



2025:DHC:3654



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

Judgment pronounced on: 13.05.2025

+ **ARB.P. 849/2024**

ELECON ENGINEERING COMPANY LIMITED Petitioner
Through: Mr. Manish Vashishth, Sr. Advocate
alongwith Mr. Sanjeev Kumar
Sharma, Mr. Vikas Bhardwaj and
Ms. Gargi Gaur, Advocates.
versus

BHARTIYA RAIL BIJLEE COMPANY LIMITED Respondent
Through: Mr. Adarsh Tripathi, Mr. Vikram
Singh Baid and Mr. Ajitesh Garg,
Advocates for R-1.
Mr. Shiva Krishnamurti, Advocate for
Respondent no.2.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “**A&C Act**”) has been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The petitioner is a company, *inter alia*, engaged in the business of manufacturing Material Handling Equipment (‘MHE’) including industrial gears and reducers, mining, equipment and casting processes and supplying the same to the Fertilizer, Cement, Coal, Power Generation, Mining, Chemical, Steel, Port-mechanization, Minerals and Metals-processing



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sectors etc. The petitioner also undertakes turnkey projects offering a complete range of services, designs, engineering, procurement, supplies, testing, manufacturing, construction and project management and commissioning etc.

3. The petitioner is the successor in interest of M/s Elecon EPC Projects Limited, which entity merged into the petitioner's company by way of scheme of arrangement in the nature of amalgamation, approved by the Hon'ble High Court of Gujarat *vide* order dated 07.10.2016 passed in Co. Pet. No.398 of 2016 and Co. Pet. No.399 of 2016.

4. The respondent no.1 is a joint venture of M/s NTPC Limited and Ministry of Railways.

5. A tender was floated by the Joint venture partner of the respondent no. 1, i.e. M/s NTPC Ltd on 14.12.2009 and bids were invited for Coal Handling Plant Package (CHP) for "Nabinagar Thermal Power Project" of the respondent company.

6. The respondent no.2 i.e., M/s Tecpro Systems Limited, the successful bidder, collaborated with the petitioner for limited part viz., as design agency and for supply of certain equipment / materials. The Respondent No. 2 is now in liquidation.

7. Consequently, the petitioner along with the respondent no.2, was a party to two Deeds of Joint Undertaking, both dated 22.02.2010. The said Deeds of Joint Undertaking contain an arbitration clause in the following terms:-

"Any dispute that may arise in connection with this Deed of Joint Undertaking shall be settled as per arbitration procedure/rules mentioned in the Contract Document. This Deed of Undertaking shall be



construed and interpreted in accordance with the Laws of India and the Courts of Delhi shall have exclusive jurisdiction.”

8. As noticed, only the petitioner and the respondent no.2 are parties to the said Deeds of Joint Undertaking. Certain bank guarantees were also submitted by the petitioner pursuant to the Deeds of Joint Undertaking.

9. It is the case of the petitioner that during the execution of the work, certain vital obligations in connection with the *inter-se* Contract between the respondents were assumed by the petitioner. Consequently, it was also agreed that certain payments would be made directly by the respondent no.1 to the petitioner. In particular, this was reflected in the minutes of a Review Meeting held on 12.02.2014.

10. It is submitted that for the purpose of the execution of the work, the petitioner was engaged in direct correspondence with the respondent no.1. Further, review meetings held on 30.07.2015 and 05.04.2016 records that certain obligations were cast on the petitioner by the respondent no.1. Thereafter, a Tripartite Agreement dated 22.04.2016 was executed. It is submitted that by way of the Tripartite Agreement, the respondent no.1 undertook the obligation to directly pay the petitioner for future supplies and towards previous outstanding dues.

11. Subsequently, another meeting was held on 26.12.2016, wherein, the modalities with respect to raising of invoices by the petitioner directly upon the respondent no.1, was agreed upon. However, since the requisite payments were not being made by the respondent no.1 to the petitioner, differences developed between the parties.

12. During the meeting held on 25th and 26th May, 2018, the respondent no.1 assured to pay certain outstanding amounts to the petitioner.



