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

\+ ARB.P. 485/2023

RUGBY RENERGY PVT. LTD. ..... Petitioner

Through: Mr. Abhishek Puri, Ms. Surbhi Gupta, Mr. Sahil Grewal and Mr. Amit Ranjan Singh, Advs.

versus

SREI EQUIPMENT FINANCE LIMITED ..... Respondent

Through: Mr. Rajshekhar Rao, Sr. Adv. with Mr. Arijit Majumdar, Mr. Shambo Nandy and Mr. Bhaskar Anand, Advs.

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\+ O.M.P.(I) (COMM.) 61/2023

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**CORAM:**
**HON'BLE MR. JUSTICE JASMEET SINGH**

**O R D E R**

% **03.05.2024**

**ARB.P. 485/2023**

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties arising out of Term Sheet Agreements dated 20.01.2021.

2. Under the terms of the Term Sheet Agreements, the petitioner was to acquire the windmill business of the respondent. The two Term Sheet Agreemnts dated 20.01.2021 concerned the sale of 24.8 MW Wind Business as well as 5 MW Wind business. The arbitration clause is contained in clause 9 of the agreements. It reads as follows:-

> *"Any and all disputes, controversies, claims and differences arising out of, involving, or relating to this. Term Sheet and its. Amendments) including the scope, interpretation, validity thereof shall be settled by reference to arbitration, in accordance with the provisions of the Arbitration and Conciliation. Act, 1996 or any statutory modification thereof which is in force, by a sole Arbitrator to be appointed by the Delhi High Court. The arbitral proceedings shall be held in Delhi only and in the English language. Parties agree to the Jurisdiction of courts at Delhi only and nowhere else. As it shall be the endeavor of the Parties to effectuate the present Term Sheet, they shall continue to perform the undisputed terms thereof during the pendency of any such proceedings."*

3. Since there were disputes between the parties, the petitioner issued a notice under section 21 of the Arbitration and Conciliation Act, 1996 on 10.02.2023.

4. In the petition under section 9 of the Arbitration and Conciliation Act, 1996, i.e. O.M.P.(I) (COMM.) 61/2023, filed by the petitioner, status quo orders were passed.

5. During the pendency of the proceedings, CIRP proceedings were initiated against the respondent on 08.10.2021. Subsequently, the respondent terminated the agreements with the petitioner on 24.01.2023.

6. The resolution plan of the respondent was approved by the NCLT on 11.08.2023.

7. Hence, the present petition.

8. Mr. Rao, learned senior counsel for the respondent appearing for the respondent states that the petitioner had a right to lodge its claims before the resolution professional, having failed to do so cannot maintain the present petition. It is stated that the contract once terminated, the only remedy available to the petitioner was to file for damages and cannot seek specific performance.

9. He states that once the claim of the damages is the only relief available to the petitioner and once the resolution plan approved by the NCLT, all claims of the petitioner extinguishes with approval of that plan.

10. I have heard learned counsel for the parties.

11. The resolution applicant amongst others sought the following reliefs:-

> *"37. Save and except as referred to in* ***Section 3.2.8*** *of* ***Part A (Financial Proposal)****, the Hon'ble NCLT be pleased to give or issue necessary directions, instructions such that any and all claims or demands made by, or liabilities or obligations owed or payable to (including any demand for any losses or damages, or interest, back wages, compensation, penal interest, liquidated damages already accrued/accruing or in connection with any claims) any present or past, direct or indirect, permanent or temporary employee and/or workman of the Corporate Debtors, whether claimed or unclaimed, admitted or not, due or contingent, asserted or unasserted, crystallised or not, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the provisional balance sheet, the balance sheets of the Corporate Debtors or the profit and loss account statements of the Corporate Debtors or the List of Creditors, in relation to any period prior to the Closing Date, shall be deemed to be permanently extinguished with effect from the NCLT Approval Date by virtue of the order of the NCLT approving this Resolution Plan*

*and the Corporate Debtors or the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable (whether in the capacity of a principal employer or otherwise) in relation thereto.*

*38. The Hon'ble NCLT be pleased to give or issue necessary directions, instructions such that all monetary liabilities or obligations of the Corporate Debtors, in relation to: (a) any investigation, inquiry or show-cause, whether civil or criminal; (b) any non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permits; (c) change of control, transfer charges, compensation, or any other such liability whatsoever under any contract, agreement, lease, license, approval, consent or permission to which the Corporate Debtors or its subsidiaries, joint ventures or associates are entitled; (d) any leasehold rights or freehold rights to movable or immovable properties in the possession of the Corporate Debtors; (e) any contracts, agreements or commitments made by the Corporate Debtors, in each of the foregoing cases whether claimed or unclaimed, admitted or not, due or contingent, asserted or unasserted, crystallised or not, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the provisional balance sheet, the balance sheets of the Corporate Debtors or the profit and loss account statements of the Corporate Debtors or the List of Creditors, in relation to any period prior to the Closing Date, will be written off in full and will be deemed to be permanently extinguished with effect from the NCLT Approval Date by virtue of the order of the NCLT approving this Resolution Plan, and all consequential liabilities, if any, that may arise in the future on account of the aforesaid (including but not limited to any duties, penalties, interest, fines or fees) shall stand extinguished and the Corporate Debtors or the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation* *thereto.*

