IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 23, 2023

\+ O.M.P.(I) (COMM.) 136/2021, I.A. 4802/2022

VISTRA ITCL INDIA LIMITED

……Petitioner

Through: Mr. Sidhant Kumar,
Ms. Manyaa Chandok,
Mr. Gurpreet Singh Bagga and
Ms. Vidhi Udayshankar, Advs.

versus

ANSAL PROPERTIES AND INFRASTRUCTURES LIMITED

..... Respondent

Through: Mr. Ashwini Kumar Mata, Sr. Adv. with Mr. Sujoy Datta,
Ms. Nishtha Khurana,
Ms. Mahima Shekhawat and
Mr. Karan Gaur, Advs. for R-1

AND

\+ ARB.P. 389/2022

VISTRA ITCL INDIA LTD. ..... Petitioner

Through: Mr. Sidhant Kumar, Ms. Manyaa Chandok, Mr. Gurpreet Singh Bagga and Ms. Vidhi Udayshankar, Advs.

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CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

I.A. 4802/2022 in O.M.P.(I) (COMM.) 136/2021

This is an application filed by the petitioner seeking condonation of 41 days' delay in filing the rejoinder-affidavit.

For the reasons stated in the application, the delay is condoned and the rejoinder-affidavit is taken on record.

Application stands disposed of.

O.M.P.(I) (COMM.) 136/2021

1. The captioned petitions have been filed by the petitioners under Sections 9 and 11 of the Arbitration and Conciliation Act, 1996 ('Act of 1996', hereinafter) respectively. As the petitions arise from the same factual matrix, I shall proceed to decide them together.

2. The petitioner herein is Vistra ITCL (India) Private Limited, formerly known as IL&FS Trust Company Limited and the respondent is Ansal Properties & Infrastructure Limited ('APIL', for short).

FACTS LEADING UP TO THE PETITIONS

3. A project was undertaken by the respondent involving development of a Group Housing Project, spread over 41.16 acres situated in Ghaziabad, Uttar Pradesh. The project was implemented by an entity called Ansal Urban Condominiums Private Limited (hereinafter referred to as "Principal Borrower" and "AUCPL" interchangeably). The Principal Borrower is majorly owned by,

amongst other shareholders, Ansal Landmark Townships Private Limited ('ALTPL', for short) and Ansal Landmark (Karnal) Townships Private Limited ('ALKTPL', for short). ALKTPL is a subsidiary of ALTPL and ALTPL is an associate of APIL/respondent.

4. By virtue of Debenture Subscription Agreement ('DSA', for short) dated July 28, 2015. Indostar Capital Finance Limited ('Indostar', hereinafter), a non-banking financial corporation, agreed to invest an amount of ₹150 crore in the Principal Borrower, by subscribing to 1,50,00,000 secured, unlisted, redeemable, non-convertible debentures at the face value of ₹100 each. The Principal Borrower agreed and accepted to repay the amounts due, which includes the subscription amount, interest, default interest on due dates.

5. It is the case of the petitioner that under Article 11.1 read with Annexure 5 of the DSA, the debentures were to be redeemed in tranches. On the last date of 24th month from the closing date, the Principal Borrower was to repay 1/3rd amount of the outstanding face value of the debentures along with accrued and unpaid interest till such date. On the last date of 30th month from the closing date, 1/2 amount of the outstanding face value of the debentures along with accrued and unpaid interest till such date were to be paid and on the last date of 36th month of the closing date, the balance outstanding amount of face value of the debentures along with accrued and unpaid interest till such date were to be paid.

6. Further, Article 2.1.1 read with Article 2 (ii) of the Terms of Debentures in Annexure 4 of the DSA contemplates that the Principal Borrower shall pay interest on the outstanding face value of the

debentures at a pre-tax rate of 21.75% per annum, on and from the expiry of 3 months from the closing date. The interest was payable at the end of each quarter.

7. During the execution of DSA, a Debenture Trust Deed ('DTD', for short) was also executed whereby the petitioner was appointed as the trustee of the debentures to act on behalf of the Debenture Holders which included Indostar or other holders of the debentures from time to time including their transferees or assigns or such other person who are for the time being, holders of the debentures. The amounts were secured *inter alia* by a Deeds of Personal Guarantee ('DPG', for short) dated July 28, 2015, executed by Gaurav Dalmia and Pranav Ansal and a Deed of Corporate Guarantee ('DCA', for short) dated October 23, 2015 by APIL.

8. The debentures being transferable, was subsequently sold by Indostar to IIFL Income Opportunities Fund ('IIFL', for short) by way of a Debenture Purchase Agreement ('DPA', for short) on October 27, 2015.

9. By December 2015, the Principal Borrower had redeemed 50,00,000 debentures held by IIFL leaving IIFL with 1,00,00,000 debentures, having a face value of ₹100/- each. In 2016, ICICI Prudential Real Estate AIF-II ('IPRU', for short), then another Debenture Holder, informed the obligors including the respondent that an amount of ₹6,23,25,599/- was due and payable on account of unpaid interest on 57,00,000 debentures. The Principal Borrower was accordingly called upon to make such payment within 7 (seven) days to IPRU, however, it failed to do so. On July 31, 2017, Principal

Borrower was required to redeem l /3rd of the outstanding face value of the debentures along with accrued and unpaid interest. This deadline was breached by the Principal Borrower which resulted in an 'Event of Default'.

10. On October 16, 2017, IPRU issued a notice to obligors including the respondent to repay an amount of ₹60,07,15,385/-, in respect of unpaid interest and redemption amount within 7 days. In response to the said letter on December 8, 2017, the respondent requested further time to make payments citing a financial slump. On December 15, 2017, on the occurrence of the 'Event of Default', IPRU accelerated the repayment of 83,00,000 debentures under the DSA and called upon the Principal Borrower and each of the guarantors including respondent herein to repay the entire outstanding face value of debentures along with default IRR of 27% within 7 days. A similar letter / reply was also sent by IIFL Yield Enhancement Fund ('IIFL YEF', for short) another debenture holder, on January 15, 2018.

11. On the account of failure by the Principal Borrower to make payments, the petitioner on the instructions of the Debenture Holders invoked the DPG by issuing a letter on February 12, 2018. Thereafter, the petitioner, and Pranav Ansal and Gaurav Dalmia, (the personal guarantors), entered into arbitration proceedings and a Sole Arbitrator passed an award against the personal guarantors to jointly and severally make payments of ₹187,50,93,000/-, along with default annual IRR of 27% from December 11, 2018 till repayment. Between 2016 and 2020, the debentures were transferred to Palm Products Pvt. Ltd., ('Palm Products', hereinafter) i.e., the current Debenture Holder.

12. On August 24, 2020, SREI, another one of the Debenture Holders, instructed the petitioner to ask the Principal Borrower and the personal guarantors to repay the outstanding payments by August 31, 2020. However, only an amount of ₹22.5 crore has been deposited with the Debenture Holder till the date of filing this petition.