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13. In the meantime, on 07.08.2017, the respondent no.2 was admitted into insolvency and ultimately a liquidation order was passed *qua* the respondent no.2. Eventually, *vide* order dated 16.01.2020, the NCLT, New Delhi directed liquidation of the respondent no.2.

14. It is the case of the petitioner that even though it performed its obligations, the requisite payment was not made to it. It is submitted that *vide* emails dated 09.08.2021 and 05.01.2022, the respondent no.1 intimated the petitioner that all the three units of 250MW were put on continuous operations to meet the grid demand. The petitioner was required to perform certain additional works as well.

15. Since disputes between the petitioner and the respondent no.1 continued with regard to the payment issues and as regards certain other issues as well, the petitioner ultimately issued a notice dated 02.07.2022 requesting the respondent to agree to refer the disputes to arbitration under the aegis of Delhi International Arbitration Centre (DIAC). The said letter was addressed by the petitioner to the respondent no.1, which reads as under:-

“K01/CO2137/BRBCL/06/28

Dated: 02nd July 2022

Without prejudice

By registered post/courier and through emails.

To,

1. The Addl. Gen. Manager (Project-ME)
Bhartiya Rail Bijlee Company Limited,
(A JV of NTPC Ltd. & Ministry of Railways),
Regd Office- NTPC Bhawan Core-7
SCOPE Complex, 7 Institutional Area,



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Lodhi Road, New Delhi 110003.

2. The Addl. Gen. Manager (Project-ME),
Project Office,
Bhartiya Rail Bijlee Company Limited
(A JV of NTPC Ltd. & Ministry of Railways)
Nabinagar Thermal Power Project,
Nabinagar-824303, Dist. Aurangabad (Bihar)

Kind Attn.: Mr. Arvind Patle (Addl. Gen Manager, Project- ME)

Project: CHP Package- BRBCL (4X250MW)

Sub:- Demand for payment of the outstanding amount of Rs. 18,30,64,483/- including amount of Rs. 1,00,95,276/- towards encashed JDU BG

Ref: 1. L.O.I dated 30-11-2010 issued by M/s Tecpro Systems Limited for supply of equipments for Nabinagar Projects.

2. Purchase Order No. ML0907003308, dated 09-02-2011 issued by M/s Tecpro Systems Limited

3. Tripartite Agreement dated 22-04-2016 (TPA)

Dear Sir,

We refer the Tripartite Agreement dated 22.04.2016 captioned hereinabove, in respect of supply of equipment on behalf of M/s Techpro Systems Ltd, which is in liquidation, as per order passed by Hon'ble NCLT, New Delhi in CP (IB) 197 (PB)/2017, we wish to submit as under:-

1. As you are aware that initially the above referred L.O.I and Purchase Orders were issued by M/s Tecpro Systems Limited (hereinafter referred as 'TSL') to Elecon being approved vendor by BRBCL for supply of equipments at BRBCL project site. TSL was the main contractor who was awarded CHP works by BRBCL as per the bidding document no. CS-0270-155(R) -2 and we, the Elecon Engineering Company Ltd is the supplier to TSL for certain CHP equipment of your project.

2. You are also aware that due to various reasons there was a delay in execution of the entire project work by TSL which were not attributable to Elecon. Since the delay was on various aspects and related to various reasons the awarded scope of supply of material was also delayed.



3. However, despite no fault of us during the execution of the project you have wrongfully encashed our bank guarantee amounting to Rs. 1,00,95,276/- in May 2015 which affected our cash flow of the project.

4. AS TSL was not in a position to pay its dues under the contract to its vendors/ sub-contractors, in the interest of the Project, particularly regarding supplies & works in the scope of Elecon as a sub-vendor of TSL for Coal Handling Plant, You approached us and a meeting was convened on 30-07-2015 at NTPC Scope Complex, Lodhi Road, New Delhi. While the CHP package execution at BRBCL was in progress, certain understandings & agreements were arrived among BRBCL/NTPC, TSL and were recorded, MoM was executed on the same day. And in continuation, Thereafter a further review meeting was also convened on 05-04-2016 and activities/ actions required were recorded and certain balance items to be supplied were also listed out and record notes of the said review meeting was signed by the parties.

