



\$~

\*

**IN THE HIGH COURT OF DELHI AT NEW DELHI***Reserved on 8<sup>th</sup> May, 2024**Date of decision: 4<sup>th</sup> July, 2024*

+

**ARB. A. (COMM.) 4/2024 & I.As.2124/2024-25/2024****ASF BUILDTECH PRIVATE LIMITED**

..... Petitioner

Through: Dr. Amit George, Mr. Vaibhav Jain,  
Mr. Shashank Pandey & Mr.  
Rayadurgam Bharat, Advs. (M:  
9711218483)

versus

**SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED  
& ORS.**

..... Respondents

Through: Mr. Saurav Agrawal, Ms. Aakanksha  
Kaul, Mr. Aman Sahani, Mr.  
Anshuman Chowdhary, Mr. Satya  
Sabharwal, Ms. Rhea Borkotoky &  
Mr. Akash Saxena, Advs. for R-1.  
Mr. Sanyat Lodha, Adv. for R-2.  
Mr. Tejas Karia, Ms. Avlokita Rajvi,  
Mr. Ramakrishna Veerendra & Mr.  
Mahir Amir, Advs.

WITH

+

**ARB. A. (COMM.) 5/2024 & I.A.2197/2024****ASF INSIGNIA SEZ PVT LTD.**

..... Petitioner

Through: Mr. Sanyat Lodha, Adv. (M:  
8447477651)

versus

**SHAPOORJI PALLONJI AND COMPANY PRIVATE  
LIMITED & ORS.**

..... Respondents

Through: Mr. Saurav Agrawal, Ms. Aakanksha  
Kaul, Mr. Aman Sahani, Mr.  
Anshuman Chowdhary, Mr. Satya  
Sabharwal, Ms. Rhea Borkotoky &  
Mr. Akash Saxena, Advs. for R-1.  
Mr. Tejas Karia, Ms. Avlokita Rajvi,  
Mr. Ramakrishna Veerendra & Mr.  
Mahir Amir, Advs.



Mr. Sanyat Lodha, Adv. for R-2.  
Dr. Amit George, Mr. Vaibhav Jain,  
Mr. Shashank Pandey & Mr.  
Rayadurgam Bharat, Advs. for R-3.

AND

+

**O.M.P. (T) (COMM.) 4/2024**

**BLACK CANYON SEZ PRIVATE LIMITED** ..... Petitioner

Through: Mr. Tejas Karia, Ms. Avlokita Rajvi,  
Mr. Ramakrishna Veerendra & Mr.  
Mahir Amir, Advs. (M: 9650269285)

versus

**SHAPOORJI PALLONJI AND COMPANY  
PRIVATE LIMITED & ORS.**

..... Respondents

Through: Dr. Amit George, Mr. Vaibhav Jain,  
Mr. Shashank Pandey & Mr.  
Rayadurgam Bharat, Advs. for R-3.

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

## **JUDGMENT**

**Prathiba M. Singh, J.**

1. The hearing in these matters has been held in hybrid mode.

### **Background Facts**

2. The present batch of proceedings include two appeals filed under Section 37(2) of the Arbitration and Conciliation Act, 1996, (*hereinafter*, '1996 Act') being, **Arb. A. (Comm.) 4/2024** and **Arb. A. (Comm.) 5/2024** and one petition under Section 14 of the 1996 Act being **O.M.P. (T) (Comm.) 4/2024**.

3. All three proceedings arise out of orders dated 23<sup>rd</sup> May, 2023 and 17<sup>th</sup> October, 2023 passed by the Id. Sole Arbitrator, who was appointed by this Court vide order dated 22<sup>nd</sup> July, 2022 in **Arb.P. 431/2022** titled '**Black Canyon SEZ Pvt. Ltd. v. Shapoorji Pallonji and Company Pvt. Ltd.**'



4. In these three proceedings, the parties are as follows:

| O.M.P. (T) (Comm.) 4/2024                                    |                                                                                         |                                                                                                                                                                                                                                                                                                                                                      |
|--------------------------------------------------------------|-----------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Petitioner                                                   | Respondent(s)                                                                           | Lis                                                                                                                                                                                                                                                                                                                                                  |
| M/s. Black Canyon SEZ Private Ltd.<br>(hereinafter, 'BCSPL') | Respondent No. 1- Shapoorji Pallonji and Company Private Ltd.<br>(hereinafter, 'SPCPL') | This petition seeks termination of mandate of the Id. Sole Arbitrator in terms of Section 14(1)(a) read with Section 14(2) of the 1996 Act.                                                                                                                                                                                                          |
|                                                              | Respondent No. 2-ASF Insignia SEZ Private Ltd.<br>(hereinafter, 'AISPL')                |                                                                                                                                                                                                                                                                                                                                                      |
|                                                              | Respondent No. 3- ASF Buildtech Private Ltd.<br>(hereinafter, 'ABPL')                   |                                                                                                                                                                                                                                                                                                                                                      |
| Arb. A. (Comm.) 4/2024                                       |                                                                                         |                                                                                                                                                                                                                                                                                                                                                      |
| Appellant                                                    | Respondents                                                                             | Lis                                                                                                                                                                                                                                                                                                                                                  |
| ABPL                                                         | SPCPL                                                                                   | This appeal under Section 37(2) of the 1996 Act has been filed seeking setting aside of the orders dated 23 <sup>rd</sup> May, 2023 and 17 <sup>th</sup> October, 2023.<br><br>Prayer is also for a declaration that ABPL is not a necessary/proper party to the arbitral proceedings arising out of SPCPL's Statement of Claim (hereinafter, 'SOC') |
|                                                              | AISPL                                                                                   |                                                                                                                                                                                                                                                                                                                                                      |
|                                                              | BCSPL                                                                                   |                                                                                                                                                                                                                                                                                                                                                      |
| Arb. A. (Comm.) 5/2024                                       |                                                                                         |                                                                                                                                                                                                                                                                                                                                                      |
| Appellant                                                    | Respondents                                                                             | Lis                                                                                                                                                                                                                                                                                                                                                  |
| AISPL                                                        | SPCPL                                                                                   | This appeal under Section 37(2) of the 1996 Act has been filed seeking setting aside of the orders dated 23 <sup>rd</sup> May, 2023 and 17 <sup>th</sup> October, 2023.                                                                                                                                                                              |
|                                                              | BCSPL                                                                                   |                                                                                                                                                                                                                                                                                                                                                      |
|                                                              | ABPL                                                                                    |                                                                                                                                                                                                                                                                                                                                                      |



|  |  |                                                                                                                                                                                      |
|--|--|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  |  | Prayer is also for a direction that AISPL be deleted from the array of parties in the arbitral proceedings before the Id. Sole Arbitrator, out of the purported SoC sought by SPCPL. |
|--|--|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

5. All the above three proceedings find their genesis in the following agreements/instruments executed between different parties:

| <i>Agreement/Instrument</i>                                             | <i>Parties</i> |       |       |
|-------------------------------------------------------------------------|----------------|-------|-------|
| <i>Works Contract dated 21<sup>st</sup> November, 2016</i>              | AISPL          | SPCPL | --    |
| <i>Co-Development Agreement dated 14<sup>th</sup> November, 2017</i>    | AISPL          | BCSPL | --    |
| <i>Supplementary Works Contract dated 9<sup>th</sup> February, 2018</i> | AISPL          | SPCPL | --    |
| <i>Novation Agreement dated 17<sup>th</sup> April, 2018</i>             | AISPL          | BCSPL | SPCPL |
| <i>Settlement Agreement dated 24<sup>th</sup> July, 2020</i>            | BCSPL          | SPCPL |       |

#### **ARB. A. (COMM.) 5/2024**

6. According to the AISPL (the Appellant in *Arb. A. (Comm.) 5/2024*), it is engaged in acquiring land for sale, developing plots, constructing buildings and flats, and acting as real estate agents. It also operates as a civil contractor for various construction projects. AISPL was involved in developing an IT/ITES SEZ project in Haryana, India, which includes a building named 'Black Canyon B1', measuring about 21,60,000 sq. ft., within the SEZ's processing zone. The background of these proceedings is that in order to



execute various construction works associated with the project, AISPL and SPCPL entered into a Works Contract dated 21<sup>st</sup> November, 2016, designating AISPL as the 'Owner'. The Works Contract included an arbitration clause, which was not invoked during AISPL's involvement. Subsequently, a Supplementary Works Contract dated 9<sup>th</sup> February 2018 was entered into to incorporate changes purportedly due to the implementation of Goods and Services Tax in India, revising the contract price.

7. It is also stated that to ensure better operations of the project, a Co-Development Agreement dated 14<sup>th</sup> November, 2017 was also executed between AISPL and BCSPL, designating BCSPL as a Co-Developer. As per AISPL, the said Co-Development Agreement transferred all of AISPL's obligations under the said Works Contract to BCSPL. Following this, it is stated by AISPL that BCSPL received necessary approvals from the Ministry of Commerce and Industry, Government of India, allowing AISPL to completely withdraw from its role as the 'Owner' under the said Works Contract.

8. Further, to ratify the arrangement where BCSPL took over the project's operation and management, a tripartite Novation Agreement dated 17<sup>th</sup> April 2018 was entered into among AISPL, BCSPL, and SPCPL. As per AISPL, the said Novation Agreement substituted AISPL with BCSPL as the 'Owner' under the Works Contract, with SPCPL's consent and acknowledgment. Consequently, as per AISPL, BCSPL fully replaced AISPL in all the responsibilities and obligations under the said Works Contract. It is claimed by AISPL that the execution of the said Novation Agreement discharged AISPL from all its obligations under the said Works Contract, with SPCPL's consent.



9. To further clarify the extent of its obligations, AISPL issued a Letter of Comfort on 17<sup>th</sup> April, 2018. According to AISPL, the said Letter of Comfort stated that in case BCSPL failed to make any payment(s) under the Works Contract, AISPL would ensure prompt payment by BCSPL. According to AISPL, the said Letter did not imply that AISPL itself would be liable for any payments. Following these agreements, AISPL claims to have withdrawn from the Works Contract and did not interfere with BCSPL's management of the project, as per the terms of the Co-Development Agreement.

10. After the Novation Agreement, AISPL was discharged from its obligations under the Works Contract. However, due to delays in completing the work, BCSPL and SPCPL agreed to foreclose the said Works Contract, leading to the execution of a Settlement Agreement on 24<sup>th</sup> July 2020. This agreement, which did not include AISPL as a party or signatory, stipulated that all arising liabilities would be satisfied by BCSPL. As per AISPL, the said Settlement Agreement did not mention any obligations to be fulfilled by the 'ASF Group'. Thus, it is AISPL's case that it was released from its obligations and liabilities under the said Works Contract, with BCSPL assuming full responsibility for the project's continuation and any arising disputes.

11. Thereafter, proceedings under the Insolvency and Bankruptcy Code, 2016 were initiated. AISPL received a demand notice dated 13<sup>th</sup> January, 2022 from SPCPL under Section 8 of the Insolvency and Bankruptcy Code, 2016, (*hereinafter, 'IBC'*) demanding payment of certain sums due to it from AISPL. As per AISPL, SPCPL mischaracterised it as a Corporate Guarantor based on the said Letter of Comfort. The said notices under Section 8 of the IBC were replied to by AISPL on 28<sup>th</sup> January, 2022, stating the nature of



their contractual relationship. However, as per AISPL, National Company Law Tribunal (‘NCLT’) dismissed SPCPL’s application against AISPL on 5<sup>th</sup> August 2022, stating that AISPL could not be treated as a Corporate Guarantor.

12. As per AISPL, despite the NCLT’s order, AISPL received a letter from SPCPL on 4<sup>th</sup> March, 2022, which was a reply to a notice allegedly invoking arbitration and seeking an arbitrator’s appointment. However, it is claimed by AISPL that it had not received any prior letter or notice from SPCPL for about 14 months until the Id. Sole Arbitrator passed the impugned order dated 23<sup>rd</sup> May, 2023, rejecting BCSPL’s application under Section 16 of the 1996 Act, and taking SPCPL’s SoC on record, thereby impleading AISPL in the arbitral proceedings.

13. It is the case of AISPL that upon receiving the notice dated 23<sup>rd</sup> May 2023 from the Id. Sole Arbitrator, AISPL learnt about SPCPL’s efforts to implead it in the arbitration proceedings under Section 11 of the 1996 Act before the High Court of Delhi. As per AISPL, SPCPL did not provide any notice or communication regarding its intention to do so, or to produce AISPL before the Court.

14. It is in the above background that AISPL maintains that there is no arbitration agreement between AISPL and SPCPL, and the dispute between SPCPL and BCSPL, arising from their *inter-se* agreement(s), does not involve AISPL. It is claimed that the said Novation Agreement clearly delineates that AISPL has been discharged from its obligations, with BCSPL taking over its role completely. Therefore, SPCPL’s efforts to implead AISPL in the arbitration proceedings are not borne out by the existing agreements, and consequently, it ought to be deleted from the array of parties.



**AISPL's application under Section 16 of the 1996 Act before the ld. Sole Arbitrator**

15. As per AISPL, having been wrongfully impleaded in the arbitration proceedings between BCSPL and SPCPL by the impugned order dated 23<sup>rd</sup> May 2023, it challenged its impleadment by filing an application under Section 16 of the 1996 Act on 4<sup>th</sup> July, 2023. After hearing the parties, the ld. Sole Arbitrator on 17<sup>th</sup> October, 2023, rejected AISPL's Section 16 application, thereby confirming AISPL's impleadment in the arbitration proceedings and directing them to file a Statement of Defence (*hereinafter*, 'SoD'). AISPL filed their SoD on 29<sup>th</sup> November 2023, and reiterated their stand against their impleadment. The said order rejecting AISPL's application under Section 16 of the 1996 Act has also been impugned in the present proceedings.

**ARB. A. (COMM.) 5/2024**

16. ABPL (the Appellant in *Arb. A. (Comm.) 5/2024*) is engaged in the business of purchasing, selling, contracting, and developing various types of land or plots, whether residential, commercial, industrial, rural, or urban. As per ABPL, on 23<sup>rd</sup> May, 2023, it received a notice from the ld. Sole Arbitrator, informing it that SPCPL had filed a SoC against them, and directed them to appear on 7<sup>th</sup> July 2023.

17. Upon a perusal of the SoC, it is ABPL's case that the disputes primarily involved SPCPL and BCSPL regarding their respective obligations under the Works Contract, the Novation Agreement, and the Settlement Agreement. According to ABPL, the SoC did not contain specific allegations against it. SPCPL's case against ABPL was based solely on ABPL's association with the ASF Group of Companies, which includes both AISPL and BCSPL.