13. Aggrieved by the non-payment of dues, the petitioner has approached this Court seeking reliefs against the respondent.

SUBMISSIONS ON BEHALF OF THE PETITIONER IN O.M.P.(I) (COMM.) 136/2021

14. It is the case of the petitioner that the respondent has been alienating its assets with a view to defeat any decree that may be passed against them.

15. Mr. Sidhant Kumar, learned counsel for the petitioner submitted that the respondent on December 20, 2022, intimated the Bombay Stock Exchange and the National Stock Exchange that it has entered into an agreement to sell its entire shareholding of 66.24 percentage, in its subsidiary firm, i.e., Ansal IT City and Parks Ltd., to Mahaluxmi Infra Home Pvt. Ltd., a part of MIGSUN Group. He also stated that, through various media reports, the petitioner came to know that the respondent has raised ₹35 crore by issue and allotment of 5,00,10,000 warrants to a non-promoter (public) investor. Furthermore, an amount of ₹100 crore is also sought to be raised in the same manner. It is his submission that therefore, the bank accounts wherein the said amount of ₹35 crore has been realised by allotment should be attached and should be secured in favour of the petitioner. He also stated that the said amount has been raised to cut debts and

overdue interest mounting over the respondent, therefore, the attachment of such amount against the outstanding dues of the petitioner would not prejudice the respondent. Further, if an urgent order is not passed in the petition, the respondent is likely to succeed in utilising the amount elsewhere, rather than fulfilling the debt owed to the petitioner.

16. According to him, it is just and necessary that, pending the commencement and hearing of the arbitration proceedings, the respondent through its agents or otherwise, howsoever, be restrained by an order and injunction, from dealing with, selling, transferring, disposing off, alienating, encumbering, mortgaging, hypothecating, charging or parting with possession of or inducting anyone else into or creating any right, title, interest or license in favour of any third party in respect of all the movable and immovable assets/investments/properties of the respondent. Furthermore, he stated that, it is imperative that the respondent should be directed to furnish security as may be sufficient to satisfy the decree.

17. He has relied upon the judgment of the Supreme Court in the case of ***Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation***[1] and ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.,***[2] wherein it was held that, where there is an imminent threat that the respondent would defeat, delay or obstruct, and the applicant has a *prima facie* case in its favour then the Court

[1] *(2007) 6 SCC 798*

[2] *(2007) 7 SCC 125*

should exercise its discretion under Section 9 of the Act of 1996 in granting interim relief.

18. As per Mr. Kumar, the relief under order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ('CPC', for short), requires only a *prima facie* case and in the present matter, there is an attempt or danger by the respondent frittering away its assets to defeat the enforcement of any award passed by the Court. The respondent has not contested its liability on the outstanding amount and that the petitioner has established a robust *prima facie* case in its favour.

19. Mr. Kumar has relied upon the judgment of this Court in the case of ***Landmark Property Development and Company Ltd. & Ors. v. Ansal Properties & Infrastructure Ltd. & Ors.***,[3] wherein the respondent has repeatedly flouted orders of this Court, and the Court had estopped the respondent from disposing of, alienating, encumbering or otherwise parting possession of its assets. Despite the directions passed by this Court, the respondent has deliberately transferred its shareholding from various companies and entered into escrow agreements. In that regard, this Court has initiated contempt proceedings against the respondent's liability to the tune of ₹200 crore. Therefore, petitioner has *prima facie* case that there is a clear and present danger of the respondent alienating its assets to defeat the enforcement of any award passed in favour of the petitioner.

20. That apart, since the Annual Reports are published in the public domain, it is clear that the respondent is trying to siphon off a

[3] *OMP (ENF.) (COMM.) 159/2019*

substantial sum of money and is an habitual defaulter in discharging its liability towards its creditors. In support of his submission, he relied upon the reports of independent auditors wherein, they have expressed grave and material uncertainty on the respondent's ability to continue. He also stated that the respondents have repeatedly defaulted in paying its creditors and fixed deposit holders, which resulted in numerous cases filed against the respondent before the Debt Recovery Tribunal and this Court.

21. The respondent has made preferential payments of ₹ 4.9 crore to the Dalmia Family Office Trust *vide* order dated June 6, 2022 by the National Company Law Tribunal in ***Dalmia Family Office Trust v. Ansal Properties and Infrastructure (IB), 639 (ND)/2021***. The respondent has also failed to disclose particulars as per statutory mandate of Form-16A, as directed by this Court *vide* order dated May 10, 2021.

SUBMISSIONS ON BEHALF OF THE PETITIONER IN ARB.P. 389/2022

22. It is the case of the petitioner that Palm Products is one of the current Debenture Holders holding 1,00,00,000 debentures, by virtue of which, it has acquired an interest in the DSA and the DCG, including all rights of Indostar Capital Finance Limited. Therefore, the petitioner is duty bound to exercise such rights of Palm Products on its behalf and for its benefit.

23. The dispute between the parties relates to a default in redeeming 1/3rd debentures at its face value along with accrued and unpaid interest along with the interest by July 31, 2017. In view of

event of default, the Debenture Holders called upon the Principal Borrower and each of the guarantors including the respondent to jointly and / or severally make payment of the entire outstanding face value of the debentures.

24. On account of the failure by the Principal Borrower to make payments of the amounts claimed, the petitioner invoked the DPG on February 12, 2018. However, even the personal guarantors failed to make the payments. Therefore, the petitioner initiated arbitral proceedings against the personal guarantors which culminated into an arbitral award dated March 25, 2019, which is before this Court in O.M.P. (ENF.) (COMM) No. 116/2019. Till date, only an amount of ₹25 crore has been deposited and substantial sums remain repayable to the petitioner. The personal guarantors have challenged the award only on the grounds that: (i) there is no valid arbitration agreement between the parties and (ii) the requirements of Order XXXVIII, Rule 5 of the Code have not been satisfied, and these objections are misconceived because: (i) there exists a valid arbitration agreement between the parties and (ii) Petitioner has satisfied the requirements of Order XXXVIII, Rule 5 of CPC based on cogent material on record.

25. Thereafter, the petitioner restated and reaffirmed its earlier invocation *vide* letter dated April 08, 2020 and an opportunity was given to the respondent to pay the outstanding amounts along with further default IRR of 27% vide letter dated April 23, 2020.

26. The petitioner also took steps to initiate Corporate Insolvency Resolution Process in respect of the Principal Borrower under the Insolvency & Bankruptcy Code, 2016, before the National Company

Law Tribunal, New Delhi. The said petition has been allowed vide Order dated March 10, 2022 and a moratorium has been declared. The petitioner has also initiated Corporate Insolvency Resolution Process against the respondent being *CP (IB) No.111/ND/2021* before the National Company Law Tribunal, New Delhi, which is pending adjudication.

27. It is the case of the petitioner that, as per the guarantee, in case the Principal Borrower defaulted in repayment of the debt, the respondent undertook to pay such default and liability. This is independent and co-extensive with the liability of the Principal Borrower.