5. Pursuant to the decisions taken in the above said two meetings, a tripartite agreement was entered into and executed on 22-04-2016. The copies of the MoM dated 30-07-2015 and the recorded notes of review meeting held on 05-04-2016 are integral part of the said Tripartite Agreement. In the said Tripartite Agreement TSL has authorized BRBCL to pay the reconciled outstanding dues of Rs.8,32,20,506.65 directly to Elecon and also to pay the price variation claims as payable by BRBCL to TSL as per the contract of CHP against submission of invoices by Elecon for the future supplies. TSL further authorized BRBCL to pay directly the value for balance supplies of Rs. 16,08,87,840/- ex-works as per BRBCL to TSL BBU. Thus you are liable to pay all the dues of Elecon before TPA and after TPA. However, BRBCL has partly paid towards this balance supply made by Elecon & chose not to pay further.

6. In compliance of the terms of TPA dated 22-04-2016, Elecon has agreed to complete the balance supplies as per the PO dated 09-02-2011 and the payment for these supplies shall be 90% against supply and balance 10% shall be paid after successful completion of PGT.

7. Further as per Clause 4 of the TPA, BRBCL is required to pay the retention amount and to return the wrongfully en-cashed BG amount of Rs. 1,00,95,276/- directly to Elecon.

8. Therefore, as per the understanding, the agreed amount payable by BRBCL to Elecon as on the date is as per table below.



TABLE -A

Sr.No.	Particulars	Dues before TPA	Dues after TPA
A	O/s Supply	8,32,20,507	4,82,647
B	O/s PVC - Supply of Equipments	-	7,38,564
C	BG Encashment	1,00,95,276	-
D	O/s Transportation	-	10,14,113
E	O/s Erection of Equipments	-	30,75,403
F	O/s PVC -Erection of Equipments	-	10,00,000
	Total Rs. A to F	9,33,15,783	63,10,727
G	Hold Amount		
1	GST Supply of Equipments	-	1,75,80,709
2	GST PVC - Supply of Equipments	-	32,05,743
3	GST Transportation	-	4,61,267
4	GST Erection of Equipments	-	27,05,421
5	Others/Hold	-	87,93,316
	Total Rs. G	-	3,27,46,455
H	Retention Payment		
1	Supply of Equipments	3,11,66,700	1,41,35,608
2	PVC - Supply of Equipments	-	23,12,649
3	Erection of Equipments	-	25,53,530
4	PVC -Erection of Equipments	-	5,23,031
	Total Rs. H	3,11,66,700	1,95,24,817
	Grand Total Rs. A to H	12,44,82,483	5,85,82,000
	TOTAL DUES FROM BRBCL	18,30,64,483	

The total amount due and payable by BRBCL to Elecon as on date is total **Rs.18,30,64,483/-**.

9. M/s Elecon has honoured its part of obligations in terms of TPA from time to time with true spirit made supplies and submitted invoices to BRBCL, but BRBCL totally failed and neglected to comply its part of



obligations and now trying to find out way and means to wriggle out its obligations by creating false and frivolous record. BRBCL instead of addressing the pending issue and to make payments in compliance of the terms of the said TPA, in a malicious attempt issued a letter dated 08-10-2021 threatening to get the work completed at risk and cost of Elecon. In furtherance, a letter dated 24-05-2022 has been issued with mala fide intention asking for the material those were already supplied and handed over at site long back and the same are in the physical possession of BRBCL and the same is part of reconciled statement of the TPA. Despite the fact that Elecon had supplied certain equipment at your project site under the contract between Elecon and TSL and custody of the same was with TSL at that time & now with you only.

10. BRBCL intentionally is trying to create false, misleading and frivolous record in a malicious attempt to avoid the legitimate payments and with an ulterior motive writing false and frivolous letters to us for no valid reason.