**ABPL's application under Section 16 of the 1996 Act before the Id. Sole Arbitrator**

18. On 3 July 2023, ABPL filed an application under Section 16 of the 1996 Act. It argued that it had no involvement in the dispute as alleged by SPCPL in its SoC. ABPL claimed to be a separate and distinct legal entity, not an alter ego of BCSPL, despite both being part of the 'ASF Group' of companies. It was emphasised that there was no contractual relationship between BCSPL and SPCPL and that it had not received any notice invoking arbitration from SPCPL. Furthermore, ABPL was not a party to the Section 11 petition before the High Court, and thus, had no opportunity to participate in the constitution of the arbitral tribunal. Based on these arguments, ABPL sought a declaration that the Id. Sole Arbitrator did not have the jurisdiction to adjudicate SPCPL's SoC against ABPL and requested its deletion from the arbitration proceedings.

19. In its order dated 17<sup>th</sup> October, 2023, the Id. Sole Arbitrator rejected ABPL's Section 16 application. The Id. Sole Arbitrator noted that ABPL appeared to be an entity 'inextricably linked' to the performance of the Works Contract and the Settlement Agreement. Relying on the '*Group of Companies*' doctrine, the Tribunal justified SPCPL's inclusion of ABPL as a party to the arbitration, suggesting that ABPL 'seemed' to be an alter ego of BCSPL, operating under the same directors/management as part of the ASF Group of Companies. The Id. Sole Arbitrator concluded that the question of impleadment involved mixed questions of law and fact, requiring adjudication, and thus it was not possible to reject SPCPL's SoC based on a preliminary scrutiny.



**O.M.P. (T) (COMM.) 4/2024**

20. BCSPL has filed this petition under Section 14 of the 1996 Act, seeking termination of the mandate of the Id. Sole Arbitrator on the ground that the Id. Sole Arbitrator has *de jure* become incapable of performing his functions in respect of the arbitral proceedings arising out of the Works Contract, the Novation Agreement, and the Settlement Agreement. The said petition arises out of several orders passed by the Id. Sole Arbitrator dated 7<sup>th</sup> July, 2023, 7<sup>th</sup> August, 2023, 25<sup>th</sup> August, 2023, and 17<sup>th</sup> October, 2023.

21. The background of this petition is that on 23<sup>rd</sup> January, 2023, SPCPL filed its SoD but did not file any Counter Claim. According to BCSPL, instead of filing a Counter Claim or an application for condonation of delay, SPCPL filed a SoC on 14<sup>th</sup> February, 2023, naming BCSPL, AISPL and ABPL as Respondents without due permission from the Id. Sole Arbitrator. The said SoC stated that it was a fresh claim against companies of the ASF Group. Thereafter, on 3<sup>rd</sup> March 2023, BCSPL filed an application under Section 16 of the 1996 Act, challenging the Id. Sole Arbitrator's jurisdiction, arguing that SPCPL had forfeited its right to file a Counter Claim under Section 4 of the 1996 Act. BCSPL also requested the rejection of SPCPL's SoC. The Id. Sole Arbitrator, however, dismissed the said Section 16 application on 23<sup>rd</sup> May 2023, stating that SPCPL had the right to file a Counter Claim, and it was preferable to try both claims together. Notices were issued to AISPL and ABPL. After notices were issued to both AISPL and ABPL, these two entities filed their respective applications under Section 16 of the 1996 Act, challenging the authority of the Id. Sole Arbitrator, as already narrated above.

22. On 7<sup>th</sup> July 2023, the Id. Sole Arbitrator bifurcated the arbitral proceedings into two cases:



- **Case-1:** For the disputes from the BCSPL's SoC, with SPCPL as the sole contesting Respondent.
- **Case-2:** For the disputes from SPCPL's SoC, with BCSPL, AISPL and ABPL as Respondents.

23. Thereafter, on 7<sup>th</sup> August 2023, BCSPL raised concerns about above bifurcation and consolidation. The Id. Sole Arbitrator clarified that the labels 'Case-1' and 'Case-2' were for convenience and did not imply consolidation or segregation. The Id. Sole Arbitrator, vide order dated 7<sup>th</sup> August, 2023, kept open the question of whether the cases should be tried together, pending formulation of issues. BCSPL's contention to label SPCPL's SoC as a 'Counter Claim' was noted and deferred the decision.

24. Vide order dated 17<sup>th</sup> October, 2023, the Id. Sole Arbitrator dismissed the Section 16 applications filed by AISPL and ABPL, as already narrated above. In the said order, insofar as the bifurcation was concerned, the Id. Sole Arbitrator noted that the labels 'Case-1' and 'Case-2' were for reference purposes only and did not imply any procedural significance. The question of consolidation was kept open for future determination, after issues had been formulated. In light of the approach taken by the Id. Sole Arbitrator, BCSPL seeks termination of the Id. Sole Arbitrator's mandate with respect to Case-2, on various grounds.

### **Impugned Orders**

25. In the present proceedings, two orders passed by Id. Sole Arbitrator have been challenged i.e., 23<sup>rd</sup> May, 2023 and 17<sup>th</sup> October, 2023.

26. Before the Id. Sole Arbitrator, arguments were heard regarding two pending applications:



- An application filed by SPCPL, on 17<sup>th</sup> February, 2023, seeking condonation of the delay in filing its SoC.
- An application filed by the BCSPL, on 3<sup>rd</sup> March, 2023, invoking Section 16 of the 1996 Act, seeking declaration that SPCPL forfeited and failed to file its Counter-Claim in terms of Section 4 of the Act, the Arbitral Tribunal did not have the jurisdiction to decide and adjudicate the SoC presented by SPCPL on 14<sup>th</sup> February, 2023, and consequently, SPCPL's SoC ought to be rejected.

27. The order dated 23<sup>rd</sup> May, 2023, decided the above said applications. The relevant portion of the order dated 23<sup>rd</sup> May, 2023 passed by the Id. Sole Arbitrator is as follows:

*“23. The argument of the learned counsel for the Claimant BCSPL that the Respondent SPCPL has not complied with the liberty granted by the Hon'ble High Court by raising the issue of joinder before this Tribunal is factually not correct. As already noted, the objection to nonjoinder of AFSPL has been taken in the SoD in answer to the SoC of BCSPL and also reiterated in its own SoC filed by SPCPL.*

*24. In the considered view of this arbitral tribunal, the label put to the pleadings by SPCPL cannot be the decisive factor. It is the substance of a pleading which is to be considered and not the form [see, Ram Sarup Gupta (Dead) by LRs v. Bishun Narain Inter College (1987) 2 SCC 555 and Bachhaj Nahar v. Nilima Mandai & Anr. (2008) 17 SCC 491]. The claims in the SoC of SPCPL arise from the transaction and works that are the subject matter of the dispute already before this arbitral tribunal, courtesy the SoC of BCSPL. It seems to be not in dispute that BCSPL and AISPL have not paid monies to SPCPL claimed due under the Settlement Agreement. From the pleadings on record, prima facie,*



*the Respondent SPCPL may not be wrong in contending that BCSPL and AISPL have essentially sought setoff of such dues against dues claimed on account of the alleged failure of SPCPL to demobilize. The questions as to whether SPCPL failed to demobilize, whether SPCPL can be held liable for any delay in such demobilization and whether BCSPL are entitled to any compensation for such alleged delay or alleged failure, are pending adjudication on the basis of the SoC of BCSPL. Having regard to the position taken by BCSPL in its own Claim, these very questions will, in all likelihood, be also some of the issues raised by BCSPL in its contest to the Claims of SPCPL.*

*25. It was clarified by the legislature through amendment by Act 3 of 2016- post the decision in State of Goa v. Praveen Enterprises (supra)- by insertion of sub-section (2A) in Section 23 of the Act that the "respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement". As is clear from Section 2(9), reference to "claim" in the statutory provisions applies equally to a "counterclaim". A claim referred for adjudication by arbitration under the Act may be defended with right given to the Respondent to press his Counter-claim in the same proceedings. A Counter-claim may be equated with a plaint in a cross-suit [see, Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala & Ors. 1 964) 2 SCR 567; Jag Mohan Chawla V. Dera Radha Swami Sa/sang (1996) 4 sec 699; Union Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. & Ors. (2000) 7 SCC 357; Rajni Rani & Anr. v. Khairati La/ & Ors. (2015) 2 SCC 682; and Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri (2020) 2 SCC 394]. The absence of third parties in the cases cited makes no difference. It is trite that a Claim and a*



*Counter-claim (or a set-off) cannot be separated. It is desirable that both are "tried" together.*

*26. The reliance by the Claimant BCSPL on ruling of Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd. (supra) in the present matter is misplaced. It is not being denied that the Respondent SPCPL had initiated legal action by serving on BCSPL and AISPL the statutory Notices dated 26.08.2021 and 13.01.2022 under Section 8 of IBC. The said notices were resisted and while responding BCSPL had issued the NTA. The High Court of Delhi has taken a view that Demand Notice under IBC suffices for the purposes of Section 21 of the Act [Brilltech Engineers Pvt. Ltd v. Shapoorji Pallonji and Company Pvt. Ltd. 2022/DHC/005579]. Even if such view were not to be taken as a general rule-because, as was pointed out, the respondent in that case was willing to submit to arbitration in parallel Section 9 proceedings - it cannot be ignored that SPCPL had put forward the foundational facts for its own claim against BCSPT, and other group companies in the reply to the said NIA, also marking copy to ASPL, giving unto it a right to press its claims against BCSPL. Since the reference to arbitration has come by an order on the petition under Section 11 of the Claimant BCSPL, it is only proper that SPCPL is pressing its Claims in the same proceedings.*

*27. If the argument of BCSPL is correct that ASPL and ABPL are different juristic persons, it is not for BCSPL to bat for them. The claim at hand is presented by BCSPL and the Respondent SPCPL is within its rights to press for its own claim, arising out of same contracts, in the same proceedings. The argument of BCSPL that the SoC presented by Respondent SPCPL cannot be pressed against ASPL and ABPL because of absence of independent notice under section 21 to them and their absence in proceedings under section 11 before the*



*High Court, has been considered for complete scrutiny, subject to the rights of ASPL and ABPL to raise such (or similar) issues in their own rights at appropriate stage and in appropriate proceedings.*

*28. It bears repetition to note that the issue of joinder of ASPL was raised before the High Court and the right of SPCPL to raise the same before this tribunal was reserved. The test to be applied in case of objection of joinder is as to whether the party in question is necessary or proper party. Given the element of the Comfort letter issued by AISPL at the stage of execution of the Novation Agreement dated 17.04.2028 by AISPL, BCSPL and SPCPL, the said party AISPL is prima facie a necessary party, answerable to the claims of SPCPL. Having regard to the chronology of events leading to the execution of the Settlement Agreement, prima facie, both ASPL and ABPL are proper parties, if not necessary, even to the Claim of BCSPL.*

*29. Whilst BCSPL is the master of the case arising out of its SoCs against SPCPL, so is the status of SPCPL vis-a-vis its own SoCs. The view that additional parties, and also some nonparties, may be impleaded in the counter-claim, because they are necessary parties interested, is well settled [see, Punnakkal Suresh v. Saraswathi 2018 SCC OnLine Ker 3494; Gaya Prasad v. Jamwanti Devi 1997 SCC OnLine Pat 290]. It was observed in Punnakkal Suresh v. Saraswathi (supra) that the "counter-claim necessarily has to be between the parties to the suit which means between the plaintiff and the defendants and for that purpose, if third parties are also necessary for considering the question of counter-claim, they also can be impleaded as additional defendants in the counter-claim".*

*30. The issue as to whether the SoCs of BCSPL may continue without inclusion of AISPL and ABPL in the*



*fray of parties will need to be examined and answered. The fact that BCSPL has chosen not to include them as parties to its own case cannot, however, control the opposite party SPCPL so as to inhibit their inclusion in its own counter case. That, if accepted, would also lead to undesirable result of spilling up one case into two proceedings.*

*31. Though it is doubtful if BCSPL has the locus to raise objections for AISPL and ABPL, since such plea has been raised it must be observed on the basis of available material that prima facie AISPL and the ASF Group are also bound by the arbitration agreement and may be subjected to the jurisdiction of this Tribunal even though they themselves are not signatories to the Arbitration agreement. SPCPL has made out a case by averments, supported by some material, which cannot be rejected at this stage, that the said entities are inextricably linked to and operationally holding control over the performance of the Works Contract and Settlement Agreement which are the subject matter of the present proceedings both (AISPL and ABPL) being seemingly alter egos of BCSPL. At the cost of repetition, it may be noted that it is not denied that ABPL is the holding company of BCSPL and AISPL, with 81.01% and 100% shareholding, respectively. There is material indicating that BCSPL does not have a separate website but it finds its mention on the website of the ASF Group, namely [www.asfinfrastructure.com](http://www.asfinfrastructure.com). Even in the said website, "Black Canyon" (name of the Claimant) is statedly used along with "ASF Insignia". BCSPL, AISPL and ABPL form part of the ASF Group of Companies and seem to be operating under the same Directors/Management/Persons, the ASF Group of Companies being a conglomerate statedly owned and controlled by Mr. Anil Saraf & Family.*

*33. The Respondent invokes the Group of Companies*



*Doctrine, and rightly so, to justify inclusion of non-signatories as party respondents in a claim presented for adjudication by arbitration. The learned Counsel for SPCPL is supported by law when he submitted that a party, which is not a signatory to a contract containing an arbitration clause, may be bound by the agreement to arbitrate if it is an alter ego of a party which executed the agreement and the parties have engaged in conduct or made statements indicating an intention to bind a non-signatory. Where the signatory to the arbitration agreement is a mere puppet of the mother company (being a non-signatory), such corporate mother must be bound by arbitration as well. While determining whether to pierce the corporate veil and deciding a claim for alter ego liability, the adjudicatory fora consider numerous factors such as whether the parent corporation exercised dominance and control over the main contractor, whether the parent and subsidiary are run by common officers, do not deal at arm's length with each other, are not treated as separate profit centers and share common office space.*