28. That apart, he stated that the guarantee executed by the respondent makes it liable to pay under the DCG, accumulated interest for a sum of ₹ 364, 25, 73, 570/- ('outstanding amount') as on January 31, 2022.

29. It is also the case of the petitioner that the dispute should be adjudicated through arbitration and relied on Article 40 of the DCG, as reproduced under:-

> *"40. Notwithstanding anything contained herein, it is agreed that any dispute, controversy, claim or disengagement of any kind whatsoever between or among the Parties in connection with or arising out of this Guarantee or the breach, termination or invalidity thereof shall be referred to and finally resolved in accordance with the arbitration mechanism as set out in the DSA."*

30. It is also the case of the petitioner as averred by Mr. Kumar that the procedure for appointment under Article 40 of the DCG is

incorporated and specified in Article 19.4 of the DSA dated July 28, 2015, reproduced as under:-

> ***"19.4 Arbitration***
> *a. Any dispute arising out of or in connection with this Deed (Including any dispute relating to arising from or in connection with this Agreement and any dispute regarding the existence, validity or termination of this Agreement) ("Dispute") Shall be referred to arbitration.*
> *b. The arbitration shall be conducted by a sole arbitrator appointed by the Subscriber / Debenture Trustee.*
> *c. The seat of arbitration shall be at Delhi or such other seat in India as may be agreed to by the Parties and the arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, .1996. The language of the arbitration proceedings shall be English. The award shall be final, conclusive and binding on all parties concerned. The arbitration tribunal may lay down from time to time the procedure to be followed in conducting arbitration proceedings and shall conduct the arbitration proceedings in such manner as it considers appropriate."*

31. Mr. Kumar submitted that the DTD dated July 28, 2015 was executed under DSA to appoint the petitioner as a Debenture Trustee to act for the benefit of the Debenture Holders. He also stated that, under DSA the debentures were secured including the DCG, where the respondent guaranteed the repayment of the debts owed by the Principal Borrower, failing which the respondent undertook to repay the outstanding amount upon the demand.

32. He stated that Section 7(5) of the Act of 1996, permits parties to incorporate an arbitration agreement contained in another agreement which was priorly executed. Upon such incorporation, the arbitration agreement is deemed to be a part of the subsequent agreement and in

the present case, the parties incorporated the arbitration agreement set out in the DSA into the DCG. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd.***[4] and ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Ltd.***[5] **.**

33. Article 40 of the DCG specifically refers to the *"arbitration mechanism as set out in the DSA"*, and that these words constitute specific and particular reference to the arbitration agreement set out in the DSA. He also stated that the plain words used clearly denote conscious acceptance and incorporation of the arbitration agreement contained in the DSA. The arbitration mechanism of the DSA therefore stands incorporated into the DCG and upon such incorporation, the arbitration agreement must be read as a part of the DCG itself by operation of Section 7(5) of the Act of 1996. In support of his submissions, he has relied upon the judgments of the Supreme Court in ***UHL Power Company Ltd. v. State of Himachal Pradesh***[6]***; ACC Ltd. v. Global Cements Ltd.,***[7] and ***Bihar State Mineral Development Corporation v. Encon Builders***[8]**.**

34. He also stated that in the petitions being OMP. (COMM)Nos. 265 & 290 of 2019, whereby the personal guarantors have challenged the arbitral award, the issue was with regard to similar transactions

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[4] *(2009) 7 SCC 696*

[5] *(2013) 1 SCC 641)*

[6] *(2022) 4 SCC 116)*

[7] *(2012) 7 SCC 71)*

[8] *(2003) 7 SCC 418)*

concerning same document and the Arbitral Award, finds that, Article 39 of DPG independently records the 'manifest intention' of parties to submit their disputes to arbitration, and Article 39 of the DPG is identical to Article 40 of the DCG. He has placed reliance upon the judgment of the Supreme Court in the case of ***Sanjiv Prakash v. Seema Kukreja***[9] and stated that, as per the law declared by the Supreme Court, issues of novation or supersession of an arbitration agreement cannot be looked into under the *prima facie* test of existence.

35. Furthermore, he contested the submission of the respondent that the said arbitration agreement is invalid because the DSA has been superseded by the DPA and that the petitioner is not a party to the DPA and therefore its rights under the DCG is superseded, is misplaced. He stated that, assuming without admitting the supersession of the DSA, it still does not discharge the DCG. The DTD is admittedly valid and binding and reaffirms the obligations under the DCG and the respondent in its Annual Reports for the years 2020 to 2021, has admitted that the guarantee is valid and binding.

36. He also stated that the express terms of the DPA reaffirm and ratify the rights and obligations under the DSA and the DCG. He stated that the DPA reaffirms the validity of the DSA for the following reasons: -

a. Article 1.1 (ix), DPA specifically defines DSA and acknowledges it as Annexure 1 to the DPA itself. Further, Article

[9] *(2021) 9 SCC 732)*

1.2(x) also state reference to the agreement which also includes its Annexure. Upon a combined reading of these terms, the DSA forms a part of DPA itself as it is an annexure to the DPA.

b. Article 5.3 (iv) is a representation stating the terms of the DSA and other Transaction Documents as defined in the DSA are read and understood by the petitioner.

c. Article 7.1 of the DPA records that the parties to it including the petitioner i.e. Sponsor, confirm the rights and benefits accruing inter alia under the DSA are available to the purchaser of the said debenture

37. Furthermore, Article 19.18 of the DSA clearly stipulates that the respondent will be bound by the terms of the DCG, notwithstanding such transfer of debentures. He also stated that the DPA was executed expressly for the sale of the debentures and that the DSA in Article 19.16 envisions the debentures to be transferrable. He also stated that the DPA stipulates the transfer or any change of ownership of the debentures does not discharge the DSA, and under Article 19.18 of the DSA, the respondent will be bound by the terms of the DCG, notwithstanding such transfer of debentures.

38. It is his contention that Article 22(xiv) of the DCG stipulates that, any amendment or modification of the Transaction Documents including inter alia the DSA shall not discharge the guarantee and that no amendment of modification is valid until signed by the petitioner and the respondent. It is his case that the DTD reiterates and reaffirms the obligations under the DCG, and that Article 5.2.1 (vii) read with Article 5.10 of the DTD reiterate and re-affirm the rights and

obligations under DCG. He also stated that Article 12.14 of the DTD states that any amendment or modification shall be done mutually by a written agreement.

39. According to him, the stand taken by the respondent that Article 12 of the DPA asserts all previous agreements including DSA stand revoked, is contrary to Article 7.1 of the DPA. There is no specific instrument or contractual term in writing which revokes the DSA or the DCG. Furthermore, Article 19.18 of the DSA stipulates that the respondent will be bound by the terms of DCG. He also stated that, under Article 19.16 of the DSA, debentures are transferrable and the transfer or any change in ownership of the debentures does not discharge the DSA. It also records the principal terms of the debentures include repayment obligation and applicable interest owed, and therefore it is inconceivable that the DPA would revoke these fundamental understanding of the debentures.

