IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 31.01.2022

\+ **ARB.P. 905/2021**

ASHAV ADVISORY LLP ..... Petitioner

versus

PATANJALI AYURVEDA LIMITED & ORS. ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Mukul Rohatgi & Mr. Sandeep Sethi, Sr. Advs. with Mr. H.S. Chandhoke, Mr. Prashant Mishra, Mr.Shalim Arthwan, Ms. Aimen Reshi, Advocate.

For the Respondent : Mr. Ravi Shankar Prasad, Senior Advocate with Mr. NPS Chawla, Mr. Sujoy Datta, Mr. Simranjeet Singh, Ms. Rhea Dubey, Ms. Rudrakshi Deo, Advocates for R-1 and R-2. Mr. Nakul Dewan, Sr. Adv. with Mr.Surekh Kant Baxy and Ms. Sakshi Singh, Adv. for R-3 and R-4. Mr. Jayant K. Mehta, Sr. Adv. with Mr. Robin Singh Rathore and Mr. Nikhil Pahwa, Advocates for R-5.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as 'the **A&C Act**') praying that a Sole Arbitrator be appointed to adjudicate the disputes among the parties.

Parties

2. The petitioner (hereafter **'Ashav'**) is a limited liability partnership firm registered under the Limited Liability Partnership Act, 2008. Respondent no.1 (Patanjali Ayurveda Limited – hereafter '**PAL'**) is a closely held public company and holds 48.1% of the shares issued by respondent no.5 company.

3. Respondent no.2 (Patanjali Parivahan Private Limited – hereafter '**PPPL**') is a private company and holds 16.9% shares of respondent no.5. Respondent nos. 3 and 4 (hereafter referred to as '**DYMT**' and '**PGN**' respectively) are Public Charitable Trusts. Respondent no.4 holds 13.52% shares of respondent no.5.

4. Respondent no.5 (Ruchi Soya Industries Limited – hereafter '**RSIL**') is a public company.

5. The petitioner states that respondent nos. 1 to 4 are a part of one group (Patanjali Group) and are effectively controlled and managed by the same set of persons.

6. Respondent nos. 1 to 4 formed a Special Purpose Vehicle known as a Patanjali Consortium Adhigrahan Private Limited (hereafter also referred to '**the SPV'**), which has since merged with RSIL.

Factual Context

7. A petition under the Insolvency and Bankruptcy Code, 2016 (hereafter '**IBC**') was admitted by the National Company Law Tribunal (hereafter '**NCLT**') in respect of RSIL. It is stated that certain entities of the Patanjali Group proposed a Resolution Plan in respect of RSIL. Respondent nos. 1 to 4 formed the SPV, which acquired the shares of RSIL pursuant to the Resolution Plan

8. It is stated that the Resolution Plan for RSIL required a sum of ₹1,104.75 crores to be infused for the acquisition and resolution of RSIL. The resolution proponents proposed that the amount be infused through the SPV.

9. In the aforesaid context, Ashav, PAL, PPPL and the SPV entered into a Memorandum of Understanding dated 25.11.2019 (hereafter the '**MOU-I**'), whereby Ashav agreed to make available a sum of ₹40,00,00,000/- to PAL and a sum of ₹15,25,00,000/- to PPPL to be used for the resolution of RSIL.

10. Thereafter, on 09.12.2019, Ashav entered into another Memoranda of Understanding (hereafter the '**MOU-II**') with respondent nos. 1 to 4. Ashav states that disputes have arisen between the parties in connection with the said Memorandums of Understanding (MOU-I and MOU-II) and prays that an arbitrator be appointed to adjudicate the said disputes.

11. Clause 15 of the MOU-I embodies an Arbitration Agreement. The said clause reads as under :-

> "**15. Dispute Resolution and Governing Law**
>
> 15.1 If any dispute, claim , controversy or disagreement of any kind whatsoever (a "Dispute") arises at any time between the Parties out of or in connection with this MOU or the respective rights and liabilities of the Parties, including without limitation, any question regarding its existence, validity . scope , interpretation or termination such Dispute shall, to the extent possible be settled amicably in the first instance by prompt and good faith negotiations between the representatives of the Parties, who shall cooperate in good faith to resolve such dispute.
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> 15.2. The Parties agree that if such Dispute cannot be resolved by mutual discussions between the parties within *(thirty (30))* days from the commencement of discussions, such disputes shall be referred to and finally resolved by arbitration under the (Indian) Arbitration and Conciliation Act. 1996 ("ACA") by a sole arbitrator mutually appointed by the Parties in accordance with the said Act.
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> 15.3. The place of arbitration shall be *(Delhi)* and the language of arbitration shall be English. The arbitrator's award shall be substantiated in writing. The arbitrators shall also decide on the costs of the arbitration procedure. The Parties hereto shall submit to the arbitrators' award and award and the same shall been forceable in any competent court of law. (emphasis added)