38. The learned Counsel for the Respondent SPCPL is right in submitting that the Claims in its SoCs arise from the transaction and works that are the subject matter of the dispute before this Arbitral Tribunal, the Claimant BCSPL and AISPL having allegedly not paid monies to the Respondent SPCPL herein as stipulated under the Settlement Agreement, the Claims in own SoCs of BCSPL being in the nature of set off against reliefs claimed on account of alleged failure of the Respondent SPCPL to demobilize. Indeed, the questions as to whether the Respondent SPCPL had failed to demobilize, or it can be held liable for delay in such demobilization or further as to whether the Claimant BCSPL is entitled to any compensation for such delay or failure (as are alleged) are pending adjudication before this Tribunal and, from this perspective, there is



*bound to be an overlap of the issues arising from the two sets of Claims which would require simultaneous adjudication. Thus, this arbitral tribunal may also adjudicate the Claims raised by the Respondent SPCPL in its SoC.*

*44. It must be observed that SPCPL has filed its SoC while the arbitration proceedings are at the stage of completion of pleadings, issues on the pleadings concerning SoC of BCSPL are yet to be framed and the "trial", if that expression may be used in absence of more appropriate word, on the issues of fact yet to begin. Thus, no prejudice is likely to be caused to BCSPL by the SoC of SPCPL being entertained beyond the time-lines prescribed by the procedural orders. 45. Upon consideration of the rival contentions on this issue, this tribunal is of the view that Delay, not beyond the limitation prescribed under the Limitation Act, ought not be a ground to decline taking the SoD or SoC on record or from being entertained.*

*46. For the foregoing reasons, keeping open the right of the other Respondents in the above said matter to raise such pleas as may be available in law to each of them, the application moved on 03.03.2023 by the Claimant BCSPL invoking Section 16 of the Arbitration and Conciliation Act, 1996 ("the Act") seeking declarations to the effect that the Respondent SPCPL has forfeited or failed to file its Counter-Claim in terms of Section 4 of the Act and that this Arbitral Tribunal does not have jurisdiction to decide and adjudicate the SoC presented by the Respondent SPCPL on 14.02.2023 also seeking rejection of the said SoC of the Respondent is found devoid of merit and, therefore, dismissed.*

*47. Further, the application moved on 17.02.2023 by the Respondent SPCPL seeking condonation of delay in filing of its Statement of Claims is allowed and the delay*



*in it being filed in relation to the procedural orders is condoned.*

*51. Thus, formal notices on the SoC of SPCPL are issued to the two other Respondents in the SoC of SPCPL viz. M/S ASF Insignia SEZ Pvt. Ltd. ("AISPL") and MIS ASF Buildtech Pvt. Ltd. ("ABPL"), i.e., Respondent nos. 2 and 3 respectively, to be sent by post/dasti/email to their available addresses, calling upon them to appear before this arbitral tribunal on the next date, being hereby fixed, in proceedings to be held by Video-conferencing ("VC") and file their respective Statements of Defence in answer to SoC of SPCPL within six weeks from the date of receipt of the copy of the said SoC. The learned Counsel for SPCPL is called upon to assist in service and take necessary steps to serve copies of the SoC, complete in all respects, on the said Respondent nos. 2 and 3 at the earliest. A copy of this order shall be sent to the respondent nos. 2 and 3 with the above-mentioned notices, also requesting each of them to provide the full particulars (including email addresses) of the Counsel and officers or authorised representatives who shall be concerned with or participating on their respective behalf in the present Arbitration for facility of communication and sharing of the VC link and to enable the Arbitral Tribunal to proceed further with the matters."*

28. Thus, in terms of the above order passed by the Id. Sole Arbitrator, the application moved on 3<sup>rd</sup> March, 2023 by BCSPL under Section 16 of the 1996 Act, seeking a declaration that SPCPL has forfeited or failed to file its counterclaim and that the Id. Arbitral Tribunal does not have jurisdiction to decide the SoC presented by SPCPL on 14th February, 2023, was found devoid of merit and dismissed. Further, the application moved on 17th February, 2023 by SPCPL seeking condonation of delay in filing its SoC was



allowed, and the delay was condoned. Thus, formal notices on the SoC of SPCPL were issued to the two other Respondents, AISPL and ABPL, to appear before the Id. Arbitral Tribunal and file their respective SoDs within six weeks.

29. On 7<sup>th</sup> July, 2023, the Id. Sole Arbitrator thereafter bifurcated the claims as Case 1 and Case 2, which can be represented as follows:

| Case | Claimant | Respondents                     |
|------|----------|---------------------------------|
| 1    | BCSPL    | SPCPL                           |
| 2    | SPCPL    | 1. BCSPL<br>2. AISPL<br>3. ABPL |

30. On the said date, AISPL and ABPL moved applications under Section 16 of the 1996 Act, challenging the jurisdiction of the Id. Sole Arbitrator in Case-2 and seeking the deletion of their names from the memo of parties as Respondents. These applications were submitted via email in PDF and Word formats. Notices on these applications have been accepted by the learned Counsel for SPCPL, who has been granted two weeks to file replies. The learned Counsel for R-2 and R-3 may file rejoinders to these replies within one week thereafter. Additionally, it was agreed that pleadings and proceedings from Case-1 will be shared with the learned Counsel for R-2 and R-3 in Case-2 by those participating from the beginning.

31. The relevant portions of the order dated 17<sup>th</sup> October, 2023 passed by the Id. Sole Arbitrator reads as follows:

*“23. The objection of SPCPL to the defect on non-joinder, based particularly on the contention that AISPL is a necessary party was raised before the High Court*



and the same was reserved to be pressed before this tribunal. Ordinarily, the arbitral proceedings would engage only such disputants as are party to the Arbitration Agreement. But it is well settled that non-signatories may also be made parties to such adjudicatory process, inter alia, upon attendant facts and circumstances justifying invocation of group of Companies doctrine. Whilst there may be no quarrel with the proposition that the arbitral tribunal is "not bound" by the Code of Civil Procedure and the Indian Evidence Act (Kerala State Electricity Board and Ors. vs. Kurien E. Kalathil and Ors. (2018) 4 SCC 793), it does not mean the civil jurisprudence does not apply. In adversarial adjudicatory process, the test to be applied for such purposes, and in case of objection to joinder, remains the most fundamental consideration viz. as to whether the party in question is necessary or proper party. **Given the element of the Comfort letter issued by AISPL at the stage of execution of the Novation Agreement dated 17.04.2028 by AISPL, BCSPL and SPCPL, the said party AISPL is prima facie a necessary party, answerable to the claims of SPCPL. Having regard to the chronology of events leading to the execution of the Settlement Agreement and the subsequent conduct ascertainable from correspondence exchanged in its wake, prima facie, both AISPL and ABPL are proper parties, if not necessary, even in relation to the Claim of BCSPL.**

24. BCSPL had taken out the petition under Section 11 of the A&C Act before the High Court. It is the master of the case arising out of its SoCs against SPCPL. It chose to restrict the array of opposite side to SPCPL. But, SPCPL against which the said claim is directed is entitled in law to press its own claims, provided it is able to plead and substantiate a cause of action for the same, against BCSPL, whether styled as Counter-Claim or set off or, to use slightly loose expression (in absence of a



better one coming to mind), by a petition in the nature of a cross-suit. This, it may do, whilst raising for adjudication objection to non-joinder of what from its perspective is necessary or proper party, in the case of the opponent and, by joining such parties (being described by it as necessary or proper) as respondents, in its own case. **Like the opponent, it is also master of its own SoC. Whether the SoC of the second party is to be labelled as Counter-Claim or Set-off or something else is a question of semantics.**

25. It is trite that additional parties, and also some non-parties, may be impleaded in the counter-claim, because they are necessary parties [ see, *Punnakkal Suresh v. Saraswathi* 2018 SCC Online Ker 3494; *Caya Prasad v. Jamwunti Devi* 1997 SCC Online Pat 290]. In *Punnakkal Suresh v. Saraswathi* (supra), it was ruled that the "counter-claim necessarily has to be between the parties to the suit which means between the plaintiff and the defendants and for that purpose, if third parties are also necessary for considering the question of counter-claim, they also can be impleaded as additional defendants in the counter-claim." **In the matter before this Tribunal, SPCPL had raised the issue of non-joinder before the High Court. The issue was kept open and left to be pressed before this Tribunal. And whilst such objection in the matter arising out of the SoC of BCSPL is pending consideration, objection cannot be taken to impleadment, on the ground the fray has been improperly enlarged, it being in exercise of its discretion by SPCPL to press its own SoC including therein the parties whose absence in the former case is objected to.**

26. Noticeably, the applicants (AISPL and ABPL) raise questions of facts. It is their case that AISPL is not the alter-ego of BCSPL, they being separate and distinct legal entities, they having never acted at any time on



behalf of BCSPL and that the intent of the Letter of Comfort was not to assume responsibility to pay for BCSPL.

**27. Having regard to the material available on record, it does appear, prima facie, that AISPL (R-2) and ABPL (R-3) are entities which may have been inextricably linked to and operationally holding control over the performance of the Works Contract and Settlement Agreement which are the subject matter of the present proceedings. Both of them (AISPL and ABPL) seem to be alter egos of BCSPL, they being part of the same group of Companies.**

**28. It is not denied that ABPL is the holding company of BCSPL and AISPL, with 81.01.% and 100% shareholding, respectively. There is material indicating that BCSPL does not have a separate website but it finds its mention on the website of the ASF Group, namely [www.asfinfrastructure.com](http://www.asfinfrastructure.com). It is alleged by SPCPL, which cannot be rejected at this stage when opportunity to adduce evidence is yet to be afforded, that the three Companies under the ASF Group function with the same staff, managers & officials using common domain email IDS (@asfinfrastructure.com). Even in the said website, "Black Canyon" (name of the Claimant) is statedly used along with "ASF Insignia". BCSPL, AISPL and ABPL, forming part of the ASF Group of Companies, seem to be operating under the same Directors/ Management/ Persons, the ASF Group of Companies being a conglomerate statedly owned and controlled by Mr. Anil Saraf & Family.**

29. It is not denied that the Works Contract dated 21.11.2016 was signed by AISPL (R-2), being SPV of ASF Group that was to develop the SEZ, it being the case of SPCPL that there were representations and



assurances that AISPL had the entire support, backing and strength of the ASF Group of Companies. Reliance is placed by SPCPL on email dated 02.06.2021, issued by Mr. Anil Sharma, Vice President (Projects), ASF Group, conveying the commitment of 'ASF Management' to release outstanding dues to SPCPL. Pertinently, the said communication, assumed at this stage to be real, is much later in time to the execution of the Novation Agreement and constitutes prima facie material reflective of the conduct of the partis. **This would be relevant to understand the intent of the parties in context of the Comfort Letter (relevant part quoted earlier) admittedly issued to SPCPL contemporaneous to the execution of the novation agreement dated 17.04.2018 acknowledging that "AISPL and BCSPL are the group of companies of ASF group and both companies are under the management & control of the same set of management/owners", AISPL statedly having "nominated/appointed its associate company Black Canyon SEZ Pvt. Ltd. ("BCSPL ") as a Co-Developer with regard to Black Canyon Private Campus Land, Black Canyon Building and its allied structure "**

....

33. Indeed, last above-mentioned submissions of AISPL and ABPL are founded in ruling of a learned Single Judge of the High Court of Delhi in *Arupri Logistics Pvt. Ltd. v. Shri Vilas Gupta and others* (Arb. A. 5/2022 decided on 24.07.2023) accepting the said proposition, endorsing such view expressed by learned Single benches of the Madras High Court in two judgments reported as *VG. Santhosam v. Shanthi Gnanasekaran & others* (2020 SCC OnLine Mad 560) and *Abhibus Services India Pvt. Ltd v. Pallavan Trampont Consultancies Services Ltd* (2022 SCC OnLine Mad 796). A lot of argument was raised on the issue as to whether the decision of jurisdictional High Court in



*Arupri (supra) is binding or is per incurium (as contended by SPCPL) on the ground, inter alia, that previous ruling of another coordinate bench - Amazon. COM NV Investment Holdings LLC v. Future Coupons Private Limited (supra) - holding to the contrary having not been noticed, the rulings of Madras High Court having only a persuasive value. This tribunal need not venture into such issues for more than one reason.*

*34. It is not correct to argue that by the SoC presented by SPCPL, it has called upon this Tribunal to allow impleadment of AISPL and ABPL. SPCPL has come up with its SoC asserting in its own rights that the said parties are necessary and proper, showing them in the fray, invoking the group of Companies doctrine. **It is not contested that the Group of Companies doctrine carves out an exception to the general rule that only signatories to the Arbitration agreement can be party to the proceedings as at hand. Whether or not the inclusion of AISPL and ABPL amongst the party-Respondents on basis of such doctrine is correct on basis of facts narrated by SPCPL, some crucial and on which AISPL and ABL join issue, would need adjudication as questions mixed of facts and law arise and, thus, is yet to be determined. The High Court, by its order in the proceedings under Section 11 of the A&C Act, has left the issue of inclusion of other entities, on basis of averments of SPCPL, to be determined by this Tribunal.** With such imprimatur by the "Court", this Tribunal is duty-bound to consider if the objection of non-joinder in relation to the SoC of BCSPL is well-founded and, conversely, if the inclusion of AISPL and ABPL in the array of Respondents in SoC of SPCPL is correct. **So, it cannot be said that this Tribunal has exceeded jurisdiction vested in it by the law by entertaining the Soc of SPCPL.***

*35. For the foregoing reasons, it is not fair to seek, nor*



*possible to order, rejection of the SoC of SPCPL to the extent it is directed against AISPL (R-2) and ABPL (R-3), based on threshold scrutiny. The issue of liability - joint or several - of the said parties for defaults primarily attributed to BCSPL (R-1) will have to be decided after findings are reached on the basis of evidence germane to invocation of the group of companies doctrine. If SPCPL succeeds in establishing such linkage, and brings home its case of defaults by BCSPL vis-a-vis the obligations under the Settlement Agreement and other aspects, it would have to also prove that AISPL and ABPL are accountable. It is in that context that the application of group of companies doctrine would need to be examined. Conversely, gaps in proof of germane facts might entail SPCPL failing in holding the applicants accountable. When some of the crucial facts are in dispute, giving rise to mixed questions of facts and law, it is not permissible to reject the contentions without opportunity to substantiate. It, thus, cannot be held at this stage that the jurisdiction has been wrongly invoked against AISPL (R-2) and ABPL (R-3). The issue is kept open. The applications under section 16 A&C Act of AISPL (R-2) and ABPL (R-3) are disposed of with these observations.*

*36. Some tentative and prima facie observations have been recorded in the above order but only for purposes of deciding the captioned applications. Nothing in this order shall be construed as tantamount to expression of final opinion on any of the issues raised.*

32. In relation to the objections raised to the description of SoCs as Case-1 and Case-2, the Id. Sole Arbitrator observed as follows:

*“Objection to description of Statements of Claims as Case-1 and Case-2*

*37. The Claims of SPCPL in its SoC arise from the same*



transaction and works that are the subject matter of the dispute before this Arbitral Tribunal, BCSPL and AISPL having allegedly not paid monies to SPCPL as stipulated under the Settlement Agreement. This is counter when compared with the case of BCSPL in its SoC for reliefs founded on alleged failure of SPCPL to demobilize and, thus, in the nature of cross-version, or set off, or Counter-Claim, or a cross-suit. Indeed, the questions as to whether SPCPL had failed to demobilize, or it can be held liable for delay in such demobilization or further as to whether BCSPL is entitled to any compensation for such delay or failure (as are alleged) are pending adjudication on the basis of SoC of BCSPL. The claims pressed by BCSPL and the reliefs sought by SPCPL are two facets of essentially the same dispute for adjudication by arbitral process of which this tribunal has been constituted. From this perspective, there is bound to be an overlap of the issues arising from the two sets of rival Claims which would require simultaneous adjudication.

