

\$~3

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

Date of decision: 11th May, 2023

+ ARB.P. 1113/2022 & I.A. 556/2023

ARPIT PROJECTS LTD.

..... Petitioner

Through: Mr.Chetan Anand, Mr.Akash
Srivastav, Ms.Tejasvini Singh,
Advs.

versus

GURGAON RECREATION PARK LIMITED Respondent

Through: Mr.Siddharth Batra, Ms.Shivani
Chawla, Mr.Chinmay Dubey,
Mr.Rhythm Katyal, Mr.Ashutosh
Chugh, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to a Memorandum of Understanding dated 27.04.2009 executed between the parties.
2. On issuance of the notice of this petition, the respondent filed an application, being I.A.556/2023, praying that in view of the moratorium declared by the Hon'ble Supreme Court vide orders dated 20.01.2020 and 24.03.2021 in Civil Appeal No.10856/2016, titled *Bhupinder Singh v. Unitech Limited*, vis-à-vis subsidiaries

and group entity, the present petition be adjourned *sine die*.

3. The learned counsel for the respondent, in support of the application, has drawn my attention to the order dated 20.01.2020 passed by the Hon'ble Supreme Court in the above-mentioned Civil Appeal. The same *inter-alia* directs as under:

“We issue the following directions:

xxx

(vii) Pending further orders of this Court, there shall be a moratorium against the institution of proceedings against Unitech Limited and its subsidiaries. The moratorium shall also extend to existing proceedings against the company as well as the enforcement of orders that may have been passed against the company.”

4. The learned counsel for the respondent further draws my attention to the order dated 24.03.2021 passed in the above Civil Appeal, which *inter-alia* directs as under:

“2. The Learned Additional Solicitor General has explained the import of the directions which have been sought in respect of the above categories. Certain directions have been sought from this Court to facilitate the work of the new Board of Management. Having considered the proposed directions, we are of the view that at this stage, the following directions can be issued to facilitate the control and management of the new Board of Management:

(1) The new Board shall be responsible for the management and control of the Unitech Group (including all its affiliates, trusts, subsidiaries etc.). The Order passed by this Court dated 20 January 2020 is applicable to all group entities of Unitech Ltd. The management is authorized to appoint and remove Directors/ Trustees of its subsidiaries/ trusts etc.”

5. The learned counsel for the respondent submits that the respondent is a subsidiary of Unitech Limited. In support, he draws my attention to the list of shareholders of the respondent as on 31.03.2015, as also to the Auditor's report dated 08.09.2016 of the respondent.
6. He submits that the Unitech Holdings Limited holds around 52% of the shares of the respondent. Unitech Holdings Limited is a wholly owned subsidiary of Unitech Limited. Relying upon the definition of a "subsidiary company" as defined in Section 2 (87) of the Companies Act, 2013 (hereinafter referred to as "Companies Act"), he submits that with the above shareholdings, the respondent is clearly a "subsidiary company" of Unitech Limited and, therefore, the moratorium as declared by the Hon'ble Supreme Court in its orders dated 20.01.2020 and 24.03.2021, is applicable to the respondent as well.
7. He further draws my attention to the "Resolution Framework Unitech Groups" dated 28.10.2020 submitted before the Hon'ble Supreme Court, which *inter-alia* also mentions the respondent company for "Details of the financial liabilities of Unitech Group as on December 31, 2019" as also in "Potential monetization opportunity for unsold/unutilized FSI and licenses". He submits that the respondent company is, in fact, mentioned in the Annexure-F to the Resolution Framework under the heading "Details of the corporate structure of the Unitech Group". He submits that therefore, there can be no doubt that the respondent company is a part of the 'Unitech Group'.