40. With regard to Article 22 (xiv) of the DCG, any amendment or modification of the transaction documents including *inter alia* DSA shall not discharge the DCG. Furthermore, no amendment or modification of the DCG are valid and binding, until the repayment obligations by the Principal Borrower are discharged and since such obligations have not been discharged by the Principal Borrower, the respondent and the Principal Borrower have co-existent liability upon default in payment.

41. He also stated that the Principal Borrower has admitted that the guarantee and the debentures are validly secured by the guarantee in its Quarterly Compliance Report, which has been furnished in accordance

with the reporting obligations stipulated under Article 9.2 of the DSA. He also submitted that the respondent has published its Annual Report in the public domain for the years 2019-2020 and 2020-2021, wherein it has categorically listed the guarantee as a binding obligation of the respondent, even the principal amount of ₹100 crore has been mentioned as outstanding against the guarantee. Furthermore, he has submitted that the statement of a company in its balance sheet and other books of accounts is a complete admission of the liability and that the respondent is foreclosed from disputing the binding force of the DCG and the liability arising under the DCG.

42. He has relied upon the following judgments in support of his submissions:

a) ***Rukmini Bai v. Collector Jabalpur***[10]

b) ***Punjab State v. Dina Nath*** [11]

c) ***Jagdish Chander v. Ramesh Chander*** [12]

d) ***Central Bank of India v. C.L. Vimla &Ors.***[13]

e) ***SBI v. Ramakrishnan***[14]

f) ***ESPN Software India Pvt. Ltd. v. Modi Entertainment Network Ltd.,***[15]

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[10] *(1980) 4 SCC 556*

[11] *(2007) 5 SCC 28*

[12] *(2007) 5 SCC 719*

[13] *(2015) 7 SCC 337*

[14] *(2018) 17 SCC 394*

[15] *(2012) 191 DLT 734*

g) Dena Bank v. C. Shivakumar Reddy,[16]

h) Shahi Exports Pvt. Ltd. v. CMD Buildtech Pvt. Ltd.[17]

i) Raman Tech & Process Engg. Co. v. Solanki Traders,[18]

j) Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd.[19]

k) Savita Jain v. Krishna Packaging[20]

43. He has sought appointment of an arbitrator to adjudicate the disputes.

SUBMISSIONS ON BEHELF OF THE RESPONDENT

44. Mr. Ashwini Kumar Mata, learned senior counsel appearing for the respondent stated that the petitioner has concealed that they and the parties under the DSA have entered into another agreement being the DPA, whereby the parties have expressly replaced and supplanted the previous agreements, including the DSA, and the new agreement has not referred to or incorporated the arbitration clause contained in Article 19.4 of the DSA. Therefore, there is no arbitration agreement between the parties.

45. He stated that the parties had adopted and applied a specific reference to arbitration mechanism and agreement contained under

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[16] *(2021) 10 SCC 330*

[17] *(2013) 202 DLT 735*

[18] *(2008) 2 SCC 302*

[19] *2014 SCC OnLine Del 4181*

[20] *2021 SCC OnLine Del 2417*

DSA, which has now been superseded. He also stated that, at the time of drafting of DPA, the parties were conscious of the contents of the DSA and chose to incorporate certain selected provisions of DSA into DPA and thus the DPA replaced the DSA. Upon execution, the DPA constitute the complete legal relationship and understanding between the parties and there is a specific exclusion of other previous agreements governing the debentures. Therefore, the parties and their legal relationships are governed solely and exclusively by the DPA, and the DSA was brought to an end in its entirety including the arbitration clause contained therein.

46. He stated that, under Section 7(5) of the Act of 1996, it is clear that, a mere reference to a document would have no effect on an arbitration clause from that document which is a part of the contract. Therefore, in the present case, there was no intention of the petitioner to incorporate the said arbitration clause of DSA in the DPA. Hence, there exists no valid arbitration agreement between the parties.

47. In support of his submission, he has relied upon the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Pvt. Ltd. (supra),*** and stated that the parties did not incorporate the dispute resolution clause as stipulated under DSA into DPA. Therefore, there cannot be any reason to invoke the arbitration clause which is contained in the DSA, as it has been superseded by the DPA.

48. He also stated that, it is a settled law that to determine the intent of the parties of a commercial agreement, a comprehensive and a holistic view must be taken from the clauses drafted by the parties, including the sequence of agreements, what the parties chose to

stipulate and to omit. In the present case, the parties while executing the DPA consciously omitted the arbitration clause under the DSA, and it is evident that the parties has entered into DPA and chose to supplement and terminate the DSA.

49. His case is that the arbitration clause in the DSA cannot survive when the latter agreement, i.e., the DPA, has superseded the original agreement and the instant petition was filed by invoking Article 40 of the DCG referring to Article 19.4 of the DSA and as such, is not maintainable.

SUBMISSIONS ON BEHALF OF THE RESPONDENT IN OMP (I) (COMM) 136/2021

50. Contesting the submissions of Mr.Kumar, Mr. Mata stated that, it is a well settled law that, if a petition under Section 9 of the Act of 1996 is made before the Court, the Court will first have to be satisfied that, there exists a valid arbitration agreement, and the petitioner intends to take the dispute to arbitration. In support of this submission, he has relied upon the judgment of the Supreme Court in ***Sundaram Finance Ltd. v. NEPC India Ltd.***[21]**,** wherein the Supreme Court held that, once it is satisfied that there exist a valid arbitration agreement, then the Court will have the jurisdiction to pass orders under Section 9 of the Act of 1996.

51. He submitted that there is no express arbitration agreement in terms of Section 7 of the Act of 1996, between the parties, and the reference of the dispute for arbitration, thus, cannot have relevance under Section 9 of the Act. Hence, the petition under Section 9 is not

[21] *(1999) 2 SCC 479*

maintainable.

52. The arbitration under Article 15.2 of the DPA cannot be used to seek reference of any dispute between the parties, since the mechanism as stated under the clause stipulates that, it can only be invoked in case disputes arises between the seller and purchaser, and not the parties herein.

53. He stated that, since a serious challenge has been raised on the existence of the arbitration agreement, the interim relief ought to be considered by the Arbitral Tribunal under Section 17 of the Act of 1996, and while considering the question at length with the benefit of substantial pleadings by the parties.

54. In the present case, the petition has been filed at the very end of the limitation period of three years from the date of invocation of DCG and there exists no urgency requiring reliefs before the constitution of the Arbitral Tribunal.