38. It was noted in the proceedings of 07.08.2023 that there is no direction yet by this Tribunal for the two captioned matters to be consolidated. It was also pointed out that the observations in Para 6 of the Record of Proceedings dated 07.07.2023, as quoted above, have to be read with observations in paras 2 and 3 whereby the two Statements Claims 're labelled as Case-I and Case-2 respectively "for convenience of reference". The suggestion of the learned Counsel for BCSPL that the Statement of Claims of SPCPL be instead referred to as "Counter-Claim" seemed to be one possible solution but for reluctance of the learned Counsel for SPCPL to agree to it. The expressions - Case-1 and Case-2 - have been adopted only as labels and not to signify anything more. Nothing further needs to be read into it. The dispute between the parties is same, each side having its own version and set of



*grievances, the nomenclature used not meant to indicate clubbing or segregation or anything else. The question whether they ought to be put together to "trial", if such be the appropriate expression to deploy in the present context, is presently kept open and shall be decided at appropriate stage after pints for determination (Issues) have been formulated.*

39. The above should allay apprehensions expressed by the learned Counsel for BCSPL. *This tribunal, thus, will continue with the description of the Statements of Claims of BCSPL and SPCPL as Case-I and Case-2 respectively.*

40. The second and third Respondents in Case-2, i.e., AISPL (R-2) and ABPL (R-3) are called upon to fil their Statements of Defence in answer to the Statement of Claims of SPCPL. They may do so within six weeks from today, as is the time now sought by their leaned Counsel, a clear understanding being that there shall be no request for enlargement of time.”

**Submissions on behalf of Id. Counsel Mr. Tejas Karia in O.M.P. (T) (Comm.) 4/2024.**

33. As recorded in the order dated 24th January 2024, Mr. Tejas Karia, Id. Counsel, sought the termination of the mandate of the Id. Sole Arbitrator. He argued that the Id. Sole Arbitrator improperly described the two claims made by SPCPL as Case 1 and Case 2. Mr. Karia contended that impleading AISPL and ABPL as respondents in the arbitral proceedings was impermissible, as the initial reference was only between BCSPL and SPCPL. He asserted that SPCPL should have sought impleadment in the main matter before the Id. Sole Arbitrator and then filed its claims as counterclaims. This position was contested by the counsel for SPCPL.



34. Mr. Karia also raised an objection regarding the Id. Sole Arbitrator's actions, arguing that the Arbitrator not only condoned the delay in filing SPCPL's claim but also treated it as a separate claim petition, thereby adding two new parties who were not referred to arbitration by the order of this Court dated 22nd July, 2022. According to Mr. Karia, the only permissible course of action was for the Arbitrator to treat SPCPL's claim as a counterclaim. Additionally, if further parties were to be added, SPCPL should have sought their impleadment through an appropriate application. Instead, a separate, independent claim was allowed, and in the order dated 17th October, 2023, BCSPL's claim was treated as Case No. 1 and SPCPL's claim as Case No. 2. Mr. Karia contended that this approach is contrary to the scheme of the Arbitration and Conciliation Act, 1996, specifically Sections 23 and 2(9) of the 1996 Act.

**Submissions on behalf of Id. Counsel Dr. Amit George in ARB. A. (COMM.) 4/2024.**

35. On behalf of ABPL, it is submitted by Id. Counsel Dr. Amit George that the said company is the holding company of BCSPL and AISPL, which was never a party to either the initial reference or to the Settlement Agreement. The Settlement Agreement, at best, is between BCSPL and AISPL, not involving ABPL. ABPL, being a holding company, cannot be impleaded in a proceeding where there is no privity, and the Group of Companies doctrine cannot be stretched to such an extent to implead ABPL in these proceedings.

36. Dr. George further submits that, insofar as the maintainability of the present appeal is concerned, it is now settled in *M/s Arupri Logistics Pvt Ltd v. Shri Vilas Gupta (2023 SCC OnLine Del 4297, paragraphs 54 and 61)*



that any order passed by the Tribunal impleading a party would be challengeable by way of an appeal. He took the Court through the reference order under Section 11 of the 1996 Act dated 22<sup>nd</sup> July, 2022, to argue that the only reference here in paragraph 18 of the said order, as also in the conclusion, is to AISPL and not to ABPL. Thus, the impugned order impleading ABPL as a holding company would not be sustainable.

37. He further submitted that in an arbitral proceeding, non-signatories to an arbitration agreement cannot be impleaded by the manner as is being sought to be done by SPCPL. The observations of the Id. Sole Arbitrator by confusing the Group of Companies Doctrine (*hereinafter*, 'GoCD') and Alter Ego Doctrine are contrary to settled legal principles as laid down in ***Cox and Kings Ltd. v. SAP India Pvt. Ltd. (2023 SCC Online SC 1634)*** and ***Arupri Logistics (supra)***. Reliance was placed on ***Cox and Kings (supra)***<sup>1</sup>, specifically paragraphs 109 onwards, where there is a discussion on the distinction between GoCD and Alter Ego doctrine.

38. He further submits that the decision in ***Cox and Kings (supra)*** lays down that GoCD cannot be utilized to implead parties who have no connection and no liability under the respective agreement(s). According to him, if such an impleadment is allowed, especially in the case of large conglomerates, the holding company could get embroiled in thousands of disputes, which is contrary to the intention of arbitration law itself. It was further submitted that paragraph 171 of ***Cox and Kings (supra)*** is clear to the effect that insofar as non-signatories are concerned, the Id. Arbitral Tribunal may consider impleadment in respect of such non-signatories, only if the

---

<sup>1</sup> Other paragraphs relied upon are paragraphs 110,111,117 and 118 of the decision in ***Cox and Kings (supra)***.



Referral Court refers a non-signatory to the Id. Sole Arbitrator. In the case of non-signatories in respect of whom, no observation has been made by the Referral Court, the Tribunal has no jurisdiction. Therefore, in his submission, the judgment of this Court in *Arupri Logistics (supra)* is good law.

39. In *Arupri Logistics (supra)*, Id. Counsel places reliance upon paragraphs 55 to 61 in support of his submission that individuals who are not parties to the arbitration agreement cannot be impleaded. Paragraph 93 of the said decision is also relied upon to argue that powers of an arbitral tribunal are distinct and different from the powers of the Court. The arbitral tribunal does not enjoy inherent powers and, therefore, cannot implead parties who are not strictly bound by the arbitration agreement.

40. Before this Court, in the reference petition, the only liberty granted was for raising the issue relating to impleadment of ASF before the Id. Sole Arbitrator. However, SPCPL chose not to implead ASF but instead filed a SoC, which has been accepted by the arbitral tribunal, and the same procedure is contrary to law. He further submitted that ASF is not a party to any of the agreements signed with SPCPL and BCSPL. Even in the reply to the notice under Section 21 of the 1996 Act dated 4<sup>th</sup> March, 2022, claims were raised only against ASF and not ABPL.

41. Dr. Amit George Id. Counsel places reliance on the following decisions:

- *Cox & Kings Ltd. v. SAP India (P) Ltd. [2023 SCC Online SC 1634]*
- *Arupri Logistics (P) Ltd. v. Vilas Gupta [2023 SCC Online Del 4297]*
- *Cheran Properties Ltd. v. Kasturi & Sons Ltd. [(2018) 16 SCC 413]*
- *Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd. [(2010) 7 SCC 417]*



- *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd. (2017) 162 DRJ 412; [2017 SCC Online Del 7228]*

**Submissions on behalf of Id. Counsel Mr. Sanyat Lodha in ARB. A. (COMM.) 5/2024.**

42. Mr. Sanyat Lodha, Id. Counsel appearing for AISPL, submits that AISPL is not a party to the said Settlement Agreement, out of which the present arbitral proceeding arise. AISPL is mentioned only in the recitals for the sake of background facts, and there are no obligations imposed on AISPL in the Settlement Agreement, as AISPL is not a signatory. Regarding the Letter of Comfort issued by AISPL, it is submitted that the said Letter also clarifies that the main obligation lies with BCSPL and not AISPL. Therefore, the impleadment of AISPL and the continuation of the counterclaim against AISPL are not maintainable.

43. Further, reference is made to the judgment in *Sudhir Gopi v. Indira Gandhi National Open University (2017 SCC OnLine Del 8345)*, where the Court held that the arbitral tribunal cannot pierce the corporate veil (Paragraph 15). He further places reliance on the reference order dated 22<sup>nd</sup> July, 2022 passed by this Court, which only refers to a Settlement Agreement dated 24th July, 2020, and does not mention AISPL. The said Settlement Agreement is solely between BCSPL and SPCPL, with recovery only against BCSPL. The Settlement Agreement (at page 114) and the Novation Agreement (at page 104) make it clear that Clause 5.2 of the Novation Agreement supersedes all earlier agreements, including the Letter of Comfort issued by AISPL. Relevant clauses of the Novation Agreement relied upon are: Recitals D and E, Clauses 1.1, 1.2, 1.3, 1.4, 1.5, Clause 2, Clauses 3.2, 3.3, and Clause 5.

44. It is also argued that in the Section 21 notice, ASF is not a party. SPCPL



raised a demand notice under Section 8 of IBC, against AISPL, which was rejected by the NCLT on 5th August, 2022. Even at the stage of the petition under Section 11 of the 1996 Act, impleadment of ASF was not sought. SPCPL adopted a new procedure before the arbitral tribunal by filing a SoC without impleading the other two companies. Notice was issued on 23rd May, 2023, by the Id. Sole Arbitrator to the said two companies, asking for filing their respective SoD(s). Consequently, an I.A. was filed seeking deletion of AISPL, which was decided on 17<sup>th</sup> October, 2023. Therefore, there has been no delay in approaching the Court.

45. Mr. Lodha further submits that AISPL is not a signatory to the Settlement Agreement. The Novation Agreement has taken care of AISPL's role, and after the new company came into the picture, AISPL could not have been implicated in this manner. Reliance is placed on the decision in *Arupri Logistics (supra)* regarding the power of the Id. Arbitral Tribunal to implead third parties. Paragraph 92 of the said decision is only in the context when there are statutory rules governing arbitral proceedings or the agreement itself provides for rules governing the conduct of the arbitral proceedings. The decision in *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd., (2017 SCC OnLine Del 7228, Paragraph 30)* is relied upon to argue that arbitral tribunals cannot assume jurisdiction on their own since notice under Section 21 of the 1996 Act is mandatory even in respect of such third parties.

46. Ld. Counsel Mr. Lodha has additionally placed reliance on the following decisions:

- *Sudhir Gopi vs. IGNOU (2017 SCC OnLine Del 8345)*
- *M/s Arupri Logistics Pvt Ltd v. Shri Vilas Gupta & Ors. (2023 SCC OnLine Del 4297)*



- *Abhibus Services India Pvt. Limited and Others v. Pallavan Transport Consultancies Services Ltd. Represented by its Managing Director and Others (2022 SCC OnLine Mad 796)*
- *M. Mythrai v. T. Ramesh & Ors., (2021 SCC OnLine Mad 13704)*
- *V.G. Santhosam and Others v. Shanthi Gnanasakaran and Others, (2020 SCC OnLine Mad 560)*
- *Amit Guglani and Another v. L and T Housing Finance Ltd. Through Managing Director and Another, (2023 SCC OnLine Del 5206)*
- *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd. (2017 SCC OnLine Del 7228)*
- *Shriram Transport Finance Company Limited V. Narender Singh [(2022) 6 HCC (Del) 275]*
- *Haldiram Manufacturing Co. Ltd. v. SRF International (2007 SCC OnLine Del 457)*
- *Extramarks Education India Private Limited v. Shri Ram School (2022 SCC OnLine Del 3123)*
- *Union of India v. Bharat Enterprise (2023 SCC OnLine SC 369)*
- *Bharat Coking Coal Ltd. v. Annapurna Construction, (2003) 8 SCC 154*
- *Kerala State Electricity Board and Ors. v. Kurien E. Kalathil and Ors. (2018) 4 SCC 793*
- *Girnar Traders v. State of Maharashtra, (2007) 7 SCC 555*
- *Jarnail Singh v. Lachhmi Narain Gupta, (2022) 10 SCC 487*
- *State of Maharashtra v. Murao Malojirao Ghopade (1996 SCC OnLine Bom 1645)*



**Submissions on behalf of Id. Counsels Mr. Saurav Agrawal & Ms. Akanksha Kaul for SPCPL.**

47. Mr. Saurav Agarwal, Id. Counsel appearing for SPCPL, submits on a query from the Court that his client would have no objection if the claim filed by SPCPL is treated as a counterclaim to the BCSPL's claim petition. Additionally, he submits that the two additional parties would be covered by the GoCD, wherein connected parties to the BCSPL can be made Respondents in the matter for a comprehensive adjudication of the dispute. He further submits that when AISPL and ABPL were impleaded as Respondents in the SoC filed by SPCPL, these Respondents objected by filing an application under Section 16 of the 1996 Act, which has now been adjudicated vide order dated 17<sup>th</sup> October, 2023, by the Id. Sole Arbitrator. The Id. Sole Arbitrator has permitted their impleadment on a *prima facie* basis. Thus, he submits that all necessary procedural requirements have been complied with, although there may be differences in terminology used by the Id. Sole Arbitrator.