> 15.4. The MOU shall be governed and construed solely in accordance with the laws of India and the Parties hereby submit to the exclusive jurisdiction of Court at Delhi."

12. Clause 15 of the MOU-II provides that all documents executed on 25.11.2019 would form a part of the said MOU. Ashav claims that by virtue of the said clause, the Arbitration Agreement under MOU-I stands incorporated in MOU-II, as well. Clause 15 of the MOU-II reads as under:-

> "**15. Documents** : The Parties agree to execute such other documents in addition to this MOU to reflect the above understanding and such documents including all other documents executed on 25th November 2019 shall form part of this MOU."

13. In the meantime, the SPV has merged with RSIL. Ashav claims that by virtue of the merger, all rights and obligations of the SPV are assumed by RSIL and therefore, RSIL is also bound by the Arbitration Agreement under Clause -15 of the MOU-I.

14. Ashav claims that the two MOUs represent a composite commercial transaction, whereby Ashav had agreed to provide funds for acquisition of RSIL under the Resolution Plan and it was agreed that it would be allotted equity shares, either directly or indirectly, in RSIL.

15. The respondents dispute the existence of an arbitration agreement between the parties. They state that there is no agreement to refer the disputes arising out of the MOU-II to arbitration. The respondents have

filed a common reply to oppose the present petition. They state that (a) there is no arbitration agreement in existence with all the respondents as arrayed in the present petition; (b) that the notice invoking arbitration issued by Ashav is vague and does not crystallise the claim sought to be referred to arbitration; (c) that the disputes, essentially, relate to the MOU-II and therefore, cannot be referred to arbitration under the Arbitration Clause as contained in the MOU-I; and (d) that the Arbitral Tribunal constituted under the MOU-I cannot examine the intention of the parties for entering into the MOU-II.

16. The respondents state that Clause 15 of the MOU-II cannot be read to mean that the parties had any intention to incorporate the Arbitration Agreement as articulated in Clause 15 of the MOU-I in MOU-II.

Submissions of Counsels

17. Mr Ravi Shankar Prasad, learned senior counsel appearing for PAL and PPPL, submitted that Ashav's claim for allotment of shares in RSIL clearly arises under MOU-II alone. He submitted that the MOU-I and MOU-II are two separate agreements and the commercial understanding under the two MOUs are completely different. Therefore, the same cannot be considered as a part of a singular transaction as claimed by Ashav. He submitted that in terms of the MOU-I, Ashav had agreed to provide ₹55.25 crores in lieu of 6% equity shares of RSIL. However, this is not the commercial understanding under the MOU-II. In terms of the MOU-II, Ashav had agreed to

provide a sum of ₹110.47 crores in two stages. In contrast to the MOU-II, Ashav had agreed to provide the funds as an Inter-Corporate Deposit under the MOU-I and therefore, the nature of the transaction was that of lending and borrowing. The funds lent were repayable in terms of Clause 8 of the MOU-I. However, there is no concept of repayment of consideration in any transaction to acquire equity. He submitted that under the MOU-II, the commercial understanding was for acquisition of equity, whereby the petitioner had agreed to acquire 11% equity of RSIL on an investment of ₹110.47 crores. He submitted that it is inconceivable that the MOU-I and MOU-II could be implemented together as a singular transaction, as one was destructive of the other.

18. Mr Prasad referred to Section 7 of the A&C Act and submitted that in terms of Sub-section (5) of Section 7 of the A&C Act, a reference to a contract or a document containing an arbitration clause constitutes an arbitration agreement only if the reference is such as to make that arbitration clause a part of the contract. He submitted that the use of word 'such' clearly indicates that the clause seeking to incorporate an arbitration agreement contained in any other document must expressly indicate the intention to do so. He submitted that Clause 15 of the MOU-II does not express any such intention. He referred to the decision of the Supreme Court in ***Nathi Devi v. Radha Devi Gupta: (2005) 2 SCC 271*** and on the strength of the said decision, contended that while interpreting a statute, effort should be made to ensure that effect is given to each and every word used by the legislature.