55. To buttress his arguments, he has relied upon the judgment in ***Gujarat Bottling Co. Ltd. v. Coca Cola,***[22] wherein, the Apex Court held that the scope of Section 9 of the Act of 1996 is *pari materia* with the provisions of Order XXXIX of CPC, and the power vested with the Court by virtue of Section 9 of the Act of 1996 must be exercised in consonance with equity which tempers the grant of discretionary relief, as the relief of interim injunction should be wholly equitable in nature. Therefore, the principles for granting interim relief under Section 9 of the Act of 1996 is the same that governs the exercise of power under

[22] *(1995) 5 SCC 545*

Order XXXIX of the CPC. In this regard, he has also relied upon the judgment of this Court in the case of ***Sanrachna (India) Inc. v. AB Hotels Ltd.***[23]

56. He submitted that the power under Section 9 of the Act of 1996, being of a drastic nature, a direction to secure the amount should not be issued merely on the merits of the claim. The respondent has no intention to defraud the petitioner and the petitioner will not suffer any irreparable loss or hardship and still the interest of the petitioner will be protected.

57. Mr. Mata contended that the petitioner has not led any substantive evidence in support of the allegation that the respondent is encumbering / systematically alienating its assets. The respondent has only been carrying out ordinary business transactions and has not been stripping assets with any motive to dispose of properties with the intention of defeating any decree that may follow. He stated that the interim order of attachment which is subject matter of arbitration is ordered only in rare cases and here the petitioner has failed to provide any evidence and steps taken by the respondent for disposing off its properties.

58. He submitted that the sale of 66.27 % of shareholding of the respondent in Ansal IT City and Park Ltd. to Mahaluxmy Infra Home Pvt. Ltd. was not alienation of its assets but was part of a planned and routine disinvestment at the behest and to give exit to HDFC India Real Estate Fund for its investment made in Ansal IT City and Park

[23] *(128) DLT 694*

Ltd. in the year 2006, through 33% of equity share and debentures. He stated that the said transaction was a routine business without any intent to defeat any decree that may be passed. The respondent did not raise ₹35 crore by way of issue and allotment to non promoter (public) investors, and that it was only a proposal made by the Board of Directors which never materialised. He has also denied the contention of the petitioner that the respondent proposes to raise an amount up to ₹100 crore. He also stated that the respondents cannot be questioned on how it runs its business or the manner of repayment of debts. The payments to Dalmia Family Office Trust were made pursuant to the settlement which was entered into by the parties and the repayment to its lenders, is a business decision which has no bearing in the present proceedings. He has vehemently denied the petitioner's allegation that Uttar Pradesh Real Estate Regulatory Authority ('UPRERA', for short) found that the respondent had siphoned off ₹606 crore. He stated that the findings of the UPRERA were vacated by a subsequent order dated July 9, 2019, after detailed hearing of the promoter.

SUBMISSIONS ON BEHALF OF THE RESPONDENT IN ARB. P. 389/2022

59. According to Mr. Mata, the DPA supersedes the entire agreement clause and wiped away all the previous agreements between the parties and that the DSA stood novated and the DCG stood rescinded within the meaning given under Section 62 of Indian Contract Act, 1872. He stated that it is a settled law that, in case of novation of an agreement containing an arbitration clause, the arbitration clause does not survive. In support of his submissions, he

has relied upon the following judgments:-

(a) ***Air Liquide North India Pvt. Ltd. v. Inox Air Products Pvt. Ltd.***[24]

(b) ***Gatx India Pvt. Ltd. (supra)***

(c) ***Union of India v. Kishorilal Gupta & Bros.,***[25]

(d) ***Damodar Valley Corporation v. KK Kar,***[26]

(e) ***Young Achievers v. IMS Learning Resources Private Limited,***[27]

(f) ***Sanjeev Prakash (supra)***

(g) ***Sundaram Finance Limited (supra)***

(h) ***M/s SBP and Co. v. Patel Engineering Ltd.,***[28]

(i) ***Pearl Hospitality and Events Pvt Ltd. v. Oyo Hotels and Homes Pvt Ltd.,***[29]

(j) ***Gautam Landscapes Pvt. Ltd. v. Shailesh S Shah and Anr.,***[30]

60. Mr. Mata has relied upon the judgment of the Supreme Court in ***M.R. Engineers and Contractors Pvt. Ltd. (supra)*** to contend that a reading of Section 7(5) of the Act of 1996 would reveal that a mere reference to a document would not have the effect of incorporating an

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[24] *2015 (2) RAJ 135*

[25] *AIR 1959 SC 1362*

[26] *(1974) 1 SCC 141*

[27] *(2013) 10 SCC 535*

[28] *AIR 2006 SC 450*

[29] *O.M.P (I) COMM 123/2020*

[30] *2019 SCC Online Bom 563*

arbitration clause contained in that document, a part of the contract. His case is that the reference to the DSA in the DPA would not mean that the arbitration clause contained in the DSA has been incorporated in the DPA.

61. Furthermore, he contended that the judgment of the Supreme Court in the case of ***UHL Power Company (supra),*** as relied upon by the petitioner is misplaced as in the said case, the agreement stated that *"agreement shall mean this agreement together with all its appendices and annexures.."* which is entirely different from the definition of agreement in the present case i.e. *"Agreement" means this agreement (as from time to time amended, modified or supplemented)* @ Article 1.1 (i) and *"In this Agreement ..... references to an agreement shall include any recitals, annexures, schedules or attachments to it'....*

The interpretation of both clauses is completely different from each other and the said judgment is misconstrued and in contrast with the present case.

62. Mr. Mata, in response to Mr. Kumar's contention that the respondent has admitted the validity of guarantee in its Annual Report, stated that the listing of guarantee in the Annual Report of the respondent was an inadvertent mistake on the part of the respondent and mere listing of guarantee in the Annual Report does not make the guarantee existing and subsisting, unless there is an existing contract or agreement enforcing the guarantee.

63. That apart, according to him, the petitioner herein is not a creditor to the subscriber / purchaser and under Section 126 of the Indian Contract Act of 1872, contract of guarantee is a *'contract to*

perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the "Surety"; the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor".

64. In the present case, the surety is the respondent, APIL, the Principal Borrower, i.e., AUCPL and the creditor is the 'Debenture Holder' i.e. Palm Products. The DCG dated October 23, 2015 was executed between the Guarantor, i.e., APIL in favour of the Debenture Trustee instead of the creditor / the Debenture Holder. It is stated that the DCG is not a valid contract of guarantee as per the Indian Contract Act, 1872, as it is not executed between the guarantor and creditor instead between a guarantor and a trustee.

65. He stated that the petitioner has filed the present petition in representative capacity for the current Debenture Holders; however, the rights conferred onto the present Debenture Holders have not been disclosed by the petitioner and the agreement by which the debentures have been transferred to them are suppressed and concealed. Therefore, no transaction documents are on record showing transfer of debentures to Palm Products, thus, there is no basis for the petitioner to claim that the Debenture Holders have right to invoke DCG either by themselves or through Debenture Trustees.

66. That apart, as per Article 12 of DPA dated October 27, 2015, the DPA supersedes all previous agreements related to the subject matter of those documents, which include DCG and DSA. He also stated that certain securities were saved by DPA and specifically

included in the DPA in terms of Article 7.2 r/w Schedule 3.However, the DCG was not included and therefore ceased to exist. Even the subsequent DPA dated March 3, 2016 in Schedule II updates the list of existing securities to include securities created later but does not save or mention the DCG.