11 . In view of above we humbly submit that, despite our sincere follow ups with you on the pending payments as agreed and other issues, you did not show any interest to resolve the same and not ready to comply and honor the agreed contractual commitments. Unless you extend your support to us, we cannot keep on comply our part of obligation at our cost for the benefit of BRBCL. As we have no further hope and confidence upon BRBCL as a last option we are issuing this notice of demand for payment of all agreed outstanding amount of Rs.18,30,64,483/- with interest @18% p.a. from the date of respective pending invoices immediately within 7 days. The details of outstanding is as per Table-A above.

12. However, we being a responsible corporate believe and endeavor to settle the dispute through direct discussions to resolve the pending unresolved issues amicably in the interest of the project. If you wish to resolve amicably, kindly confirm us within 7 days from the date of receipt of this notice of demand.

13. Please take further notice that you are the sole beneficiary of the project and is liable to pay the above outstanding dues in compliance of the "Tripartite Agreement". It is stated that longstanding due payments towards supply of the material/ equipment for the project work depends upon the timely payments by you as per terms of Tripartite agreement. Evidently and admittedly, huge amounts payable to Elecon are struck with you affecting our working capital and capacity, due to which we shall not be obliged and could not be in position to take out further works resulting in to further losses with question of sustainability of number of



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employees and their families apart from the stake holders associated with the Elecon. In view of your act and conduct by not complying with the terms of Tripartite Agreement and then finding out ways and means to wriggle out of you obligation, our trust, faith and confidence has shattered and this demand notice has been issued as a last recourse seeking you co-operation and commitments to consider the outstanding dues and for amicable closure of the issue.

14. Since the BRBCL is in fundamental default and breach of the material terms and conditions of the Tripartite agreement dated 22.04.2016, and in furtherance has tried to create dispute by issuing false and frivolous letters to avoid the payments, we hereby propose to refer the matter to "The Delhi International Arbitration Centre (DIAC)" for reference and request you to accord your express written consent Within a period of 7 days from the receipt of this notice, which can be treated as joint memorandum/ contract for the reference to DIAC for arbitration. Please treat this notice under Section 21 of The Arbitration and Conciliation Act, 1996 (as amended).

15. This notice does not limit and is without prejudice to our rights and remedies under the said Tripartite Agreement, law or in equity. Nothing contained herein should be construed as a waiver of any of our rights under the said Agreement, law or in equity.

Thanking you

For Elecan Engineering Company Limited

Sd/-

Kaushik Patel

Head – projects”

16. A response dated 29.07.2022 was sent by the respondent no.1, which reads as under:-

“Ref. No. BRBCL/Nabinagar/Fm-Proj/

Dated 29.07.2022

To
ELECON Engineering Limited
Anand Sojitra Road
Vallabh Vidya Nagar-388120
District: Anand
Gujrat



Kind attention: Sri H S Patel, GM (Project & Marketing)

Subject: Coal Handling Plant Package for NabinagarTPP (4X250 MW)

- Ref: 1. CS-0270-155(R)-2-SC-NOA/BRBCL/Nabinagar/10-11/72A;
Dated 13.11.2010
2. CS-0270-155(R)- 2-SC- NOA'BRBCL/ Nabinagar/10-11/72B;
Dated 13.11.2010
3. M/s ELECON letter no K01/C02137/BRBCL/06/28 dtd
02.07.2022

Dear Sir,

At the very outset, it is stated that BRBCL has never defaulted or breached any terms of the CHP contract or the Tripartite Agreement. Your letter under reply is entirely frivolous and untenable, therefore denied and needs to be withdrawn immediately. BRBCL reserves its right to give a detailed reply to the false and frivolous allegation made in the present letter under reply at the appropriate time.

You are aware that BRBCL awarded the Contract to M/s TSL for the CHP Package only after submission of the DJU agreement with its collaborators; wherein the M/s TSL and its collaborators, including M/s ELECON, are jointly and severally responsible for completing the Contract. However, since 16.03.2021, M/s ELECON has stopped working and has defaulted in performing as per terms of the DJU and the Tripartite Agreement. Even before that, on several occasions, M/s ELECON has caused the delay in completing the agreed work.