*....*

*43. The Hon'ble NCLT be pleased to give or issue necessary directions, instructions such that on and from the Effective Date, the Servicer Agreements and/or any other Third Party Assets Agreements shall stand terminated or renegotiated, at the option of the Resolution Applicant and any liability under the Servicer Agreements and/or the Third Party Assets Agreements,, whether general or specific, claimed or unclaimed, due or contingent, asserted or unasserted, crystallised or not, known or unknown, disputed or undisputed, shall be deemed to be permanently extinguished with effect from the Effective Date by virtue of the order of the NCLT approving this Resolution Plan and the Corporate Debtors or the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto."*

12. The NCLT while approving the resolution plan granted the following:-

*"117. The reliefs sought with respect to subsisting contracts/agreements can be granted, and no blanket orders can be granted in the absence of the parties to the contracts and agreements.*

13. A perusal of the aforesaid paragraphs shows that the relief with regard to extinguishing of subsisting contract/agreements were not granted. It is stated by the learned senior counsel for the respondent that since the contract between the petitioner and respondent was no longer subsisting in view of Termination Letter dated 24.01.2023, no relief can be granted to the petitioner.

14. The same is disputed by the learned counsel for the petitioner.

15. In view of the termination of agreements between the parties being

unilateral, I am of the view that the issue needs to be decided by the Arbitral Tribunal.

16. I am supported by the view of Coordinate Bench of this court in ***"Bharat Petroresources Limited vs. JSW Ispat Special Products Limited"*** (2022) SCC OnLine Del 443, wherein in somewhat similar circumstances the Coordinate Bench held as under:-

> *26. It is well settled that in terms of sub-section (6-A) of Section 11 of the A&C Act, the scope of examination under Section 11 of the A&C Act is limited to the existence of an arbitration agreement between the parties. Notwithstanding the same, in cases where it is ex facie clear that the disputes cannot be entertained, the courts would refrain from entertaining the petition to appoint an arbitrator as the same would be an exercise in futility. [see Vidya Drolia v. Durga Trading Corpn., N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. and BSNL v. Nortel Networks (India) (P) Ltd.*
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> *…*
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> *30. In a recent decision of the Supreme Court in Intercontinental Hotels Group (India) (P) Ltd. v. Waterline Hotels (P) Ltd. [Intercontinental Hotels Group (India) (P) Ltd. v. Waterline Hotels (P) Ltd., 2022 SCC OnLine SC 83] , the Supreme Court had highlighted that as a matter of default, the parties must be referred to arbitration and it is only in cases where it is clear that the disputes are deadwood that the courts would refrain from appointing an arbitrator. The court had once again reiterated the principle "when in doubt refer".*
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> *31. The controversy in the present petition is required to be considered bearing the aforesaid principle in mind.*
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> *…*
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> *34. It is apparent from the above that Nclat was of the view that BPRL's appeal was in respect of claims arising post the ICD and could not be accepted by the resolution professional. Therefore,*

*its grievance that the same had not been considered was not sustainable.*

*35. Thus, the question whether the liability sought to be enforced by BPRL against the respondent stands extinguished is a contentious issue*

*36. In view of the above, this Court is unable to accept that the controversy involved in the present case falls within the standards of examination under Section 11 of the A&C Act. The Supreme Court in its recent decision in Mohd. Masroor Shaikh v. Bharat Bhushan Gupta while referring to the decision in Vidya Drolia v. Durga Trading Corpn held that "the court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable".*

*37. As noticed above, this Court is not required to examine and adjudicate any contentious issue and the parties must be relegated to the forum of their choice for adjudication of their disputes.*

17. For the said reasons, once there is an arbitration clause between the parties, the fact whether the contract between the petitioner and the respondent stood terminated and/or can be extinguished needs to be adjudicated by the Sole Arbitrator.

18. For the said reasons and in view of the apprehension expressed by the respondents, the petition is allowed. Since the parties are still having disputes between them, the following directions are issued:-

i) Ms. Justice Mukta Gupta (Retd.) (Mob. No. 9650788600) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

v) The parties shall approach the learned Arbitrator within two weeks from today.

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19. In view of the order passed in ARB.P. 485/2023, the present petition under section 9 of the Arbitration and Conciliation Act, 1996 will be treated as an application under section 17 of the Arbitration and Conciliation Act, 1996 and will be adjudicated upon the arbitral tribunal.

20. Till the application is adjudicated, the interim orders shall continue.

21. The petition is disposed of.

**JASMEET SINGH, J**

**MAY 3, 2024/NG**

*Click here to check corrigendum, if any*