19. Next, Mr Prasad, referred to the decision of the Supreme Court in ***M.R. Engineers & Contractors Private Ltd. v. Som Datt Builders Ltd: (2009) 7 SCC 696*** and on the strength of the said decision, he submitted that a mere reference to a document in a contract does not have the effect of making the arbitration clause in that document, a part of that contract. He emphasised that a reference to a document in a contract should be such that it shows the intention to incorporate the arbitration clause as contained in that document. He also submitted that the said view was reinforced by the Supreme Court in a later decision in ***Inox Wind Ltd. v. Thermocables Ltd. : (2018) 2 SCC 519.***

20. Next, he submitted that the Clause 15 of the MOU-II merely referred to documents that were executed on 25.11.2019 and not MOU-I. He submitted that there were a number of documents executed on that date, which were intended to provide security to Ashav in respect of its investment and the import of Clause 15 of MOU-II was to incorporate those documents and not the Arbitration Clause in MOU-I.

21. Mr Prasad submitted that in any event, the disputes sought to be raised were outside the scope of the Arbitration Clause and thus, an arbitrator could not be appointed. He referred to the decision in ***Vidya Drolia and Ors. v. Durga Trading Corporation: (2021) 2 SCC 1***, in support of his contention that even at a referral stage, it is necessary for the court to briefly examine the dispute between the parties. He also referred to the decision of the Supreme Court in ***DLF Home Developers Private Ltd. v. Rajapura Homes Pvt. Ltd.: (2021) SCC OnLine SC 781*** and submitted that the court would decline to appoint an arbitrator even

in cases where an arbitration agreement exists if the disputes sought to be agitated, fell outside the scope of the arbitration agreement.

22. Mr Nakul Dewan, learned senior counsel appearing on behalf of DYMT and PGN, submitted that DYMT and PGN are not signatories to MOU-I and therefore, cannot be referred to arbitration. He submitted that in order to join non-signatories as parties, it was, essential, for the petitioner to plead the basis for doing so. He submitted that there must be a clear discernable intent for the parties to imply that both signatories and non-signatories would be bound by the arbitration agreement and the same was not so in this case. He stated that DYMT and PGN are Charitable Trusts and therefore, cannot be considered as a part of a group under the Group of Companies doctrine as referred to by the Supreme Court in ***Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc. And Ors.: (2013) 1 SCC 641***. In addition, he submitted that the two MOUs do not represent a composite commercial transaction but contemplate completely different commercial transactions. He also referred to the decision of ***M.R. Engineers & Contractors Private Ltd. v Som Datt Builders Ltd.*** (*supra*) and submitted that a mere reference to a document would not amount to incorporating an arbitration agreement. The only exception is where the referred document is a standard format of terms and conditions of trade associations or regulatory institutions, which publish such standard terms and conditions, for the benefit of members.

23. Mr Jayant Mehta, learned senior counsel appearing for RSIL, submitted that RSIL was not a party to either MOU-I or MOU-II. He

contended that the notice invoking arbitration dated 01.09.2021 was vague, cryptic and defective and therefore, was *non-est*. He also reiterated the contentions as advanced by Mr Prasad and Mr Dewan

Reasons and Conclusion

24. The scope of examination under Section 11 of the A&C Act is limited to examining the existence of an arbitration agreement. In the present case, it is apparent that disputes have arisen between the parties in connection with the MOU-I as well as MOU-II. Ashav had issued a notice under Section 21 of the A&C Act invoking the Arbitration Agreement. It had claimed that the respondents were obliged to ensure that 11% of the equity shares of RSIL are available to Ashav for its benefit. In its notice, Ashav had referred to the MOU-I as well as MOU-II. In addition, it had also referred to other agreements executed on 25.11.2019.

25. The contention that the notice under Section 21 of the A&C Act is vague and non-est is erroneous. It is not necessary for a party invoking arbitration to set out all claims; it is sufficient if indicates the disputes sought to be referred. In this case Ashaav had indicated that it is entitled to acquire equity shares in RSIL. The respondents are disputing the same. The amount invested by Ashav has been remitted to its bank account. Ashav has not accepted the same and at the outset had volunteered to deposit the same with the Registry of this court.