As per the tripartite agreement, M/s TSL authorized BRBCL to pay the outstanding amount of Rs.8,32,20,506 directly to M/s ELECON out of the amount due to M/s TSL only after completion of the CHP Package. However, since the CHP package is not completed yet because of the non-performance of M/s TSL and M/s ELECON, the said amount is not payable. Moreover, the alleged retention amount and encashed amount against Bank Guarantee were agreed to be paid to M/s ELECON out of the amount due to M/s TSL only after completion of the CHP project and reconciliation of Contract.

Various letters have been issued by BRBCL for completion of package issued to M/s ELECON are as per details given below:

1. Letter Ref No BRBCL/Nabinagar (TSL/6524 dated 04.02.2019, M/s ELECON was asked to commission side arm Charger-1 and Wagon Tippler-1.
2. letter Ref. No. BRBCL/Nabinagar/CHP/7061 dated 08.05.2019 M/s ELECON was asked for commissioning of Wagon Tippler 1 & 2.



3. Letter ref No BRBCL/Nabinagar/CHP/7062 dated 08.05.2019, BRBCL requested for supplying of balance materials for commissioning of Wagon Tripler #2 and commissioning of Stacker Reclaimer#1.
4. Vide letter Ref No. BRBCL/Nabinagar/CHP/7062 dated 08.05.2019, request was made for early commissioning of Stacker reclaimer#1.
5. Letter dated 14.06.2019, M/s ELECON was again requested for commissioning of wagon tippler#2, Sidearm Charger#2 & Stacker reclaimer#2.
5. Letter ref No BRBCL/Nabinagar/TSL/7946, dated 17.01.2020, M/s ELECON was requested to take action for Wagon Tippler #2.
6. Vide letter Ref. No. BRBCL/Nabinagar/TSL, dated 04.02.2020, M/s ELECON was Again asked for commissioning of Wagon Tripler#2 & Side arm charger#2.
7. Vide letter Ref. No. BRBCL/Nabinagar/FM-Proj dated 08.10.2021, M/s ELECON was once again requested for completion of work of stacker reclaimer#2.

Thus, it is evident that BRBCL has taken all out efforts and given sufficient time to party for mobilization at BRBCL to complete erection and commissioning work of Wagon Tripler#2 and Stacker Reclaimer#2, but M/s ELECON did not mobilize at the site. Generation is being hampered due to non-availability of stacker reclaimer#2 as available Stacker Reclaimer#1 can be either used for reclaiming or stacking only, at a time.

In view of above, M/s BRBCL is left with no other option but to complete the balance works on the risk & cost of M/s TSL/ELECON. M/s ELECON was working in Stacker Reclaimer#2, and materials were already handed over to M/s ELECON for erection purposes. When M/s ELECON stopped working, BRBCL asked M/s ELECON to hand over the materials. However, M/s ELECON has not responded to the request. The store's Key (where materials are kept), electrical MCC room, and operator cabin of Stacker Reclaimer#2 were in the custody of Representative of M/s ELECON, and the same has not been handed over till date, even after repeated request of BRBCL.

BRBCL has already taken the initiative to award the Contract for the balance work of Stacker Reclaimer#2, and these contracts are in the advanced stage. Therefore, it is once again requested to hand over the materials to BRBCL so that the balance works of Stacker reclaimer#2 may be completed at risk & cost of M/s TSL/ELECON through various awarded contracts.



M/s ELECON vide present letter has claimed amount under "dues after TPA", and the same is denied since the claims are yet to be submitted/verified as per agreed terms. It is, therefore, requested that a Financial Reconciliation is required with M/s TSL and M/s ELECON, along with verified invoices from M/s TSL, which is the sole responsibility of M/s ELECON. For GST payments, details of ITC is required for M/s ELECON supplied equipment.

As per BRBCL's record, BBU wise reconciliation and protocol details are required for a further payment (if any). Therefore, it is requested to depute a person for Financial Reconciliation. In addition, since, as per the tripartite agreement, any additional payment to M/s ELECON shall be made only from the due amount of M/s TSL, M/s TSL's representative is also required for any effective reconciliation discussion.