67. Furthermore, he stated that DCG ceased to exist after execution of the DPA on October 27, 2015. The said saved documents would continue to be valid and binding for the benefit of the purchaser. He stated that, it is critical to note that various instruments such as mortgage, personal guarantee of promoters, corporate guarantee of certain companies dated July 28, 2015 were enlisted and saved but the DCG dated October 23, 2015 was not saved and was thus extinguished on October 27, 2015.

68. Mr. Mata has submitted that the contention of Mr. Kumar that, even if the DSA was superseded, Article 40 of the DCG would survive, is misconceived as the DCG has been entirely superseded as submitted above. Hence, neither Article 19.4 of the DSA nor Article 40 of the DCG survives.

69. He stated that the Supreme Court in ***Sanjiv Prakash (supra)*** does not espouse a general proposition that, an issue of novation cannot be considered by the Court in Section 11 petition. Rather, the decision is that, when the question of novation requires examination of surrounding circumstances in which the agreements were entered is in addition to an extensive reading of various clauses of the relevant agreement and the exercise would be beyond the limited jurisdiction of the Court and cannot be held to be a general proposition of law.

70. That apart, Mr Mata submitted that the issue with regard to the existence of DSA is under adjudication before this Court in OMP (COMM) No. 290/2019. Since the existence of the arbitration agreement is already under detailed review by this Court, this Court may not restrict itself in the present case to mere *prima facie* review.

71. In support of this contention that this Court can hold a primary inquiry/review and decide on the arbitrability of the dispute, he has relied upon the following judgments:

1. ***DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd.***[31]
2. ***Vidya Drolia & Ors. v. Durga Trading***[32]
3. ***Indian Oil Corporation Limited v. NCC Ltd.***[33]
4. ***M/s Emaar India Ltd. v. Tarun Aggarwal Projects LLP & Anr.***[34]

FINDINGS

72. Having heard the learned counsel for the parties and perused the record, at the outset, I may state here, after judgment was reserved in these petitions, on a mentioning made before this Court on November 21, 2022, it was brought to the notice of the Court that an Insolvency Resolution Professional *qua* the respondent has been appointed by the National Company Law Tribunal, New Delhi, I

[31] Arb.P. (Civil) 17 of 2020 (SC)

[32] (2021) 2 SCC 1

[33] 2022 SCC OnLine SC 896

[34] Civil Appeal No.6774 of 2022

directed the listing of the matters on November 24, 2022 when Mr. Ashwani Kumar Singla, the Insolvency Resolution Professional, was present in the Court. He stated, he shall file an affidavit with regard to the moratorium which has come into effect on November 16, 2022. The affidavit dated November 28, 2022 filed by Mr. Singla in ARB.P. 389/2022 records as under:

> *"I, Ashwani Kumar Singla (UID: XXXX-XXXX- 3520) aged about 67 years, S/o Shri Durga Dass Singla, R/o Flat No. E 701 Park Grandeura Sector- 82 Faridbabd, Haryana- 121007, do hereby affirm and declare as under:*
> *1. That I have been appointed as an Interim Resolution Professional, by the Hon'ble National Company Law Tribunal, Delhi through its orders dated the 16th November 2022 (uploaded on the 17th November 2022) in the matter of Bibhuti Bhushan Biswas and 125 others vs Ansal Properties & Infrastructure Limited (IB)-330(ND)/2021.*
> *2. That on 24th November 2022, I was ordered by this Hon'ble High Court of Delhi, at New Delhi, to clear my stand whether this Hon'ble Court should proceed to pronounce its Judgment in the above referred case, which was already reserved by it before the order dated 16th November 2022 in (IB)-330(ND)/2021 passes by NCLT Delhi.*
> *3. Respectfully it is submitted that as per the consequence of the moratorium in terms of Section 14(1)(a), (b), (c) & (d) of the IBC 2016, the following prohibitions are imposed, which must be followed by all and sundry:-*
>
> > *"(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment decree or order in any court of law, tribunal, arbitration panel or other authority:*
> > *(b) Transferring, encumbering alienating or disposing of by the corporate debtor any of its assets*

or any legal right or beneficial interest therein:
(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002:
(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor:"

4. That as per my knowledge, in the IBC, 2016, there is no reference to the cases where the hearings have been concluded and the orders have been reserved. To the best of my knowledge it is so because it is not a pending case. The hearings have already been concluded, no party can advance any new evidence or argument. Reservation of Judgment is only a procedural way to pronounce a judgment which the Hon'ble Court has already arrived at.
5. I respectfully submit before this Hon'ble Court to pronounce its Judgment as it will help the process of CIRP to be saved from a predicament. In case this Hon'ble Court does not pronounce its judgment, there is every likelihood that the Petitioner in this case will lodge a financial claim before the IRP. In case the IRP admits the financial claim of the Petitioner, the Corporate Debtor may approach NCLT and if the IRP rejects the claim of the Claimant (Petitioner in this case), the Claimant/ Petitioner may approach the NCLT.
6. That in both the above mentioned circumstances, the NCLT, Delhi shall be adjudicating on matter which has already been heard, adjudicated and Judgment reserved by a superior Court i.e this Hon'ble Court.
7. That the Deponent has no interest either in the Corporate Debtor or the claimants/ Petitioner or Petition ARB. P. : 389/2022 filed before this Hon'ble Court."

73. When the matters were listed on December 7, 2022 I passed

the following order:

> *"1. Pursuant to the order dated November 24, 2022, IRP Mr. Ashwini Kumar Singla has filed an affidavit which is on record, paragraphs 4, 5 and 6 of the same read as under:*
>
> > *"4. That as per my knowledge, in the IBC, 2016, there is no reference to the cases where the hearings have been concluded and the orders have been reserved. To the best of my knowledge it is so because it is not a pending case. The hearings have already been concluded, no party can advance any new evidence or argument. Reservation of Judgment is only a procedural way to pronounce a judgment which the Hon'ble Court has already arrived at.*
> >
> > *5. I respectfully submit before this Hon'ble Court to pronounce its Judgment as it will help the process of CIRP to be saved from a predicament. In case this Hon'ble Court does not pronounce its judgment, there is every likelihood that the Petitioner in this case will lodge a financial claim before the IRP. In case the IRP admits the financial claim of the Petitioner, the Corporate Debtor may approach NCLT and if the IRP rejects the claim of the Claimant (Petitioner in this case), the Claimant/ Petitioner may approach the NCLT.*
> >
> > *6. That in both the above mentioned circumstances, the NCLT, Delhi shall be adjudicating on matter which has already been heard, adjudicated and Judgment reserved by a superior Court i.e this Hon'ble Court."*
>
> *2. Mr. Singla reiterates the stand taken in the affidavit that this Court can decide the petition which it had reserved for judgment.*
>
> *3. Accordingly judgment is reserved in this petition."*

74. From the aforesaid, it is clear that Mr. Singla, Insolvency Resolution Professional, has stated that this Court can decide the

petitions. Accordingly, I proceed to decide these petitions taking into consideration the submissions made and filed on behalf of the respondent.