48. On behalf of SPCPL, Ms. Akanksha Kaul, Id. Counsel, submits that the order dated 22<sup>nd</sup> July, 2022, gave permission to both the newly impleaded Respondents to raise these contentions before the Id. Sole Arbitrator. Additionally, ASF has issued a Letter of Comfort in favor of SPCPL. Further, in reply to the Section 21 notice issued by BCSPL, SPCPL made it clear that claims are being raised against AISPL. She relies on the reply dated 4<sup>th</sup> March, 2022, which states:

*“4. That in view of the aforesaid facts and circumstances, BCSPL and AISPL are, jointly and severally, liable to pay the following monies, admittedly and undisputedly outstanding and payable to SPCPL, in terms of Clause 4 read with Annexure A of the Settlement Agreement:*



- a. Rs.1,48,17,623/-;
- b. Rs. 2,94,01,513 towards the retention money;
- c. Certified Final Bill amount of Rs. 74,33,683; and
- d. Rs. 43,29,106.38 towards the cost of material transfer.

*In addition to the aforesaid amounts, BCSPL and AISPL are also liable to pay monies towards TDS and cement consumption.*

*That in terms of Clause 61.1 of the Works Contract, not only disputes and differences but also “claims of any nature whatsoever arises out of, in connection with, or in relation to the Contract Agreement” are to be referred to arbitration. Thus, the claims of my client towards the admitted and undisputed outstanding amounts as well as towards damages and compensation for breach of contract, TDS, and cement consumption are liable to be referred to arbitration. However, in view of the comfort letter and the conduct of AISPL, in any proceedings that SPCPL initiates for recovery of the aforesaid amounts, AISPL would be a proper and necessary party.*

*That even otherwise SPCPL has not caused any delay in the demobilization of the entire Work Site. Any delay that may have been caused is entirely attributable to hindrances created by BCSPL. Furthermore, SPCPL has not caused any delay in the reconciliation process/exercise and any delay that may have been caused in the reconciliation process/exercise is entirely attributable to BCSPL.*

*That it is clarified that in terms of the Settlement Agreement the liability of BCSPL to make payments to SPCPL is not contingent on the latter demobilizing from the site. Thus, your client cannot seek to avoid making payment on the ground that the demobilization was allegedly delayed. By failing to make payments in terms of the Settlement Agreement, your client has breached the terms of the said Agreement. For such breach,*



*SPCPL is entitled to damages and compensation from your Client.*

*That without prejudice to the aforesaid contentions, my client proposes that the Parties (i.e., SPCPL, BCSPL & AISPL) appoint Hon'ble Mr. Justice C.K.Prasad as the sole arbitrator. SPCPL is not agreeable to the appointment of the sole name proposed by you."*

49. Ld. Counsel for SPCPL further submitted that AISPL was a necessary and proper party in the arbitral proceedings, and no challenge was raised to the order dated 23rd May, 2023, passed by the Id. Arbitral Tribunal. Additionally, she notes that in the reply to the Section 21 notice, SPCPL clearly stated that it has monetary claims against AISPL as well.

50. Mr. Saurav Agarwal, Id. Counsel appearing along with Ms. Akanksha Kaul, rebuts the submissions made by AISPL, ABPL and BCSPL by relying on the decisions in ***Gaya Prasad v. Smt. Jamvanti Devi (AIR 1998 Patna 53)***, and ***Punnakkal Suresh v. Saraswathi (2018 SCC OnLine Ker 3494)*** to argue that the fundamental principle is that in a counterclaim, new parties can be impleaded as the counterclaimant is the *dominus litis*. The submission that such an impleadment is not permissible in a counterclaim is contrary to settled legal principles. Reliance is place on the decisions in ***AV Murugan v. K. Maheshwari (2019 SCC OnLine Mad 39139)***, ***Gaya Prasad (supra)***, and ***Punnakkal Suresh (supra)***.

51. It is further argued that the focus on notice invoking arbitration under Section 21 of the 1996 Act is misplaced, as Section 21 of the 1996 Act merely signifies the completion of arbitral proceedings. Once the commencement has happened, SPCPL is free to proceed according to law and file its counterclaim or counterstatement of claim, irrespective of the nomenclature.



52. In relation to the demand notice issued under the provisions of the IBC, it is submitted that an order passed under Section 8 of the IBC, adopts different standards and cannot be used to decide whether any person is a necessary or proper party.

53. Reliance is place on the decision in *MTNL v. Canara Bank [(2020) 12 SCC 767]*, to argue that an arbitral tribunal can invoke GoCD. Without flexibility given to the arbitral tribunal, disputes cannot be adjudicated effectively by the tribunal. Paragraph 10.3 of the said decision is relied upon. It is pointed out that the overruling of the decision in *MTNL (supra)* is on a different issue. Further, reliance is placed upon the decision in *Cox and Kings (supra)* (paragraphs 85 & 103) to submit that if commercial circumstances or the conduct of parties require such an impleadment, it would be permissible.

54. Ld. Counsels for the parties further argue that though there may be a difference between the GoCD and the consideration of a party as an 'alter ego', in this case, the conduct of the parties shows that AISPL is a proper and necessary party. Reliance is placed on the following documents:

- Letter of Comfort dated 17<sup>th</sup> April, 2018 by AISPL.
- Settlement Agreement wherein Clause 5 uses the abbreviation ASF.
- Use of the terminology "ASF" in various correspondences.

55. In relation to AISPL's contention that the arbitral tribunal cannot pierce the corporate veil, it is argued that the decision of this Court in *Sudhir Gopi (supra)* is not good law as it is based on *Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306*, which has been subsequently overruled in *Cheran Properties Ltd. v. Kasturi and Sons Ltd., (2018) 16 SCC 413*. Finally, it is submitted that ASF relates to one individual under whose control



and management all these companies are, making the impleadment of these companies necessary and proper. Reference is made to an email dated 2<sup>nd</sup> June, 2021, where the term ‘ASF Management’ is used, and note that all correspondences are signed by ASF Group.

56. On the issue of impleadment, Mr. Agarwal, Id. Counsel relies upon a recent decision of the Bombay High Court in ***Cardinal v. Subramaniam Construction (2024:BHC-OS:5502)*** to argue that the arbitral tribunal has the jurisdiction to consider impleadment under GoCD. He placed reliance on paragraphs 41 and 42 of the decision. He also notes that the Report No. 246 of the Law Commission of India titled ‘*Amendments to the Arbitration and Conciliation Act 1996*’, while amending Section 23 of the 1996 Act, made an observation at page 52 to the following effect:

*“Amendment of Section 23*

*13. In section 23, after sub-section (1) and before sub-section (2), add the words “Explanation: In his defence the respondent may also submit a counter claim or plead a set off, which shall be treated as being within the scope of reference and be adjudicated upon by the arbitral tribunal notwithstanding that it may not fall within the scope of the initial reference to arbitration, but provided it falls within the scope of the arbitration agreement.”*

*[NOTE: This explanation is in order to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent so long as it falls within the scope of the arbitration agreement, in order to ensure final settlement of disputes between parties and prevent multiplicity of litigation.]”*

57. Reliance is placed on the following decisions:



**On the Scope of Intervention**

- *SBP & Co. v. Patel Engineering Ltd. & Anr. (2005) 8 SCC 618*
- *Progressive Career Academy Pvt. Ltd. v. FIIT JEE Ltd. ILR (2011) IV DELHI 286*
- *Devinder Kumar Gupta v. Realogy Corporation & Anr. 2011 (125) DRJ 129 (DB)*
- *Maharaji Educational Trust & Anr. v. M/s SGS Constructions & Developers Pvt. Ltd. 2012 SCC OnLine Del 796*
- *Rhiti Sports Management Pvt. Ltd. v. Power Play Sports & Events Ltd. 2018 SCC OnLine Del 8678*
- *Future Coupons Pvt. Ltd. & Ors. v. Amazon.com NV Investment Holdings LLC & Anr. 2022 SCC OnLine Del 3890*
- *ITC Ltd. v. Bhadra Products (2018) 2 SCC 534*
- *Deep Industries Ltd. v. ONGC & Anr. (2020) 15 SCC 706*

**Arbitral Tribunal is the master of its own procedure under Section 19 of the 1996 Act**

- *NTPC v. Wig Brothers Builders & Engineers Ltd. ILR (2009) IV Delhi 663*
- *Sahyadri Earthmovers v. L&T Finance Ltd. & Anr. 2011 (4) Mh.L.J 200*
- *Gammon India Ltd. v. Sankaranarayana Construction (Bangalore) Pvt. Ltd. 2011 (6) CTC 736*
- *ONGC Petro Additions Ltd. v. Tecnimont SPA & Anr. 2019 SCC OnLine Del 8976*



- *Union of India v. RCCIVL-LITL (Joint Venture) 2023 SCC OnLine Del 3246*

### **Nature of Counterclaim**

- *State of Goa v. Praveen Enterprises (2012) 12 SCC 581*
- *Voltas Limited v. Rolta India Limited (2014) 4 SCC 516*
- *ONGC v. Afcons Gunanusa JV 2022 SCC OnLine SC 1122*
- *Jag Mohan Chawla v. Dera Radha Swami Satsang (1996) 4 SCC 699*
- *Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri (2020) 2 SCC 394*

### **New parties can be added to a counterclaim**

- *A.V. Murugan v. K. Maheshwari & Ors. 2019 SCC OnLine Mad 39139*
- *Rameshwar v. Kaptansingh & Ors., 2023 SCC OnLine MP 1481*
- *Gaya Prasad v. Jamwanti Devi, 1997 SCC OnLine Pat 290*
- *Punnakkal Suresh v. Saraswathi 2018 SCC OnLine Ker 3494*

### **Multiplicity of proceedings**

- *Gammon India Ltd. v. National Highways Authority of India 2020 SCC OnLine Del 659*

### **Parties before the Arbitral Tribunal**

- *IMC Limited v. Deendayal Port Trust 2018 SCC OnLine Guj 4580*
- *IMC Limited v. Deendayal Port Trust 2020(4) ARB LR 221(Gujarat)*
- *IMC Limited v. Deendayal Port Trust SLP (C) No. 2320/2019 (Diary No. 1215/2019)*
- *ONGC v. Discovery Enterprises Pvt. Ltd. & Anr. (2022) 8 SCC 42*
- *Cox and Kings Limited v. SAP India Pvt. Ltd. & Anr. 2023 SCC OnLine SC 1634*



**Demand Notices under the Insolvency & Bankruptcy Code, 2016**

- *Brilliant Engineers Pvt. Ltd. v. Shapoorji Pallonji and Company Pvt. Ltd.* 2022/DHC/005720

**Rejoinder Submissions on behalf of Id. Counsel Mr. Tejas Karia**

58. Mr. Tejas Karia, Id. Counsel, in rejoinder, again emphasizes that the procedure followed by the Id. Sole Arbitrator is completely unknown to law. The reliance on *Gaya Prasad (supra)* is in a different context, i.e., that a counterclaim can be without restriction. Paragraph 9 of this judgment refers to the extent of relief that can be sought in a counterclaim, not whether counterclaim can be filed against parties who are not signatories to the arbitration agreement itself. The restriction contemplated in paragraph 9 relates to the nature of the relief and not the party concerned.

59. He further submits that the correct procedure which SPCPL ought to have followed was:

- Invoke arbitration, if any, against the other two companies;
- File impleadment applications seeking to implead the said two companies and then seek leave to file a counterclaim. SPCPL did neither, and therefore, the impugned orders passed by the Id. Sole Arbitrator are not sustainable.

60. Reliance is also placed upon *State of Goa (supra)* to argue that the proposition in paragraph 20 and 32 of the said decision, that Section 21 of the 1996 Act is not relevant to counterclaim, has an exception. This exception is in the context where multiple parties are sought to be impleaded, as specifically referenced in paragraph 20. In the present case, no notice under Section 21 of the 1996 Act was issued. The counterclaim has been made as a SoC with two additional parties, and when a Section 16 application was filed



by these two parties, it was rejected by the Id. Sole Arbitrator.

61. Lastly, he submits that the 1996 Act is a complete code in itself, and therefore, the adoption of an unknown procedure is not permissible.

### **ANALYSIS & CONCLUSIONS**

62. A short issue has in fact been converted into a complicated legal issue as is evident from the facts of this case. The genesis of all the three petitions is the order dated 22<sup>nd</sup> July, 2022 passed by this Court in a petition under Section 11 of the 1996 Act, by which a Id. Sole Arbitrator was appointed to adjudicate the disputes between the parties. Admittedly, the parties in the said arbitration petition under Section 11(6) were BCSPL and SPCPL.

63. The background of the said arbitration petition was that ASF had executed a Works Contract dated 21<sup>st</sup> November, 2016 with SPCPL for development of a building in Gurgaon, Haryana. The said Works Contract was between AISPL (as the Owner) and SPCPL (as the Vendor). A Supplementary Works Contract was executed on 9<sup>th</sup> February, 2018 which was again between AISPL and SPCPL. However, finally, there was a Novation Agreement dated 17<sup>th</sup> April, 2018 between AISPL, BCSPL and SPCPL. As per this Novation Agreement, AISPL was substituted with BCSPL and all the rights, claims, liabilities, obligations and duties were transferred *mutatis mutandis* to BCSPL<sup>2</sup>. Some clauses of this Novation Agreement are relevant and extracted below:

#### ***“1. Substitution of AISPL***

***1.1 The Parties agree that from the Effective Date (i.e., 01.04.2018), BCSPL stands substituted in place of AISPL as the Owner in the said Contract. All rights,***

---

<sup>2</sup> Clause 1 of the Novation Agreement.