It is pertinent to mention that while participating through the collaborator route, M/S Elecon had furnished the DJU as a contract of Guarantee and Indemnity with BRBCL and therefore all the terms and condition shall be governed as per the DJU and other than DJU BRBCL and M/S ELECON have no privity of contract. Therefore, BRBCL give no consent for adjudication of any dispute with M/S ELECON regarding its claim against any amount recoverable from M/S TSL and BRBCL reserve its right to enforce the DJU condition to get the work done at your risk and cost.

Further, it is being reiterated once again that in light of above discussion your claim as per letter mentioned above is not tenable and claim stands cancelled.

Thanking You,

Sd/-

29.07.2022

AGM-FM

A. K. BEHERA"

17. In the above background, since the Arbitral Tribunal could not be constituted by the parties with mutual consent, the present petition has been filed by the petitioner.

18. The contention of the learned senior counsel for the petitioner is that during the execution of the Contract, there was direct dealing between the



petitioner and the respondent no.1. Attention in this regard has been drawn to the aforementioned minutes of review meeting dated 12.02.2014, minutes of meetings dated 30.07.2015, 05.04.2016 and the Tripartite Agreement dated 22.04.2016, in terms of which the petitioner assumed responsibility of balance supplies and works pursuant to the purchase order issued by the respondent no.2 to the petitioner.

19. It is emphasized that in terms of the Tripartite Agreement, the respondent no.2 authorized the respondent no.1 to directly pay the outstanding amount to the petitioner owed to it.

20. It is submitted that the transaction between the respondent no.1 and the respondent no.2 and the *inter-se* transaction between the respondents and the petitioner are inseparable and since an arbitration agreement has been incorporated in the Deeds of Joint Undertaking, the disputes between the petitioner and the respondent no.1 are liable to be resolved by way of arbitration.

21. The aforesaid submissions have been refuted by the learned counsel for the respondent, who submits that the respondent no.1 is not a party to the Deeds of Joint Undertaking.

22. Further, it is submitted that there exists no arbitration agreement between the petitioner and the respondent no.1. It is submitted that the Tripartite Agreement dated 22.04.2016 between the petitioner and respondent nos.1 and 2 does not contain an arbitration clause.

23. It is emphasized that no arbitration can be initiated against the respondent no.1 by the petitioner based on the arbitration agreement



contained in the Deeds of Joint Undertaking, to which the respondent no.1 is not a signatory.

REASONING AND CONCLUSION

24. The legal position is now well settled that although normally, only formal signatories to an arbitration agreement will be bound by it, in certain circumstances, non-signatories may become bound therewith in certain situations.

25. Various tests and legal theories are applied to determine whether a non-signatory is to be bound by an arbitration agreement.

26. In ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Others***, (2013) 1 SCC 641 and ***Cox and Kings Limited v. SAP India Private Limited and Another***, (2024) 4 SCC 1, it has been recognized that consent based theories such as agency, novation, assignment, operation of law, merger and succession and third party beneficiaries can be applied to bind non-signatories to an arbitration agreement. Further, non-consensual theories such as alter ego and estoppel have also been applied to bind a non-signatory to an arbitration agreement. The Group of Companies Doctrine has also been applied in certain situations to bind non-signatories to an arbitration agreement.

27. In ***Cox and Kings*** (supra), it was observed by the Constitution Bench of the Supreme Court as under:-

“169. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge : first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a



non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16.”

28. In **Ajay Madhusudan Patel and Others v. Jyotrindra S. Patel and Others**, 2024 SCC OnLine SC 2597, it has been reiterated that while considering a Section 11 petition which seeks to bind a non-signatory to arbitration, the referral Court would be required to prima facie consider the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement.

29. It has further being reiterated, relying upon **Cox and Kings** (supra), that if there is any complexity involved in such a determination, this aspect can be left to be considered by the Arbitral Tribunal.

30. In the present case, admittedly, there is no written arbitration agreement between the petitioner and the respondent no.1.

31. In these proceedings, the petitioner relies upon the arbitration clause in the Deeds of Joint Undertaking. The same is in the following terms:

“Any dispute that may arise in connection with this Deed of Joint Undertaking shall be settled as per arbitration procedure/rules mentioned in the Contract Document. This Deed of Undertaking shall be



construed and interpreted in accordance with the Laws of India and the Courts of Delhi shall have exclusive jurisdiction.”