75. Accordingly, I intend to deal with the petition under Section 11 of the Act of 1996 whereby the petitioner has sought appointment of an arbitrator to adjudicate the disputes between the parties.

76. In support of the prayer for appointment of an arbitrator, Mr. Sidhant Kumar has referred to Article 40 of the DCG and Article 19.4 of the DSA, which have already been reproduced above. The claim raised by the Debenture Trustee on behalf of the Debenture Holder-Palm Products is with regard to the failure on part of the Principal Borrower, namely AUCPL, to pay the outstanding dues for which the respondent has given a corporate guarantee. It is this corporate guarantee which has been invoked in terms of DCG executed on October 23, 2015.

77. Mr. Mata had contested the petition on the following grounds:-

i. The parties herein and the parties under the DSA have entered into another agreement being DPA, wherein the parties have expressly replaced all previous agreements including DSA.

ii. The new agreement has not referred to or incorporated the arbitration clause contained in Article 19.4 of the DSA. Therefore, there is no arbitration agreement between the parties.

iii. At the time of drafting the DPA, the parties were conscious of the contents of the DSA and chose to incorporate certain selected provisions of DSA into DPA and thus DPA

replaced DSA and upon execution, the DPA constitute the legal relationship and understanding between the parties and there is a specific exclusion of other previous agreements governing the debentures.

iv. Under Section 7(5) of the Act of 1996, a mere reference to the documents would have no effect of incorporation of the arbitration clause from the document which is the part of the first contract. .

v. It is settled law that to determine the intent of the parties of a commercial agreement, a comprehensive or a holistic view must be taken from the clauses drafted by the parties, including the sequence of the agreements, what the parties chose to stipulate and to omit.

vi. The arbitration clause/mechanism in the DSA cannot survive when the latter agreement, i.e., the DPA, has superseded the original agreement. The instant petition was filed by invoking Article 40 of the DCG read with Article 19.4 of the DSA.

vii. The DPA supersedes the 'Entire Agreement" clause and wiped away all the previous agreements between the parties. The DSA stood novated and the DCG stood rescinded within the meaning given under Section 62 of the Indian Contract Act, 1872. It is a settled law that, in case of novation of an agreement containing an arbitration clause, the arbitration clause does not survive.

78. Having noted the broad submissions made by the learned

counsel for the parties, I may state here that the petitioner herein is only a party to the DCG and DTD. It is not a party either to the DSA or the DPA.

79. It is the case of the petitioner that, because of the failure on part of the Principal Borrower to pay the outstanding amounts, it is the obligation of the guarantors upon demand under the DSA and/or the other transaction documents, to jointly and/or severally pay such amounts to the Debenture Trustee.

80. From a bare perusal of Article 40 of the DCG, it is manifest that the intent of the parties while entering into the DCG was to resolve the disputes through the process of arbitration in terms of the mechanism set out in the DSA. If that be so, it must follow that Article 40 by itself is an independent arbitration clause. The reference made to the DSA in Article 40 is with regard to the procedure/mechanism of appointment and constitution of the arbitral tribunal. The arbitration mechanism as set out in the DSA which I have reproduced above is that (i) the arbitration shall be conducted by a sole arbitrator appointed by the Subscriber/Debenture Trustee; (ii) the seat of arbitration shall be Delhi; (iii) other clauses related to the arbitration shall be governed by the provisions of Act of 1996; and (iv) the arbitration shall be conducted in English.

81. The submission of Mr. Mata is that the DPA supersedes the "Entire Agreement" clause and wipes away all agreements between the parties, and as such the DSA stood novated and the DCG stood rescinded within the meaning given under Section 62 of Indian Contract Act, 1872, and that there is no arbitration clause between the

parties. As such, according to him, the petition is not maintainable.

82. I am not in agreement with this submission. Firstly, as stated above, the petitioner is not a party to the DPA and the issue of supersession/novation raised by Mr. Mata has no bearing on the DCG and/or the DTD. Having said that, even if the submission of Mr. Mata that the DSA stands superseded (though disputed by Mr. Kumar) is accepted, as the DCG has an arbitration clause independent of the DSA or DPA, under which the disputes arisen can be referred to arbitration, surely the petition shall be maintainable.

83. This I say so, as it is a law well settled in terms of the judgment of Supreme Court in the case of ***Mayavati Trading Private Limited v. Pradyuat Deb Burman,***[35] that in a petition under Section 11, it is the existence of the arbitration agreement that need to be seen for referring the parties to arbitration.

84. One of the submissions of Mr. Mata is that Article 12 of the DPA supersedes all previous agreements relating to the subject matter of the DCG and the DSA. He stated that certain securities have been saved by specific reference in the DPA in terms of the Article 7.2 read with Schedule 3. However the security with regard to the present DCG was not included therein. Similar is the case in the second DPA wherein Schedule II sets out the list of existing securities and even securities to be created later, but does not save the present DCG. Therefore, according to him, it must be held that the DCG has been consciously been brought to an end by the parties.

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[35] *(2019) 8 SCC 714*

85. Suffice it to state, the invocation of the arbitration and the reference that is being sought is with regard to a dispute that has arisen under the DCG and the DTD. For the purposes of adjudicating the present petition, the terms of the DPA and its applicability need not be gone into by this Court. Even otherwise, this is an issue on the merits of the dispute and surely this Court while exercising the jurisdiction under Section 11 of the Act of 1996 would not examine the same. Appropriate shall be for this Court to leave the issue for determination by the Arbitral Tribunal. As a result, this submission of Mr. Mata is also rejected.

86. At this juncture, it is apposite to refer to the decision of the Supreme Court in ***Bharat Sanchar Nigam Limited and Anr. v. Nortel Networks India Private Limited***,[36] wherein it was held that it is only in a very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred, or that the dispute is non-arbitrable, that the Court may decline to make the reference. If there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the Tribunal.

87. It is also necessary to state here that similar issues arose for consideration in two petitions under Section 34 of the Act of 1996 filed by the personal guarantors against the arbitral award dated March 25, 2019. This Court has rejected the arguments made by Mr. Mata therein, in the following manner:-

[36] *(2021) 5 SCC 738*

(i) There exists a separate arbitration clause in the DPG (which is *pari materia* to the DCG) evidencing the intent of the parties therein to refer disputes to arbitration.

(ii) The reference to Article 19.4 of the DSA in the DPG is only with respect to the procedure/mechanism to be employed for constituting the Tribunal.

(iii) Such procedure under Article 19.4 of the DSA has been incorporated into the DPG by specific reference.

(iv) Vistra ITCL was not a party to the DPA and is not bound by the terms of the DPA.

(v) Even assuming DPA has novated the DSA, the right of Vistra ITCL to invoke the personal guarantees would not be taken away.