*claims, entitlement, liabilities, obligations, and duties of AISPL under the said Contract qua the Contractor stand transferred mutatis mutandis to BCSPL.*

*1.2 The Contractor accepts and acknowledges the said substitution of AISPL with BCSPL and agrees that all rights, claims, and entitlement, liabilities, obligations, and duties of the Contractor under the said Contract qua AISPL shall hereinafter stand transferred mutatis mutandis to BCSPL.*

*1.3 BCSPL agrees to ratify all actions of AISPL, taken by AISPL with reference to the said Contract, with the same force and effect as if the action had been taken by BCSPL itself.*

*1.4 The Contractor also agrees to ratify all actions taken by it under the said Contract qua AISPL in the same force and effect as if such actions had been taken by the Contractor qua BCSPL.*

*1.5 The Parties agree that from the Effective Date all their inter-se rights/liabilities/obligations under the said Contract shall be valid, binding, and enforceable between BCSPL and the Contractor to the exclusion of AISPL, as if BCSPL had itself executed the said Contract with the Contractor.*

*1.6 With effect from the Effective Date, all reference to AISPL under the said agreement shall be construed as reference to BCSPL.*

## **2. Novation**

*2.1 Each party to this Agreement understands that this Agreement constitutes a novation to the said Contract dated 21.11.2016 and Supplementary Works Contract dated 09.02.2018 by and between the parties. The terms hereof shall be read as part and parcel of the said Contract dated 21.11.2016 and Supplementary Works Contract dated 09.02.2018, with all Parties agreeing to the substitution of BCSPL in place of AISPL.”*



64. The Novation Agreement was thus a tripartite agreement entered into between AISPL, BCSPL and SPCPL. This was followed by a Settlement Agreement dated 24<sup>th</sup> July, 2020 between BCSPL and SPCPL which was entered into as a result of the COVID-19 pandemic. The Settlement Agreement was dealing with the costs and claims of SPCPL (as Contractor) which would be paid by BCPSL (as the Owner) and the manner in which the payments were to be made. The Settlement Agreement records that a final bill of approximately Rs.1.60 crores was submitted which was under process for settling by BCSPL. Further, the contract stood foreclosed effective 31<sup>st</sup> March, 2020, and SPCPL was mandated to demobilize by 15<sup>th</sup> September, 2020. It was further provided that if BCSPL fails to make payments or if SPCPL fails to fulfill demobilization and defect liability obligations, each party has the right to avail of their respective remedies under the contract and law<sup>3</sup>. However, Clause 12 of the Settlement Agreement is also relevant and the same is extracted herein below:

*“The Parties agree and confirm that save and except the clause(s) modified, amended, replaced, substituted, and/or added by way of this Agreement, **the remaining part of the Contract dated 21.11.2016, including provisions regarding Dispute Resolution, shall remain in full force and continue to be effective and binding on the Parties hereto.**”*

65. Along with the Novation Agreement, a Letter of Comfort dated 17<sup>th</sup> April, 2018 was issued to SPCPL by AISPL giving the following assurances:

*“1. The above mentioned Work Contract was executed between ASF Insignia SEZ Pvt Ltd ("AISPL") and Shapoorji Pallonji & Co. Pvt. Ltd. ("SPCPL"), whereby SPCPL was appointed as Contractor to*

<sup>3</sup> Clause 8 of the Settlement Agreement



carry out various works including civil, structural, masonry, waterproofing, plastering (internal and external), basement finishing, external development and facade work (the said "Works") in B1 building and infrastructure appurtenant thereto, subject to the terms specified therein.

2. Subsequently, we have executed the above mentioned supplementary work contract wherein the parties inter alia agreed that with effect from 01.07.2017, the estimated contract price as mentioned in clause 10.2 of the work contract dated 21.11.2016 has been changed to Rs.119,70,51,750/-, subject to terms thereof.
3. In the meanwhile, for better management of its project, AISPL nominated/appointed its associate company Black Canyon SEZ Private Limited ("BCSPL") as a Co-developer with regard to Black Canyon Private Campus Land, Black Canyon Building and its allied structure (hereinafter referred as "Black Canyon Undertaking") pursuant to receipt of approvals from SEZ authorities, consequent to which with effect from 01.04.2018, BCSPL has been substituted in place of AISPL as the Owner in the above mentioned work contract. Accordingly, all rights, claims, entitlement, liabilities, obligation and duties of AISPL under the said work contract qua the contractor stands transferred mutatis mutandis to BCSPL.
4. AISPL and BCSPL are the group companies of ASF group and both companies are under the management & control of the same set of management/owners.
5. We, AISPL undertake that if BCSPL does not make payment with regard to duly certified works delivered by SPCPL, under the contract, then AISPL shall intervene and ensure prompt payment of such dues by BCSPL."



66. Thus, AISPL undertook to ensure payment of dues by BCSPL. The Settlement Agreement was accompanied by an 'Annexure A' which set out all the statements of accounts and the full and final amount of the settlement as well. A perusal of all of the above agreements along with the Letter of Comfort reveals that the admitted position is as under:

- i) That the original Works Contract was entered into between AISPL and SPCPL;
- ii) As per AISPL, for the purposes of better management of the project, BCSPL - which is an associate company of AISPL, was nominated;
- iii) It is acknowledged that AISPL and BCSPL are group companies of ASF Group and both companies are under management and control of the same set of management owners i.e., Mr. Anil Saraf, and the same is demonstrated by the following chart:

| SL.NO | ASF BUILDTECH<br>PRIVATE LIMITED         | ASF INSIGNIA SEZ<br>PRIVATE LIMITED | BLACK CANYON<br>SEZ PRIVATE<br>LIMITED   |
|-------|------------------------------------------|-------------------------------------|------------------------------------------|
| 1.    | ANIL SARAF<br>(DIN: 00373265)            | ANIL SARAF<br>(DIN: 00373265)       | ANIL SARAF<br>(DIN: 00373265)            |
| 2.    | MANOJ KUMAR<br>BHINDA<br>(DIN: 08947310) | PANKAJ<br>SARAF (DIN:<br>00373321)  | MANOJ KUMAR<br>BHINDA<br>(DIN: 08947310) |
| 3.    | SANDEEP MITTAL<br>(DIN: 02462543)        | SANDEEP MITTAL<br>(DIN: 02462543)   | TULSI RAM<br>AGARWAL<br>(DIN: 01377550)  |

- iv) The Letter of Comfort also clearly records an undertaking by AISPL that if BCSPL is unable to payments to SPCPL, AISPL undertakes the responsibility to intervene and ensure prompt payment;
- v) The determination of the final bill in terms of the Settlement



Agreement had to take into consideration the costs of material taken over by BCSPL from the contractor-AISPL;

- vi) The use of the term ASF includes all the entities under the ASF Group, namely, AISPL, BCSPL and even ABPL.

67. From the above-admitted position, it is clear that the entities forming part of the ASF group are related to each other. They fall under the same management, and it appears that the substitution in the contract, took place merely for convenience or for some other reasons, which need not be gone into. Even under the Co-Development Agreement dated 14<sup>th</sup> November, 2017, executed between AISPL (Developer) and BCSPL (Co-developer), BCSPL is required to continuously keep AISPL fully informed of the construction development, redevelopments, operation, and maintenance of the project<sup>4</sup>. The main company, which is the developer under the Special Economic Zones Act, 2005, is AISPL and not BCSPL or ABPL. In fact, BCPSL, being a co-developer, acknowledges that the main developer is AISPL.

68. The SoC filed by BCSPL relates to its claims that SPCPL had failed to demobilize the project site. It delayed the reconciliation exercise, and thus it is entitled to withhold payments and claim damages on account of idling costs and interest. A perusal of the claim and counterclaim shows that the Works Contract is the genesis of claims by BCSPL as well as by SPCPL. The development is taking place in AISPL's (original owner) project. AISPL is mentioned several times in the claim statements filed by BCSPL. Delays attributed to SPCPL relate to a period even before the Novation Agreement. The claim statement of BCSPL intends to, *inter alia*, portray how AISPL is

---

<sup>4</sup> Clause 7.7.2 of the Co-Development Agreement.



no longer responsible for the implementation of the works and how no amounts are due and payable to SPCPL.

69. In response to this, instead of a SoD or a counter claim, a separate SoC has been filed by SPCPL. The nature of the claims raised are monetary, and it is SPCPL's case that it is entitled to recover a large amount of dues from BCSPL and AISPL. Such claims include allegedly admitted claims under the Settlement Agreement, amounts retained as retention money along with interest, amounts payable under the final bill, costs of materials, and other withheld amounts, interest, and costs.

70. The Court has also perused the email correspondence wherein repeated emails in respect of demobilization, etc., are written by senior officials employed under the ASF Group of Companies. For example, an email dated 9th December, 2020, written by Mr. Vinod Bhartia, Vice-President (Commercial), uses the insignia ASF Group and the name ASF Group of Companies. Even the email address is related to [www.asfinfrastructure.com](http://www.asfinfrastructure.com). All the correspondence is in respect of the contract with ASF and ASF Group of Companies. There is no differentiation between BCSPL, AISPL, or ABPL, all of which are part of the ASF Group. For the sake of ready reference, some emails are set out below:



2024:DHC:4943



**From:** Vinod Bhartiya [mailto:vinod.bhartiya@asfinfrastructure.com]

**Sent:** Wednesday, December 9, 2020 11:21 AM

**To:** SURINDER.MITTAL - SPCPL/ENC/DEL; PARKASH.JOSHI-SPCPL/ENC/DEL2

**Cc:** Anil Sharma; Anil Mendiratta; kulbir singh; SHAIENDRA.AJRI - SPCPL/ENC/SR; SANJAY.KARKHANIS - SPCPL/ENC/PRO

**Subject:** RE: Payable Amount as per agreement

Dear Mr Mittal

There is no contradiction whatsoever in factual status w.r.t. demobilization hamper! we have not stopped removal of Tower Crane.

In this connection, you will recall that your team had been asked to remove Tower Crane from site after giving us an advance notice of 7 to 10 days, to enable a joint survey by ASF and SPCPL teams for assessing if any such material were lying on higher floors which would require Tower Crane for its removal. In fact, I am told that a joint survey was conducted by SPCPL and ASF on 7.12.20. As soon as its report gets circulated/ provided, and subject to observations in this report, please feel free to demount and take away your Tower Crane

Regards,

Vinod Bhartiya  
Vice President ( Commercial )  
+91 9818199964  
vinod.bhartiya@asfinfrastructure.com



**ASF Group of Companies**  
362-363, Udyog Vihar, Phase-IV, Gurgaon- 122016 (India)  
Phone : +91 124 4777238 | Fax : +91 124 4234110  
Web : [www.asfinfrastructure.com](http://www.asfinfrastructure.com)

Creating Intelligent Spaces®

**From:** Vinod Bhartiya [mailto:vinod.bhartiya@asfinfrastructure.com]

**Sent:** Thursday, September 3, 2020 1:16 PM

**To:** MUKESH SAINI; Anil Sharma

**Cc:** kulbir singh; PARKASH.JOSHI-SPCPL/ENC/DEL2; Anil Mendiratta; Vijay Tikoo; SURINDER.MITTAL - SPCPL/ENC/DEL; Satyendra Yadav

**Subject:** RE: 2 nd installment payment ASF BC

Dear Mukesh

I am quite clear that, ASF's role is anything more than that of being a facilitator in the subject issue. You know there were certain rate differences between what the incoming Vendor wanted and SPCL could offer. , those ASF agreed to bridge and agreed in our last meeting along with Mr Mittal . Beyond that we will not be able to take further involvement or responsibility.

You may deliberate this within your company and please act as is in your best commercial interest. It is a fact that need for ASF to take this initiative was to accommodate SPCL and also assist in timely demobilisation

Please take needful action and advise asap.

Regards,

Vinod Bhartiya  
Vice President ( Commercial )  
+91 9818199964  
vinod.bhartiya@asfinfrastructure.com



**ASF Group of Companies**  
362-363, Udyog Vihar, Phase-IV, Gurgaon- 122016 (India)  
Phone : +91 124 4777238 | Fax : +91 124 4234110  
Web : [www.asfinfrastructure.com](http://www.asfinfrastructure.com)

Creating Intelligent Spaces®



2024 :DHC:4943



From: Vinod Bhartiya <vinod.bhartiya@asfinfrastructure.com>  
Sent: Wednesday, September 2, 2020 1:29:05 PM  
To: SURINDER.MITTAL - SPCPL/ENC/DEL <SURINDER.MITTAL@shapoorji.com>; Anil Sharma <anil.sharma@asfinfrastructure.com>; MUKESH SAINI <MUKESH.SAINI@shapoorji.com>  
Cc: kulbir singh <kulbir.singh@shapoorji.com>; PARKASH.JOSHI-SPCPL/ENC/DEL2 <PARKASH.JOSHI@shapoorji.com>; Anil Mendiratta <Anil.Mendiratta@asfinfrastructure.com>; Vijay Tikoo <vijay.tikoo@asfinfrastructure.com>  
Subject: RE: 2 nd installment payment ASF BC

Dear Mr Mittal

I had called you yesterday it went no reply perhaps you were busy.

On the trail mail, I would like to clarify that all our discussions and closures, have been made between us based on principle.

As such crystallisation of values once done, they will be accounted for accordingly. No payments have been held due to non-closure of final values. We have remitted you the agreed amount of Rs 1.50 crores for Aug 20 as well.

It is suggested not to do change the present modus operandi on values which have not been formally signed off, as these would have Audit objections and other queries at our end too, which according to me is not advisable.

I agree that I do not envisage your Final Bill to go negative in value, once finalised the same will be suitably accounted

For material handover and value thereof, some issue of documents, have not been closed. I have asked the team not to hold final bill certification for the same. This will be closed separately, as the material will be simultaneously handover to the New/Incoming contractor - ASF is just a facilitator here.

Our concern continues to be on the progress and completion of the demobilisation by 15<sup>th</sup> Sept continue to be unresolved and once again, would like you to ask team to adhere to agreed dates in our agreement.

Regards,



Vinod Bhartiya  
Vice President ( Commercial )  
+91 9818199964  
vinod.bhartiya@asfinfrastructure.com



From: Vinod Bhartiya <vinod.bhartiya@asfinfrastructure.com>  
Sent: Thursday, 3 September, 2020, 1:21 pm  
To: MUKESH SAINI; Anil Sharma  
Cc: kulbir singh; PARKASH.JOSHI-SPCPL/ENC/DEL2; Anil Mendiratta; Vijay Tikoo;  
SURINDER.MITTAL - SPCPL/ENC/DEL; Satyendra Yadav  
Subject: RE: 2 nd installment payment ASF BC

Dear Mukesh

I am quite clear that, ASF's role is anything more than that of being a facilitator in the subject issue. You know there were certain rate differences between what the incoming Vendor wanted and SPCL could offer, those ASF agreed to bridge and agreed in our last meeting along with Mr Mittal. Beyond that we will not be able to take further involvement or responsibility.

You may deliberate this within your company and please act as is in your best commercial interest. It is a fact that need for ASF to take this initiative was to accommodate SPCL and also assist in timely demobilisation

Please take needful action and advise asap.

Regards,



Vinod Bhartiya  
Vice President ( Commercial )  
+91 9818199964  
vinod.bhartiya@asfinfrastructure.com





71. It is in this background that the Court has to consider whether the impugned orders are sustainable or not and whether the mandate of the Id. Sole Arbitrator deserves to be terminated.

