner to its application mentioning the dismissal of the company petition filed by the respondent and referring to an application under Section 8 of the 1996 Act being allowed by the Tribunal *vide* order dated August 30, 2022. Accordingly, the petitioner invoked the arbitration clause.

- 52.** From the definitions as provided in the Option Agreement itself, there cannot be any doubt that the agreement, under Clause 10(a), was to be effective from the date of execution and was to remain in full force and effect until the earlier of three contingencies. It is undisputed that out of the three contingencies, the first, being expiration of the Option Period, was the earliest, since there was no settlement date or mutual termination.
- 53.** The Option Period, as per Clause 1.1.26, means the period starting from the Option Start Date and ending immediately after the completion of the Concession Period.
- 54.** Clause 1.1.27 stipulates the Option Start Date to mean the earlier of three eventualities. Since no question arose of completion of the lock-in period or NHAI permitting the transaction, Clause (c), that is, termination of the Concession Agreement, was the earliest of the three eventualities.
- 55.** As such, the Option Start Date was the date of termination of the Concession Agreement, that is, January 13, 2017. Since the Option Period under Clause 1.1.26 ends immediately after the completion of the Concession Period, which is also January 13, 2017, *the Option Period in the present case, in reality, comprised of a single date, that is, January 13, 2017*, on which date the Concession Agreement was terminated and which was the single date on which the Option Start Date and end of Option of Period coincided.
- 56.** The notice dated July 29, 2011, on which the petitioner seeks to rely, was long before the Option Period. As such, the same cannot count,

by any stretch imagination, as the exercise of Option under the Option Agreement.

- 57.** Insofar as the Notices dated July 2, 2022 and October 29, 2022 are concerned, both the said dates were far beyond the Option Period. Clause 2.1 of the Option Agreement clearly provides that the exercising party shall have the right to acquire all the Option Shares *during the Option Period*.
- 58.** Clause 3.1 also stipulates that the petitioner shall exercise the Option during the Option Period by issuing a notice.
- 59.** Clause 10(a) is specific on the effective date and duration of the obligations of the parties under the Option Agreement. As per sub-clause (a) of Clause 10, the Agreement was to be effective from the date of execution and was to remain in full force and effect until the earlier of three possible dates. Out of the three, admittedly Clause (i), that is, the expiration of the Option Period, was the earliest. As per the above discussion, the Option Period started and ended with the termination of the Concession Agreement on January 13, 2017, on which date the petitioner did not issue any notice whatsoever.
- 60.** Clause 10(b) clarifies that if a notice has been served on or prior to the expiry of the above period, the agreement would continue in force until the fulfilment of all the obligations, even though such obligations may fall beyond the Option Period. The expression “on or prior to the expiry” has to be read in conjunction with the rest of the provisions discussed above, which unerringly indicate that the Option was to be exercised during the Option Period by issuing a notice as per Clause 3.1 of the Agreement. Hence, read in such fashion, Clause 10(b) has

to be read to stipulate that the notice was to be served on or prior to the expiry of the Option Period but, in terms of Clause 3.1, during the Option Period.

- 61.** In the present case, the petitioner having admittedly not done so, the question of applicability of Clause 10(b) does not arise at all. Hence, the argument of the petitioner, that upon service of the notice on July 29, 2011 the obligations under the Agreement crystallised and were to continue in force until fulfilment even though such obligations may fall beyond the Option Period, falls flat. In the absence of any notice being served within the time as contemplated in the agreement, there did not arise any question at any point of time for the obligations under the agreement to continue. Hence, the petitioner's argument of its rights having crystallised with the notice dated July 29, 2011 is not tenable in the eye of law and in the context of the agreement. Such unilateral notice of the petitioner did not even constitute any agreement between the parties to give rise to obligations on the part of the respondent.
- 62.** The NCLT order relied on by the petitioner could not, in any manner, confer any right on the petitioner to assert the Option Agreement Rights, if the same otherwise did not arise from the Option Agreement. Whatever observation was made by the NCLT, was in the context of the limited dispute raised before it pertaining to alleged oppression and mismanagement in the company and did not have anything to do with the present dispute regarding exercise of Option Rights.

- 63.** Thus, on a comprehensive reading of the agreement and its amendment, the dispute sought to be referred to arbitration is proverbial ‘deadwood’, as often used by the Supreme Court.
- 64.** Hence, the question of curing the defect of insufficient stamp as per *N.N. Global (supra)*, reported at 2023 SCC OnLine SC 495 does not come into operation at all.
- 65.** Following the principles in *Vidya Drolia (supra)*, the dispute sought to be raised by the petitioner is not maintainable and, hence, non-arbitrable. Even by limiting the interference of Court under Section 11 to a *prima facie* review of the dispute, the dispute sought to be referred is patently ‘deadwood’ and non-arbitrable. Thus, a reference to arbitration of such a dispute, which is *ex facie* not maintainable, would merely be a futile exercise.
- 66.** The same principle was laid down in *B.K. Consortium Engineers Private Limited (supra)* by the co-ordinate Bench of this Court.
- 67.** As far as *Ghanashyam Mishra (supra)* and *Essar Steel India Limited (supra)* are concerned, the same proposition finds iteration, insofar as the claim of the petitioner was extinguished. Although the only date on which the notice exercising the Option could be issued was January 13, 2017, the petitioner chose not to make any claim in the CIRP which commenced subsequently on March 30, 2017 and the Resolution Plan therein was accepted on April 18, 2018. The petitioner, at least, was an operational creditor within the IBC. Hence, assessing from such perspective as well, the petitioner’s claim is ‘deadwood’.

- 68.** Insofar as the non-impleadment of the SPV, Orissa Steel Expressway Private Limited is concerned, the same could be termed as a curable defect. Although the SPV was a signatory to the Option Agreement and a proper party to the present application, the question of curing such defect became infructuous *ab initio* in view of the application under Section 11 not being maintainable on the grounds as indicated above.
- 69.** Thus, the present application under Section 11 of the Arbitration and Conciliation Act, 1996 is not maintainable in law and in terms of the Option Agreement itself, as amended.
- 70.** Hence, AP No.67 of 2023 is dismissed on contest, without any order as to costs.
- 71.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

**( Sabyasachi Bhattacharyya, J. )**