32. Admittedly, the respondent no.1 is not a signatory to the Deeds of Joint Undertaking.

33. For the purpose of seeking arbitration against the respondent no.1 (a non-signatory), it was incumbent on the petitioner to establish/assert that given the circumstances in which the transactions between the parties have been structured and actually executed, the respondent no.1 is a veritable party to the arbitration agreement incorporated in the Deeds of Joint Undertaking.

34. Alternatively, it was incumbent on the petitioner to make out a case that the agreement between the respondent no.1 and the respondent no.2, and the agreement between the petitioner and the respondent no.2, is part of a composite transaction in the context of interlinked and inseparable transactions, and therefore, the arbitration agreement incorporated in the principal contract (inter-se the respondents) would enure to the benefit of the petitioner as well.

35. Thereafter, based on the case set out for impleadment of the non-signatory, this Court would have had occasion to test the same on the touchstone of legal position as set out in ***Chloro*** (supra) and ***Oil and Natural Gas Corporation v. Discovery Enterprises Private Limited and Another***, (2022) 8 SCC 42, ***Ajay Madhusudan Patel*** (supra) and other judgments which dwell at length on the legal test or threshold for binding a non-signatory to an arbitration agreement.



36. However, such a case was required to be made out in the notice under Section 21 of A&C Act. As noticed in Paragraph 169 of **Cox and Kings** (supra), there can be two scenarios: first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party; and second, where a non-signatory party itself seeks invocation of the arbitration agreement.

37. In the present case, neither in the notice under Section 21 of A&C Act nor in the petition under Section 11 of the A&C Act, has the petitioner made a cogent case, based on any applicable legal doctrine, as to why the respondent no.1, despite being a non-signatory to the Deeds of Joint Undertaking, is a veritable party to the arbitration agreement incorporated therein. Nor has the petitioner categorically asserted that it is a veritable party to the arbitration agreement that was incorporated in the *inter-se* contract agreement between the respondents, even though it was a non-signatory thereto.

38. In fact, the notice under Section 21 of A&C Act proceeds on the admission that there exists no arbitration agreement between the parties. The same arbitration notice has been reproduced hereinabove. The operative paragraph of the same is reproduced hereunder :-

“14. Since the BRBCL is in fundamental default and breach of the material terms and conditions of the Tripartite agreement dated 22.04.2016, and in furtherance has tried to create dispute by issuing false and frivolous letters to avoid the payments, we hereby propose to refer the matter to "The Delhi International Arbitration Centre (DIAC)" for reference and request you to accord your express written consent Within a period of 7 days from the receipt of this notice, which can be treated as joint memorandum/ contract for the reference to DIAC for arbitration. Please treat this notice under Section 21 of The Arbitration and Conciliation Act, 1996 (as amended).”



39. Thus, by way of the above, the petitioner has sought to reference to arbitration under the DIAC and called upon the respondent no.1 to give its consent thereto “which can be treated as joint memorandum / contract for reference to DIAC for arbitration”.

40. Clearly, the above is in the nature of invitation to the respondent no.1 to enter into an arbitration agreement with the petitioner. The same was categorically denied by the respondent no.1 *vide* communication dated 29.07.2022, in which it was reiterated that the respondent no.1 has no privity of contract with the petitioner.

41. It is not within the province of this Court to direct the respondent no.1 to enter into an arbitration agreement with the petitioner (as sought in the Section 21 Notice).

42. In these circumstances, there is no occasion for this Court to even go into the issue as to whether the respondent no.1 can be subject to arbitration with the petitioner, despite not being a party to any arbitration agreement with the petitioner.

43. In the above circumstances, given the admitted position in the notice under Section 21 of the A&C Act to the effect that there exists no arbitration agreement which is applicable/ attracted for the purpose of adjudicating the disputes between the petitioner and respondent no. 1, it is not possible for this Court to accede to the request of the petitioner to constitute an Arbitral Tribunal to adjudicate the disputes between the parties.

44. The present petition is, consequently, dismissed.

SACHIN DATTA, J

MAY 13, 2025/r, sv