8. He also draws my attention to various orders passed by this Court rejecting similar petitions filed under Section 11 of the Act against other group companies of Unitech Limited.
9. On the other hand, the learned counsel for the petitioner, placing reliance on the Assisted Sector Agreement dated 01.04.2004 executed between the Haryana State Industrial Development Corporation Ltd. (in short, 'HSI IDC'), on one hand, and M/s Unitech Ltd and Sun Media Pvt. Ltd., on the other, submits that the respondent company is a Special Purpose Vehicle to carry out the project of setting up of a recreation park at Gurgaon, Haryana. He submits that the said agreement records that Unitech Limited and its associates (Unitech Group) and Sun Media Pvt. Ltd./its associates (Jatia Group) hold 42.50% shares each in the respondent Company. Clause 9 of the said Agreement restrained Unitech Limited and Sun Media Pvt. Ltd from *inter se* transferring their shareholding in the respondent Company without prior consent of the HSI IDC. He submits that in spite of this restraint, the Shareholders' Agreement dated 30.09.2006 was executed between Unitech Holdings Limited and Sun Media Pvt. Limited transferring the shareholding *inter se* and thereby increasing the shareholding of Unitech Holdings Limited in the respondent company, without obtaining prior approval of the HSI IDC. He submits that, therefore, no cognizance can be taken by this Court of such clandestine transfer of shareholding. He submits that the moratorium declared by the Hon'ble Supreme Court cannot, therefore, apply to the respondent.

10. I have considered the submissions made by the learned counsels for the parties.
11. Section 2 (87) of the Companies Act defines “subsidiary company” as under:

“2. Definitions.— In this Act, unless the context otherwise requires,—

(87) “subsidiary company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company—

- (i) controls the composition of the Board of Directors; or*
- (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:*

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation.—For the purposes of this clause,—

- (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in subclause (i) or sub-clause (ii) is of another subsidiary company of the holding company;*
- (b) the composition of a company’s Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;*
- (c) the expression “company” includes any body corporate*
- (d) “layer” in relation to a holding company means its subsidiary or subsidiaries.”*

12. The respondent has shown that the Unitech Holdings Ltd., which in turn is a 100% subsidiary of Unitech Limited, holds around 52%

shares in the respondent company. Though, the learned counsel for the petitioner submits that the shareholdings of Unitech Holdings Limited in the respondent company was clandestinely increased without the prior permission of the HSIIDC, the fact remains that on the date of declaration of the moratorium, Unitech Holdings Limited held more than 52% shares in the respondent company and, therefore, the respondent company would be a subsidiary of Unitech Limited. The respondent company would also be a group entity of Unitech Limited as is also evident from the Resolution Framework submitted by the Unitech group before the Hon'ble Supreme Court. Either way, therefore, the respondent company would be covered by the moratorium declared by the Hon'ble Supreme Court in its orders dated 20.01.2020 and 24.03.2021 passed in the Civil Appeal referred hereinabove.

13. I may herein also note that the learned counsel for the respondent has also drawn my attention to the order dated 25.07.2022 passed by the learned National Company Law Appellate Tribunal, Principal Bench, New Delhi in Company Appeal (AT) (Insolvency) No. 431 of 2022, titled *M/s. Entertainment City Limited, Through its Authorised Representative Ms. LekhaMriga v. Simran Kaur & Ors*, which, taking note of the orders of the Hon'ble Supreme Court referred hereinabove, found a company wherein the Unitech Holdings Ltd. held only 41.95% shares as an affiliate of Unitech Limited and, therefore, entitled to the benefit of moratorium. This order has been upheld by Hon'ble Supreme Court in its order dated 17.04.2023 passed in Civil Appeal

No.8321/2022, titled *Shashi Ahuja & Ors v. M/s Entertainment City Limited & Ors.*

14. In view of the above, the proceedings in this petition cannot be continued. The same is disposed of with liberty to the petitioner to file a fresh legal action for the same relief once the moratorium imposed by the Hon'ble Supreme Court is lifted or varied, if so advised, in accordance with the law.
15. The application is allowed, and the petition is disposed of in the above terms.

MAY 11, 2023/Arya

NAVIN CHAWLA, J



न्यायमेव जयते