88. As has become apparent from the above, the deeds of guarantee – both the DPGs in case of personal guarantors and the DCG of APIL in the instant case, comprise of independent arbitration clauses, which are *pari materia*. The reference made to Article 19.4 of the DSA in the DCG is with regard to the mechanism / procedure to be adopted for constituting an arbitral tribunal when disputes are referred for arbitration. The procedure contemplated by Article 19.4 of the DSA for constituting the tribunal has been incorporated by specific reference into the DCG. If that be so, even if the argument of Mr. Mata that the DSA has ceased to exist upon the execution of the DPA was to be accepted, it would have no bearing on the invocation of arbitration and constitution of an arbitral tribunal, as contemplated by the DCG. The mechanism / procedure as found in DSA having been

incorporated in the DCG, would continue to survive notwithstanding any changes made to the DSA.

89. In any case, the petitioner herein has approached this Court for appointment of an arbitrator pursuant to invocation of the valid arbitration clause of the DCG. As such, it has become incumbent upon this Court to decide upon the procedure for appointing an arbitrator. The procedure contemplated by the DSA, incorporated by reference into the DCG, has no more bearing in so far as the present *lis* is concerned.

90. Mr. Mata has placed reliance upon the following judgments for the corresponding propositions of law:

(i) ***M R Engineers and Contractors Pvt. Ltd. (supra)*** to contend that a mere reference to a document would not incorporate the arbitration clause contained therein.

(ii) ***Sundaram Finance Ltd. (supra)*** to contend that the Court has to first satisfy that there exist a valid arbitration agreement to exercise the jurisdiction under Section 9 of the Act of 1996.

(iii) ***Gujarat Bottling Co. Ltd. (supra)*** and ***Sanrachna (India) Inc. (supra)*** to contend that the scope of Section 9 of the Act of 1996 is *pari materia* to Order XXXIX of CPC.

(iv) ***Air Liquide North India Pvt. Ltd. (supra), Gatx India Pvt. Ltd. (supra), Kishorilal Gupta & Bros. (supra), Damodar Valley Corporation (supra), Young Achievers (supra), Sanjeev Prakash (supra), Sundaram Finance Limited (supra), M/s SBP and Co. (supra), Pearl Hospitality and Events Pvt. Ltd. (supra)*** and ***Gautam Landscapes Pvt. Ltd. (supra)*** to contend that the arbitration clause

contained in a contract does not survive novation of that contract.

(v) ***DLF Home Developers Ltd. (supra), Vidya Drolia & Ors. (supra), Indian Oil Corporation Limited (supra)*** and ***M/s Emaar India Ltd. (supra)*** to contend that this Court can conduct a preliminary inquiry and decide the arbitrability of the claims even under Section 11 of the Act of 1996.

91. While there is no dispute to the proposition of law laid down in the above judgments, in view of my discussion above, the judgments shall have no applicability in the peculiar facts of this case.

92. In view of the foregoing discussion and in view of the settled law in terms of the judgments of ***Bharat Sanchar Nigam Limited (supra)*** and ***Mayavati Trading Private Limited (supra)***, this Court is of the view that the parties need to be referred to arbitration.

93. Accordingly, this Court appoints Justice M.R. Shah, a former Judge of the Supreme Court of India, as the Sole Arbitrator for adjudication of disputes between the parties herein. The fee of the learned Arbitrator shall be in accordance with Fourth Schedule of the Act of 1996. The learned Arbitrator shall make disclosure in terms of Section 12 of the said Act. A copy of this order be sent to the learned Arbitrator for information. The parties shall be at liberty to raise all pleas available to them, both on facts and in law, before the learned Arbitrator.

94. The petition bearing ARB.P. 389/2022 is disposed of.

95. Insofar as the petition under Section 9 is concerned, I note that the same has been filed with the following prayers:-

"a) Pass an order directing the Respondent to deposit an

amount of Rs.288,22,95,200/- (INR Two Hundred Eighty Eight Crores Twenty Two Lakhs Ninety Five Thousand Two Hundred Only) with the Hon'ble Court towards preservation of claims and interest of the Petitioner as on 31 January 2021;

b) Alternatively, direct the Respondent, to furnish a bank guarantee from a scheduled commercial bank for an amount equivalent to the amount mentioned in prayer (a), to secure the claims and interests of the Petitioner;

c) In the meantime, pending deposit of the said amount of Rs. Rs. 288,22,95,200/- (INR Two Hundred Eighty Eight Crores Twenty Two Lakhs Ninety Five Thousand Two Hundred Only) and/or furnishing of Bank Guarantees, as the case may be:

i. Restrain the Respondent from operating any of its bank accounts;

ii. Restrain the Respondent, its agents and representatives from alienating, encumbering, transferring, selling, disposing off, parting with possession of or creating any third party right, title or interest of any nature whatsoever in respect of their respective immovable and movable assets, investments, entitlements, properties of any nature, in favor of any third party;

iii. Pass an order directing the attachment of the properties and all other movable / immovable properties, investments, assets, entitlements including all the bank accounts of the Respondent including without limitation incomes from rent receivables and Bank Accounts and its entitlement and or receivables from third parties including from companies, partnership firms in which the Respondent is a shareholder or from trusts in which it is a beneficiary, so as to secure the amounts due and payable by the Respondent to the Petitioner which, as on 31 January 2021 amounts to Rs. 288,22,95,200/- (INR Two Hundred Eighty Eight Crores Twenty Two Lakhs Ninety Five Thousand Two Hundred Only) and carries a further

interest of 27% p.a. compounded quarterly thereon till the date of actual payment; and

iv. Pass an order directing the Respondent to disclose on oath all properties and investments/assets/receivables/entitlements of the Respondent (both movables and immovable and, in case of encumbered properties and assets, the extent of encumbrance) including without limitation incomes from rent receivables and Bank accounts and all particulars of its entitlement and or receivables from third parties including from companies in which it is a shareholder or from trusts in which the Respondent is a beneficiary in form and manner notified by the Delhi High Court in the matter of Bhandari Engineers & Builders Pvt. Ltd. v. Maharia Raj Joint Venture reported in 2019 SCC OnLine Del 1 1879 or in Form 16A, Appendix E under Order XXI Rule 41 (2) of the Code of Civil Procedure within 10 days;

v. Pass an order directing the Respondent to file bank statements from the date of DSA i.e., from 28 July 2015 upto the date of filing of the present petition;

vi. Pass ad-interim ex-parte orders in terms of the prayers;

d. Pass such other order(s), direction(s) as deemed fit and proper in the facts and circumstances of the case and in the interest of justice and equity."

96. Since, I have referred the parties to arbitration to be conducted by Justice M.R. Shah (Retd.), I deem it appropriate to direct that this petition under Section 9 of the Act of 1996 shall be treated as an application under Section 17 of the Act for a decision by the learned Arbitrator. The parties shall be at liberty to raise all pleas available to them, both on facts and in law, before the learned Arbitrator.

97. The petition stands disposed of in the above terms.

98. Let a copy of this order be sent to Justice M.R. Shah (Retd.) for information.

V. KAMESWAR RAO, J

MAY 23, 2023*/aky*