72. At the outset, the Court wishes to observe that, insofar as the procedure followed before the Id. Sole Arbitrator is concerned, there is no doubt that the same is unusual. SPCPL, while filing a counterclaim against BCSPL, has impleaded two further parties, i.e., AISPL and ABPL, without seeking leave of the Id. Sole Arbitrator. It is this filing of the counterclaim, which has been labeled as a separate 'SoC', that is objected to by all three parties i.e. BCSPL, AISPL and ABPL on the following grounds:

- i) That the same has been treated as a separate SoC;
- ii) That the addition of AISPL and ABPL without impleading them is contrary to law and procedure governing arbitrations under the 1996 Act;
- iii) That in the absence of a notice of invocation under Section 21 of the 1996 Act, and in the absence of reference, AISPL and ABPL cannot be made parties in this manner;
- iv) That the conversion of the counterclaim into a separate case i.e. Case No.1 and Case No.2 has incapacitated the Id. Sole Arbitrator, as the same is beyond the reference order dated 22<sup>nd</sup> July, 2022.

### ***Impugned orders***

73. Vide order dated 23rd May 2023, the Id. Sole Arbitrator decided two applications. One sought condonation of delay in filing the SoC filed by SPCPL, and the second was an application under Section 16 of the 1996 Act filed by BCSPL to the effect that SPCPL had forfeited its right to file the



counterclaim in terms of Section 4 of the 1996 Act. In the said order, the Id. Sole Arbitrator holds that:

- BCSPL forms part of ASF Group of Companies and is merely a special purpose vehicle.
- It is nothing but an alter ego of ABPL, which along with AISPL owns 100% shareholding in BCSPL.
- ASF Group is itself a necessary and relevant party in the adjudication process on the basis of financial statements.
- It is clear that SPCPL had reserved its right in its SoD to claim damages against ASF Group of Companies.
- The delay in filing of the SoD was condoned and time was extended. The SoC was then filed by SPCPL on 14<sup>th</sup> February, 2023.
- SPCPL had in fact invoked proceedings under Section 8 of IBC against BCSPL and AISPL.
- The High Court while appointing the Id. Sole Arbitrator had in its order dated 22<sup>nd</sup> July, 2022 given liberty to raise the issue in respect of impleadment of AISPL before the Id. Sole Arbitrator.
- The contention of BCSPL that a separate invocation notice is required for filing a counterclaim was rejected based on the decision of the Supreme Court in *State of Goa (supra)*. The labeling of the pleadings filed by SPCPL as either a counterclaim or a SoC would not be a decisive factor. Therefore, the Id. Sole Arbitrator applied the GoCD and the Single Economic Entity Doctrine as per the decision of the Supreme Court in *Cox and Kings (supra)*. Thus, the Section 16 application was dismissed. In effect, the Id. Sole Arbitrator held that the Id. Arbitral



Tribunal was fully empowered to proceed with the SoC filed by SPCPL against AISPL and ABPL as well. This order dated 23<sup>rd</sup> May, 2023 was not challenged in ***O.M.P.(T)(COMM) 4/2024*** by BCSPL.

74. After the order dated 23<sup>rd</sup> May, 2023, the Id. Arbitrator passed the 7<sup>th</sup> July 2023 order, in which the two cases were segregated, i.e., BCSPL's claim was named as Case No. 1, and SPCPL's claim against BCSPL, AISPL, and ABPL was categorized as Case No. 2 for the purpose of convenience. A further order was passed on 7<sup>th</sup> August 2023, wherein directions regarding fees for both cases were issued by the Id. Sole Arbitrator. Further, vide order dated 17<sup>th</sup> October 2023, the Section 16 applications filed by AISPL and ABPL challenging their impleadment were decided. In this order, the Id. Sole Arbitrator holds as follows:

- That AISPL and ABPL are inextricably linked to the performance of Works Contract and the Settlement Agreement;
- They are both '*alter egos*' of BCSPL being part of the same group of companies- ASF Group.
- ABPL is the holding company of BCSPL and AISPL with 81.01% and 100% shareholding respectively;
- BCSPL does not even have a separate website and is shown as part of the ASF Group;
- All companies have same staff, managers and officials which would be proved in evidence;
- The Works Contract was executed by AISPL which was to develop the SEZ;
- The entire support, backing and strength was of the ASF management;



- Vide email dated 2<sup>nd</sup> June, 2021, the Vice President (Projects) of ASF Companies had expressed a commitment of ASF management to release the outstanding dues to the SPCPL even after the Novation Agreement was signed. The said email reads as under:

*“Dear Mr. Mittal,  
Hope you and your team are keeping up good health.*

*During our call with you, we had explained the uncertainties that have crept into the economy, and particularly the commercial real estate business due to the ongoing pandemic, because of which disbursements from our investors/financers are being held back, and this extension of lockdown due to the 2nd wave of COVID is in fact making things worse. Under such circumstances, we had informed SPCPL about the likely release of funds by the first week of June 2021, subject to evolving pandemic situations. As we respond, the situation seems to be improving with relaxation in lockdown. This will help us in getting disbursements from investors/financers and we have no hesitation in reaffirming our commitment, and are hoping to release partial payment any time during the later part of this month itself.*

*It is a matter of record that even ASF, in reciprocation, had extended themselves to support on multiple occasions, even though SPCPL repeatedly failed to honor demobilization timelines. On your assurance during telecons, meetings with respect to demobilization timelines, we convinced ASF Management about your commitments and continued to disburse payments at regular intervals. It would not be out of context to also mention that, though the committed date for complete demobilization was 15th September 2020 (as stipulated in the Settlement Agreement dated 24th July 2020), even as of this day, the site cannot be termed as fully demobilized. Without getting into finer details, for your kind reference I would like to cite the following few examples to show that the site is not demobilized fully even as on this day:*



- *Mast of the Tower crane is still lying at the site;*
- *Site is yet to be made free from debris/surplus earth;*
- *Shuttering battens are yet to be removed from construction joints;*
- *Brackets for anchoring tower crane supports to be removed;*
- *Handing over of unusable scrap steel and final reconciliation of steel, etc.*

*As advised many times earlier too, unless SPCPL does not complete the demobilization, we are unable to give front(s) of the B1 building envelope to the new contractor, who is already on board since mid-Jan 21 (since as per norms we cannot have two contractors simultaneously working on the same set of works/scope); and delay in their getting started at the site, in turn, is also impacting our disbursements as explained on multiple occasions. Please also appreciate that your full payments shall only be due once all the activities pertaining to demobilization are completed 100% by you, including the removal of debris and handing over of a clean site as per agreed scope; and all promises made in any contract by two parties are always reciprocal in nature, unless otherwise specified.*

*In view of the above, your time and again threatening us with 'other recourse under Contract/Settlement Agreement and law', is in bad taste and not at all appreciated at our end, more so in these extraordinary and unprecedented times of adverse market conditions. In spite of that, if you choose to explore any 'other recourse' as stated in the last paragraph of your mail, please be aware that even we shall vehemently defend ourselves and also take action in regard to your breaches, at your risk, cost, and consequences.*



*However, we do hope that better sense shall prevail, and instead of any such misadventure, both sides shall endeavor to preserve and cherish our longstanding relationship, by understanding each other's position and by continuing to support each other in these trying times.*

*Let me end by once again reiterating, that we are committed to releasing your partial payments asap, even if you are not able to fully demobilize.”*

- Even the Co-Development Agreement dated 14<sup>th</sup> November, 2017 would not show that AISPL had withdrawn its role as the owner and in fact remained the Developer of the subject project;
- Various factors including mutual intention of parties, relationship of the non-signatory to the signatory to the said Agreement(s), commonality of subject matter, composite nature of the transaction and performance of contract, etc., are relevant factors for considering the impleadment of the other entities such as ABPL and AISPL. GoCD carves out an exception to the general rule that only signatories have to be the parties to arbitration, Thus, the SoC filed by SPCPL cannot be rejected *qua* AISPL and ABPL.
- The designation of cases as Case No.1 and Case No.2 is only for the purposes of convenience. The Id. Sole Arbitrator holds that the purpose of expression as Case No.1 and Case No.2 is only for the purpose of labelling and nothing more. Id. Counsels have confirmed that no extra fee is also being charged by the Id. Sole Arbitrator.

### ***Proceedings in the three petitions***

75. Initially, only the Section 14 petition was filed by the BCSPL seeking termination of the Id. Sole Arbitrator's mandate. Thereafter, two appeals have



been filed challenging the orders dated 23<sup>rd</sup> May, 2023 and 17<sup>th</sup> October, 2023. The questions that have to be considered are:

- i) Whether the Id. Sole Arbitrator's mandate is liable to be terminated;
- ii) Whether labelling/designation as Case No.1 and Case No.2 and the dismissal of Section 16 applications filed by ASPL and ABPL deserves to be interfered with?

***Issue No. (i)***

***Whether the Id. Sole Arbitrator's mandate is liable to be terminated.***

76. The petition seeking termination of the mandate of the Id. Sole Arbitrator is based on the following grounds:

- i) That the Id. Arbitrator could not have split the two cases as Case No.1 and Case No.2 as no notice invoking arbitration under Section 21 of the 1996 Act was served on the two parties, and that such a procedure was completely alien to the agreed procedure;
- ii) That the permission granted to AISPL to file a separate SoC against the two parties who were not part of the original claim is contrary to Section 23(2A) of the 1996 Act. The Id. Sole Arbitrator has exceeded his jurisdiction by consolidating both cases, and also exceeded his jurisdiction by permitting the counterclaim to be filed.
- iii) By bifurcating the proceedings into two parallel cases, the Id. Sole Arbitrator assumed jurisdiction over SPCPL's claim without there being compliance of the mandatory conditions of the 1996 Act. The Id. Sole Arbitrator has a legal incapacity as he



was barred by law from continuing in office. The bifurcation of the proceedings is not a mere labelling but has a bearing on the merits of the dispute.

77. In the opinion of this Court, the above grounds for seeking termination of the Id. Sole Arbitrator's mandate are specious, to say the least. In the initial reference order dated 27th July 2022 itself, insofar as the impleadment of AISPL is concerned, the Id. Single Judge had permitted SPCPL to raise this issue of impleadment of AISPL before the Id. Sole Arbitrator.

78. Moreover, arbitral proceedings are not strictly governed by the rigors of the CPC. Counterclaims can be filed by the Respondent in an arbitral proceeding, as clearly allowed by Section 23(2A) of the 1996 Act. The issue is only whether the counterclaim has to be restricted to the claimant alone or can other parties be impleaded as Respondents in the counterclaim. The nature of the disputes in the present case would show that from the initial Works Contract to the Novation Agreement, the Settlement Agreement, and the Comfort Letter, the role of ASF Group, AISPL, and ABPL is not clearly delineated.

79. The expression ASF appears in the agreements and the emails exchanged, including in respect of issues such as demobilization, which BCSPL has raised claims about. The delay in demobilization is being explained to the officials of ASF Group in their emails, which have been annexed by BCSPL in the petition. The entities may be separate on paper, but ASF Group appears to be one cohesive entity as is evident from the documents placed on record. In this context, the GoCD and the Single Economic Entity Doctrines, as laid down in cases like *Cox and Kings (supra)*, and *Dow Chemical v. Isover Saint Gobain (Interim Award, ICC Case No. 4131, 23<sup>rd</sup>*



*September, 1982*) support the view that all entities within a closely-knit corporate group can be bound by the arbitration agreement if they are involved in the contract's negotiation, performance, or termination.

80. The *Dow Chemicals (supra)* case is particularly relevant here. In that case, the ICC tribunal found that the Dow Chemical Company, as the holding entity, was involved in the contractual developments through its control and ownership of the subsidiaries, justifying its inclusion in the arbitration proceedings. The background of the said case is that Dow Chemical (Venezuela) entered into a contract with a French company, which later assigned the rights to Isover Saint Gobain, for the distribution of thermal isolation products in France. The said contract was subsequently assigned to Dow Chemical AG, a subsidiary of Dow Chemical Company, the holding company. Later, Dow Chemical Europe, another subsidiary of Dow Chemical AG, entered into a similar contract with three companies, which also assigned the contract to Isover Saint Gobain. Both contracts stipulated that deliveries would be made by Dow Chemical France or any other subsidiary of Dow Chemical Company.

81. Thereafter, several suits were instituted against companies of the Dow Chemical group before the French courts. In response, four companies from the Dow Chemical group—Dow Chemical AG and Dow Chemical Europe (the formal parties to the said contract), and Dow Chemical Company and Dow Chemical France (the non-signatories)—initiated arbitral proceedings against Isover Saint Gobain before the ICC tribunal.

82. The primary issue before the ICC tribunal was to determine its jurisdiction over the non-signatory parties. The tribunal sought to ascertain whether there was a common intention among the parties to be bound by the



arbitration agreement. By analyzing the negotiation, performance, and termination of the contracts, the tribunal found that Dow Chemical France played a significant role in these processes and was therefore considered a party to the contracts and the arbitration agreements. Additionally, the tribunal concluded that Dow Chemical Company, as the holding company, had control over the trademarks and subsidiaries involved, justifying its inclusion in the arbitration. The ICC Tribunal also noted that Isover Saint Gobain had sought the joinder of the holding company in French court proceedings. The relevant observations of the ICC Tribunal are as follows:

*“Considering that it is indisputable — and in fact not disputed — that DOW CHEMICAL COMPANY (USA) has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like DOW CHEMICAL FRANCE, effectively and individually participated in their conclusion, their performance, and their termination;*

*"Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une réalité économique unique) of which the arbitral tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules.*

***"Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.***



*"Considering that ICC arbitral tribunals have already pronounced themselves to this effect (see the awards in Case No. 2375 of 1975, Journal du droit international 1976.973 ; and in Case No. 1434 of 1975, id at 978 ). The decisions of these tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.*

*"Considering that it is true that in another award (Case No. 2138 of 1974, Journal du droit international 1975.934) the arbitral tribunal refused to extend an arbitration clause signed by one company to another company of the same group. However, in so doing it based itself on the factor 'that it was not established that Company X' (which the tribunal had determined was neither a signatory nor a party to the contract) 'would have accepted the arbitration clause if it had signed the contract directly.'*

*"Considering that in the absence of such a showing, the tribunal did not allow application of the arbitration clause; but that in the present case, the circumstances and the documents analyzed above show that such application conforms to the mutual intent of the parties."*

83. The decision in **Dow Chemicals (supra)** has been affirmed recently by the Supreme Court in **Cox and Kings (supra)**. Similarly, in the present case, the ASF Group, through its entities AISPL and ABPL, has been significantly involved in the contractual obligations, as evidenced by the continuous use of the ASF insignia and correspondence addressing demobilization issues. Such involvement indicates that the ASF Group, as a cohesive entity, is integral to the arbitration process. Thus, there is a need to implead the parties for a successful resolution of disputes. Even the email correspondence makes it



clear that they are part of the same Group, each being inextricably linked to the project in question.