26. There is no dispute that an agreement to refer the disputes to arbitration exists between the parties to MOU-I. Clause 15 of the MOU-

I is not disputed. PAL, PPPL and the SPV are parties to MOU-I and thus, parties to the Arbitration Agreement. It is also not disputed that the SPV stands merged with RSIL and RSIL has assumed the obligations of the SPV under the contracts entered into by it. Therefore, RSIL being the successor to the SPV, is also a party to the Arbitration Agreement under MOU-I.

27. According to the respondents MOU-I stands terminated by execution of MOU-II. However, it is material to note that in terms of Clause 16.12, the Arbitration Clause would survive the termination of MOU-I. Clause 16.12 is set out below:

> "16.12 Survival Provisions. Notwithstanding anything contained in this MOU, the provisions of Article 15 (*Dispute Resolution*), Article 16 (*General Provisions*) shall survive termination of this MOU for any reason whatsoever."

28. There is a controversy whether the commercial transaction and understanding under the MOU-I is connected with the MOU-II. According to Ashav, the MOU-II is an extension of the understanding between the parties as contemplated under the MOU-I. However, the respondents, dispute the same. According to them, the MOU-I and MOU-II are two separate and independent agreements, which are not interrelated. DYMT and PGN were not parties to the MOU-I. They claim that they are not signatories to the Arbitration Agreement and therefore, are not bound to refer the disputes to arbitration.

29. In the aforesaid context, one of the principal questions to be addressed is whether the MOU-I and MOU-II are connected. The respondents contend that since the MOU-I cannot be performed in addition to MOU-II, the said agreements must be interpreted to be completely different transactions and treated accordingly. The said contention is unpersuasive. It is not necessary that both the MOUs should be capable of performance simultaneously for being construed as being connected or interrelated . According to Ashav, the MOU-II is a progression of the MOU-I.

30. It is important to refer to the recitals of the MOU-I to understand the context in which Ashav, PAL, PPPL and the SPV had entered the said agreement. PAL and PPPL are referred to as the 'Holding Companies' in MOU-I. MOU-I records that PAL, PPPL and the SPV had agreed to acquire majority of the equity shares representing not less than 98.87% of the equity share capital of RSIL (the Target Company) pursuant to a Resolution Plan approved by the NCLT. Ashav had the financial capability and resources to make investments and the Holding Companies (PAL and PPPL) had approached Ashav to make an investment with them to enable them together with the other companies of the 'P Group' to invest in the Target Company (RSIL) and to implement the Resolution Plan. It was agreed that pending the investment by PAL and PPPL (the Holding Companies) in the SPV and the investment by SPV in RSIL, Ashav would extend a loan to PAL and PPPL in the form of an Inter-Corporate Deposit (ICD), which would be

eventually converted to or replaced by securities of RSIL or the Holding Companies. The recitals of MOU-I are relevant and are set out below:-

> "A. The Holding Companies are a part of a consortium of companies lead by the SPV (the "**P Group**"), and P Group has agreed to acquire the majority of the equity shares (representing not less than 98.87% of the equity share capital) and control of Ruchi Soya Industries Limited ("**Target Company**") pursuant to a resolution plan approved by the NCLT on 24.07.2019 & 04.09.2019;
>
> B. The Investor has the financial capability and resources to make investment and/or give loan;
>
> C. The Holding Companies have approached the Investor with a request to make investment in the Holding Companies, to enable the Holding Companies, together with other companies of P Group, to invest in the Target Company and to implement the NCLT Resolution Plan;
>
> D. Pending (i) the investment by the Holding Companies in the SPV (and, in turn, investment, by way of subscription, purchase or otherwise of the securities of the Target and merger of the SPV with the Target), (ii) finalisation of the terms of the investment by the Investor in the Holding Companies, the Investor has, at the request of the Holding Companies, agreed to extend loan to the Holding Companies in the form of an intercorporate loan ("**ICD**"), which will be eventually converted into/replaced by securities of the Target or the Holding Companies (as the case may be) (whereupon the ICD will become investments), or be repaid to the Investor;
>
> E. The broad terms and conditions of the ICD, including, conversion or repayment (as the case may

be) is set out herein below and to be more particularly set out in the definitive documents;

F. For the purpose of this MoU, the Parties set out the key terms and conditions on which the Investor will initially extend ICD to the Holding Companies followed by conversion or and repayment thereof.

31. It is clear from the recitals of MOU-I that Ashav had agreed to make available certain funds as an Inter-Corporate Deposit, which would eventually be converted into securities of RSIL. Clause 1 of the MOU-I sets out that Ashav had agreed to make available a sum of ₹40,00,00,000/- to PAL and a sum of ₹15,25,00,000/- to PPPL. Thus, make available an aggregate sum of ₹55,25,00,000/- (Rupees Fifty Five Crores Twenty Five Lakhs). It was expressly stated that the primary intent and objective for infusing the funds by Ashav was to acquire the equity shares of RSIL soon after the merger of the SPV with RSIL. Clause 1.3 of the MOU-I also mentions that the said investment would be "*initially termed as ICD Amount*". It was also agreed that in the event such acquisition of equity shares of RSIL was not feasible for any reason whatsoever, then Ashav would acquire 'P4 Class B Shares'. However, if such acquisition was not feasible or achievable due to statutory reasons then the Holding Companies (PAL and PPPL) would repay the ICD amount to Ashav at the end of twelve months period.

32. Clause 1.4 of the MOU-I expressly provides that acquisition in terms of Clause 1.3 of the MOU-I would entitle Ashav to receive whether by way of issue, transfer or otherwise 6% of the equity capital

of RSIL, either directly or indirectly, by holding 'P4 Clause B Shares' (shares in PPPL). Clauses 1.3 and 1.4 of the MOU-I are set out below:-

> "1.3 The primary intent and objective of infusion of the funds by the Investor in P4, initially termed as ICD Amount, is (A) (i) to acquire the equity shares of the Target (soon after merger of the SPV with the Target) and (ii) in the event such acquisition is not immediately feasible for any reason whatsoever then to acquire the P4 Class B Shares (as defined later), and (B) only if such acquisition is not feasible or achievable due to statutory reasons, lack of necessary approvals or limitations under any material contract or law, then the Holding Companies shall repay the ICD amount to the Investor (which is secured by, and the terms of which, are set out later) at the end of twelve (12) months, along with earlier repayment by P1 to the Investor.
>
> 1.4 The acquisition in Clause 1.3 shall entitle the Investor to receive (whether by way of issue, transfer or otherwise), such number of equity shares of the Target Company representing six percent (6%) of the paid up capital of the Target Company (directly, in case of (A)(i) or indirectly (in case of (A)(ii) equity shareholding of the Target Company ("**Target 6% Equity Shares**"). The term "indirectly" shall mean that the Investor, through holding of P4 Class B Shares has and is entitled to corresponding economic interest in the Target Company, together with voting rights."

33. It was also agreed under the MOU-I that PAL and PPPL shall apply and utilize the amount solely and exclusively to invest in the

securities of the SPV. It is apparent from a plain reading of the MOU-I that although the funds invested by Ashav would be termed as an inter-corporate loan initially, the same would be converted to acquire, either directly or through differential voting shares of PPPL, equity interest representing 6% of the paid up capital of RSIL.

34. In connection with implementing the MOU-I, various other agreements were also entered into by certain parties. These include (i) Inter-Corporate Deposit and Pledge Agreement between Ashav and PAL (hereafter 'the **ICD Agreement – I**'), wherein Ashav had agreed to lend a sum of ₹40,00,00,000/- to PAL; and (ii) Inter-Corporate Deposit and Pledge Agreement between Ashav and PPPL (hereafter the '**ICD Agreement – II**'), wherein Ashav had agreed to lend a sum of ₹15,25,00,000/- to PPPL (These agreements are hereafter collectively referred to as the '**ICD Agreements**').

35. In terms of the ICD Agreements, Ashav had agreed to transfer the respective loan amount once a demand to extend the same under the said agreement was raised. Recital (B), which is common in the ICD Agreements, is reproduced hereinbelow:

> "(B) The Lender shall, on demand from the Borrower, either deliver a demand draft of the Loan Amount drawn in favour of the Borrower or wire transfer the Loan Amount to the bank account specified by the Borrower;"

36. Ashav states that on 25.11.2019, PAL and PPPL, issued a drawdown notice under the ICD Agreements requesting Ashav to

disburse an amount of ₹5,00,00,000/- and ₹4,00,00,000/- respectively as the first tranche payment. Ashav states that the said request was duly complied with.