84. In effect, therefore, the SoC filed by SPCPL is nothing but a counterclaim filed against BCSPL and the ASF Group. Ideally, SPCPL ought to have sought impleadment of these two companies in the arbitral proceedings before filing the claim. However, the mere fact that the claim was filed without seeking leave to implead but the impleadment has now been upheld in a Section 16 ruling, would not render the Id. Sole Arbitrator into any illegal incapacity.

85. In effect, the reading of all the orders leads to only one conclusion: that the Id. Sole Arbitrator holds that the claim filed by SPCPL is maintainable against BCSPL, ABPL, and AISPL. The Id. Sole Arbitrator also holds that for the sake of convenience, they would be labeled as Case No.1 and Case No.2. There is no legal incapacity which the Id. Sole Arbitrator suffers from either *de jure* or *de facto*. The prayer for termination of the mandate of the Id. Sole Arbitrator is clearly nothing but an attempt to ensure that the Id. Sole Arbitrator is somehow changed as he may have expressed a view in the orders that have already been passed. Thus, the stand of BCSPL that there is any *de jure* and *de facto* inability in the Id. Sole Arbitrator in performing his functions are completely untenable. Thus, the Section 14 petition is devoid of merits and is dismissed.

***Issue No. (ii)***

***Whether labelling/designation as Case No.1 and Case No.2 and the dismissal of Section 16 applications filed by ASPL and ABPL deserves to be interfered with?***



86. The above question has two or three distinct dimensions.

- i) whether a separate notice invoking arbitration was needed under Section 21 of the 1996 Act for SPCPL to maintain its claim against AISPL and ABPL?

On this issue, there cannot be two opinions about the fact that for every arbitration claim to be raised, a notice under Section 21 of the 1996 Act is mandatory. However, a Section 21 notice would not be required if a party is filing a claim in the form of a counterclaim *qua* which reference has already been made by the Court. In the present case, claims and counterclaims by BCSPL and SPCPL are clearly entertainable before the Id. Arbitral Tribunal owing to the order dated 22<sup>nd</sup> July, 2022 passed in the ***Arbitration Petition No. 431/2022***. Insofar as AISPL is concerned, the Court in its order dated 22<sup>nd</sup> July, 2022 had also permitted issues *qua* ASF to be raised before the Id. Sole Arbitrator. The said observations of the Court are set out below:

*“22. The only objection taken on behalf of the respondent is that there is no independent Arbitration Clause in the Settlement Agreement dated 24<sup>th</sup> July, 2020. It is further asserted that the ASF, which was the original signatory to the Works Contract, be also made a party.*

*23. Without prejudice, learned counsel for the respondent submits that she has no objection if the Arbitrator is appointed with liberty that the respondent may be able to raise these contentions before the learned Sole Arbitrator.”*

87. A perusal of paragraph 22 of the above order shows that the reference in this order is to ASF as an original signatory to the Works Contract. Clearly, there is some confusion which has been confounded. The original Works Contract was with AISPL. The reference to ASF pertains to the group. Thus, in effect, ASF and the original signatory to the Works Contract, AISPL, fall



within the jurisdiction of the Id. Arbitral Tribunal. The reference was therefore in relation to BCSPL and SPCPL. Contentions relating to ASF and AISPL were also permitted to be raised before the Id. Arbitral Tribunal. Thus, SPCPL cannot be faulted for raising claims before the Id. Sole Arbitrator against AISPL and ABPL. However, it ought to have first sought impleadment and thereafter filed claims. The reverse has happened in the present case. However, AISPL and ABPL filed applications under Section 16 seeking rejection of the claims against them, which has now been ruled upon by the Id. Sole Arbitrator. In effect, the Id. Arbitrator has held that AISPL and ABPL are part of the cohesive ASF Group, and claims can be entertained against them.

88. The question that now arises is whether due to the slightly varied procedure adopted by SPCPL or by the Tribunal, the orders of the Id. Sole Arbitrator on merits deserves to be interfered with. On this, the opinion of this Court is that if the claims against the AISPL and ABPL are maintainable under the Group of Companies doctrine has held in *Cox and Kings (supra)*, in order to avoid multiplicity of proceedings, contradictory findings and to ensure efficiency of arbitral proceedings, the Court ought not to interfere with the said orders.

89. Coming to the Group of Companies doctrine, the settled legal position is that a non-signatory to an arbitration agreement cannot be made a party to the arbitral proceedings. The relevant portion of the decision in *Cox and Kings (supra)* reads as follows:

*“165. In view of the discussion above, we arrive at the following conclusions:*

*a. The definition of “parties” under Section 2(1)(h) read*



with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;

b. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;

c. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;

d. Under the Arbitration Act, the concept of a “party” is distinct and different from the concept of “persons claiming through or under” a party to the arbitration agreement;

e. The underlying basis for the application of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the nonsignatory party to the arbitration agreement;

**f. The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine;**

g. The group of companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act;

**h. To apply the group of companies doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises (supra). Resultantly, the principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine;**

i. The persons “claiming through or under” can only assert a right in a derivative capacity;

**j. The approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies**



**doctrine to the phrase “claiming through or under” is erroneous and against the well-established principles of contract law and corporate law;**

*k. The group of companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements;*

**l. At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement; and**

**m. In the course of this judgment, any authoritative determination given by this Court pertaining to the group of companies doctrine should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.”**

90. In terms of the above decision, to apply GoCD, as per the Supreme Court - Courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in *Discovery Enterprises (supra)*. The Supreme Court in *Discovery Enterprises (supra)* held as follows:

*“40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*

- (i) The mutual intent of the parties;*
- (ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
- (iii) The commonality of the subject-matter;*
- (iv) The composite nature of the transactions; and*
- (v) The performance of the contract.””*

91. Considering the first factor of mutual intent, the same is demonstrated



by AISPL and ABPL's substantial involvement in the negotiation, performance, and termination of the various contracts entered into between the parties. The continuous use of ASF insignia and the participation of ASF Group officials in correspondences indicate that all entities within the ASF Group intended to be bound by the same arbitration agreement.

92. Secondly, the relationship between the signatories and non-signatories is crucial. AISPL and ABPL, as subsidiaries within the ASF Group, have a direct relationship with BCSPL. They all have common directors, if not the same directors. Their interconnected roles in the Black Canyon project, as evidenced by their involvement in securing demobilization by SPCPL and other contractual obligations, highlight this relationship.

93. Thirdly, the aspect of commonality requires that the subject matter across transactions should be shared. In this case, the original Works Contract, the Novation Agreement, the Settlement Agreement, and the Comfort Letter all pertain to the same redevelopment project of the Black Canyon project. The shared subject matter across these agreements establish a 'commonality' that justifies the inclusion of AISPL and ABPL in the arbitration proceedings before the Id. Sole Arbitrator. Further, the various transactions entered into between the parties must form a cohesive whole, indicating that they cannot be viewed in isolation. The intertwined nature of the agreements involving BCSPL, AISPL, and ABPL demonstrates that these transactions form a composite whole. The responsibilities across the ASF Group entities reflect a composite business operation.

94. Finally, the factor relating to active involvement. Participation in negotiations, execution, or enforcement of the contract is a key factor. AISPL and ABPL's active involvement in contractual obligations, such as addressing



demobilization issues and fulfilling other responsibilities under the agreements, demonstrates their significant role in the project.

95. In regard to the decision in *Arupri (supra)*, the said decision was rendered prior to the decision of the Supreme Court in *Cox and Kings (supra)*, wherein the Supreme Court has discussed the law relating to GoCD and impleadment of non-signatories comprehensively. Further the Bombay High Court in *Cardinal Energy and Infra Structure Private Ltd. v. Subramanya Construction and Development Co. Ltd. (MANU/MH/2164/2024)* has observed that the decisions in *Abhibus (supra)* and *Arupri (supra)* were rendered prior to the decision of the Supreme Court in *Cox and Kings (Supra)* which has changed the law with regard to impleadment of non-signatories to the arbitration agreement. The relevant portions of the said decision read as follows:

*“42. I do not find from a reading of the decision of the Supreme Court in Cox and Kings Ltd.(Supra) that merely by there being no prayer for impleadment of a non-signatory in the Section 11 Application, the applicability of the doctrine of 'group of companies' by the Sole Arbitrator is excluded. The Arbitrator does have the power/authority to implead the non-signatory if such non-signatory is otherwise liable to be impleaded on the basis of the 'group of companies' doctrine. Thus, the Supreme Court has infact considered that the Arbitral Tribunal is the appropriate forum to determine the issue as to joinder of a non-signatory to an Arbitration Agreement. I thus find no merit in the submission of Mr. Rustomjee that in the event the issue of joinder of a non-signatory to an Arbitration Agreement is not raised before the Referral Court, the Arbitral Tribunal on its own accord does not have the power to determine this issue and/or allow the impleadment of a non-signatory to an Arbitration Agreement. I do not find there to be any estoppel on the Arbitral Tribunal determining this issue.*



43. I further find much substance in the argument of Mr. Sarda on behalf of the Respondent Nos. 1 and 2 that the Arbitral Tribunal is obliged to follow the law laid down by the Supreme Court and/or judge made law. This would be the case despite the Arbitral Tribunal not having specific power to consider an application for impleadment and/or the power of the Civil Court under Order I Rule 10 of the CPC. The Delhi High Court in Abhibus Services India Private Ltd. and Ors. (Supra), paragraph 136 has the recognized concept of judge made law. However, it has been held that in the absence of any trace of such power in the entire scheme of the Act, the power of impleadment cannot be said to be conferred upon the Tribunal on the basis of judge made law. This decision of the Delhi High Court was prior to the decision of the Supreme Court in Cox and Kings (Supra) which in my view has changed the law with regard to impleadment of non-signatories to the Arbitration Agreement on the 'group of companies' doctrine and has left it to the Arbitral Tribunal to determine this issue.

44. There have been submissions made by Mr. Rustomjee on the power of the Referral Court to determine whether the Arbitration Agreement exists and/or validity of the Arbitration Agreement and which would include whether the Arbitration Agreement is applicable to non-signatories to the Agreement. The Supreme Court in National Insurance Company Ltd. (Supra) at paragraph 22 has referred to the issues which the Chief Justice or his designate is bound to decide and which includes whether there is an Arbitration Agreement and whether the party who has applied under Section 11 of the Act is a party to such agreement. However, this will not preclude the Arbitral Tribunal from deciding the issue of impleadment of a non-signatory to an Arbitration Agreement, particularly when this issue was not before the Referral Court. Thus, in my view, the Sole Arbitrator in the present case was perfectly justified in determining the issue of whether the Petitioners as non-signatories to



*the Arbitration Agreement could be impleaded as parties to the arbitration.”*

96. In the present case, a perusal of the impugned orders shows that the Id. Sole Arbitrator has conflated the issue of the applicability of the Group of Companies doctrine & alter ego doctrine, and thus has resorted to piercing the corporate veil. All three could not have been combined in the manner in which the Id. Sole Arbitrator has done. However, there are certain facts which are relevant:

- i) That the ASF Group is one cohesive group in which AISPL, ABPL and BCSPL are part of the group. There is no distinct management dealing with the activities of these three companies. The correspondence on record shows that whether in respect of demobilization or other performances under the contracts, AISPL is backing BCSPL, ASF Group is also standing as guarantee for BCSPL. The Comfort Letter given by ASPL is evidence of this. Thus, in effect, though there are three distinct incorporated legal entities, the group is functioning as one unit. The initial work order was with AISPL. Claims raised relate to periods even prior to the Novation Agreement where AISPL would be a necessary and a relevant party.
- ii) Non-payment of dues is also another claim of SPCPL qua which AISPL gave a Comfort Letter.
- iii) ABPL is the holding company and is part of the ASF Group. The order dated 22<sup>nd</sup> July, 2022 uses the expression ASF which includes ABPL as its part of ASF. Thus, the Id. Sole Arbitrator ought to have



simply applied GoCD as enshrined in the *Cox and Kings (supra)* to entertain the claims filed by the SPCPL.

97. In the overall scheme of things, therefore, the delineation of Case No.1 and Case No.2 was wholly unnecessary. The impleadment of AISPL and ABPL is in accordance with law, though the Id. Sole Arbitrator used different reasons for dismissing the Section 16 applications. In effect, the Id. Sole Arbitrator has held that claims can be maintained against AISPL and ABPL. In these facts and circumstances, the Court disposes of the three petitions in the following terms:

- i) AISPL and ABPL are impleaded as Respondent Nos. 2 and 3 in the arbitral proceedings.
- ii) The SoC filed by SPCL is treated as counterclaim against BCSPL, AISPL and ABPL.
- iii) The delineation of Case No. 1 and Case No.2 was wholly unnecessary and is set aside.
- iv) For all practical purposes, the case pending before the Id. Sole Arbitrator shall be treated as one case arising out of reference order dated 22<sup>nd</sup> July, 2022.
- v) There is no legal incapacity in the Id. Sole Arbitrator to deal with the claims and counterclaims and the mandate of the Id. Arbitrator does not deserves to be terminated.
- vi) The Id. Sole Arbitrator was correct in his observation that, for reasons of financial and strategic convenience, BCSPL's attempt was to restrict the counterclaim only to BCSPL and not to AISPL & ABPL. Considering that AISPL and the ASF Group had assumed responsibility for payments to be made to SPCPL and



for the implementation of the project, as evidenced by the Comfort Letter and various emails exchanged, their impleadment was necessary for a comprehensive adjudication of the matter.

- vii) In view of the fact that SPCPL has no objection to its claim petition being treated as a counterclaim to the BCSPL's claim, it is ordered that both cases shall be treated as a single reference and a single dispute. The claims of BCSPL and the counterclaim of SPCPL shall be adjudicated by the Id. Sole Arbitrator after framing issues. No bifurcation would be permissible.
- viii) Evidence shall be led first by BCSPL, AISPL and ABPL and thereafter SPCPL in their respective claims and counterclaims.

98. Let the present order be communicated to the Id. Sole Arbitrator by the Registry. The above two appeals and the Section 14 petition are disposed of in the above terms. All pending applications are disposed of.

**PRATHIBA M. SINGH**  
**JUDGE**

**JULY 04, 2024**

*Rahul/dn*