37. Subsequently, on 07.12.2019, PAL and PPPL issued a further drawdown request to Ashav under the ICD Agreements for disbursement of an amount of ₹40,00,00,000/- and ₹11,25,00,000/- respectively as the final tranche payment. Ashav asserts that the said amounts were duly transferred on 10.12.2019 and thus, it had complied with its obligations under the ICD Agreements and MOU-I.

38. The parties entered into MOU-II, wherein Ashav agreed to acquire 11% of the total subscribed share capital of RSIL for an amount of ₹110,47,50,000/-. In terms of MOU-II, the investment by Ashav was contemplated in two stages. Under the first stage, Ashav agreed to deposit ₹55,23,75,000/- against allotment of 6% of equity shares and, in the second stage, Ashav agreed to invest the balance amount, that is, ₹55,23,75,000/- towards issuance of 5% warrants convertible in equity shares. The understanding and intention of the parties as set out in MOU-II, is reproduced hereinbelow:

> "**1. <u>Co-Investors:</u>** The Parties are co-investors where the Investor shall have stake upto 11% of the total subscribed share capital of the company. Parties have acquired Ruchi Soya Industries Limited (Company) as per below:
>
> (a) Investor [Ashav] shall be allotted 11% equity stake in the Company in form of unpledged equity shares out of which for 1% equity stake no payment will be made by the Investor

(b) The Investment of the Investor towards the Debt portion shall be repaid in 5 years time without any extension.

2. <u>Investment by Investor to acquire 11% Stake:</u> The Investor [Ashav] shall make payment for 10% amount only at the same valuation as the Principal Shareholders ie Rs 7 for Equity Shares; and pay 10% amount for the NCDs and Preference Shares (debt portion) which shall be subscribed by PAL. The Investment shall be initially made by way of Inter Corporate Deposits (ICD's) as per share entitled share of the investor as below:

Investment	**Amount to be Paid to acquire 11% Equity Stake**
Equity Portion	20,47,50,000/-
NCD's (Debt Portion)	45,00,00,000/-
Preference (Debt Portion)	45,00,00,000/-
Total Investment by Investor	Rs 110,47,50,000/-

<u>3. Stages and Time Period of Investment :</u> The Investor [Ashav] shall arrange to make the Total Investment of Rs 110,47,50,000/- in two stages

(a) Stage 1 – 50% amounting to Rs 55,23,75,000/- at the time when the Principal Shareholders make payment to the lenders [Rs 12,28,50,000/- for 6% Equity Stake; Rs 21,47,62,500 towards NCD's portion and Rs 21,47,62,500 towards Preference Shares – Debt portion of the Investor]. The Free equity shall be allotted in the Stage 1 itself, against payment of

50% amount of the total Investment. This payment shall be against allotment of 6% Equity Shares (in unpledged form) of the Company by way of fresh issuance of shares by the Company

(b) Stage 2 – Balance payment of 50% amounting to Rs 55,23,75,000/- towards Issuance of 5% warrants convertible in Equity Shares as below:

Date	Amounts	Remarks
12.12.2019	Rs 2,55,00,000/-	25% Warrant Amount – equity portion first make payment to PAL and on repayment on 29.01.2020 make payment to the Company (*stage 2*)
Within 10 months of warrant offer letter	Rs 7,68,75,000/-	75% Warrant Amount - equity portion payable directly to Company (*stage 2*) on 09.12.2020
29.01.2020	Rs 7,50,00,000/-	Debt Portion payment to PAL (*stage 2*)
Within 1 year of warrant offer letter	Rs 37,50,00,000/-	Debt Portion payment to PAL (*stage 2*)
Total	Rs 55,23,75,000/-	

Note: An excess payment of Rs 1,25,000/- against stage 1 shall be adjusted as per mutually agreed terms.

(c) For stage payment 2 of debt portion payable on or before 01.12.2020 to PAL, as above and amounting to Rs 37,50,00,000/-, the Investor shall not be charged any

> interest until 09.06.2020 and interest @ 10% per annum shall be charged after 09.06.2020 on the amount of Rs 37,50,00.000/-."

39. In terms of the MOU-II, Ashav was obliged to make a payment of ₹55,23,75,000/- under Stage I for acquisition of 6% equity shares. Ashav states that under the MOU-I, it had already deposited an amount of ₹55,25,00,000/- and thus, had already complied with Stage I payment of ₹55,23,75,000/- under the MOU-II. Ashav further states that the terms of MOU-I were incorporated under the MOU-II as it records that the differential amount, which is also the excess payment of ₹1,25,000 [Rs 55,25,00,000 – Rs 55,23,75,000] made under MOU-I, would be adjusted as per mutually agreed terms.

40. MOU-II does refer to adjustment of an excess payment of ₹1,25,000/- against investments to be made in Stage I. It also expressly mentions that excess payment of ₹1,25,000/- would be adjusted as per mutually agreed terms. This does, *prima facie*, indicate that the funds invested by Ashav under the MOU-I were required to be adjusted for acquisition of shares under the MOU-II.

41. Whereas under the MOU-I, Ashav was required to invest a sum of ₹55,25,00,000/-, it was now required to make an investment of ₹110,47,50,000/- under the MOU-II. Whereas under the MOU-I, it was agreed that Ashav would acquire 6% equity shares, either directly or indirectly in RSIL, MOU-II provided that Ashav would acquire 6% equity shares in RSIL on payment of ₹55,23,75,000/- at Stage I.

42. It is relevant to note that the MOU-I was entered into at a time when the investments for acquisition of RSIL had not fructified. MOU-I only contemplated Ashav acquiring 6% equity interest (either directly or indirectly) in RSIL. *Prima facie*, MOU-II fleshed out the details in the manner of such acquisition at Stage I. It also contemplated further investment to acquire additional 5% equity interest in RSIL at the second stage.

43. It is apparent from the above that the MOU-I and MOU-II are not unconnected. In terms of MOU-I, Ashav had agreed to make an investment to be utilized for acquiring the shares of RSIL. MOU is a more definitive as it also specifies the value at which the shares of RSIL would be Ashav. The contention that the MOU-I contemplates a loan transaction and the MOU-II contemplates a transaction for acquisition of shares is, *prima facie,* unmerited. It is apparent from the recitals of the MOU-I that Ashav had agreed to make an investment, which would be initially by way of an ICD, but the purpose and object of the investment was to acquire shares of RSIL. The amount was to be returned in twelve months, if the transaction did not fructify.

44. Undeniably, the disputes between the parties also arise in connection with the MOU-II and is not limited to the MOU-I. In this regard one of the principal question to be addressed is whether the Arbitration Agreement as contained in Clause 15 of the MOU-I, is incorporated in the MOU-II. As stated above, both the MOUs are connected and cannot be treated as totally disjunct. *Prima facie*, the investments made by Ashav in terms of the MOU-I are required to be

adjusted in the manner as indicated in the MOU-II. In that sense, there is some continuity of the investment made by Ashav. It is also apparent that the object and purpose of the investment was to acquire equity interest in RSIL, either directly or indirectly. This is material in determining whether the parties intended to incorporate the Arbitration Agreement as contained in the MOU-I in the MOU-II.

45. Clause 15 of the MOU-II expressly provides that parties had agreed to execute such other documents in addition to the MOU (MOU-II) to reflect the understanding between the parties and such documents including "*all other documents executed on 25.11.2019"* would form a part of the MOU-II.

46. Mr Dewan, learned senior counsel, had contended that the documents executed on 25.11.2019 merely referred to the ICD Agreements and Share Pledge Agreements executed on 25.11.2019, but did not refer to MOU-I. It was also contended on behalf of the respondents that the expression 'documents' would not encompass an agreement.

47. Apart from the MOU-I, certain parties had also executed the following documents on 25.11.2019:

(i) ICD and Pledge Agreement dated 25.11.2019 entered into between Ashav and PAL;
(ii) ICD and Pledge Agreement between Ashav and PPPL;
(iii) Undertaking by the SPV to pledge the shares of RSIL and SPV Securities in favour of Ashav;

(iv) Undertaking to pledge by SPV;

(v) Deed of Guarantee by Sh. Ram Bharat in favour of Ashav personally guaranteeing certain obligations of PAL under the ICD Agreements;

(vi) Deed of Guarantee by Sh. Ram Bharat described himself as the Promoter director of PPPL;

(vii) Deed of Guarantee between SPV, Ashav and PAL; and

(viii) Deed of Guarantee between SPV, Ashav and PPL.

48. According to the respondents, the import of Clause 15 of the MOU-II is to include the aforesaid agreements as part of the MOU-II and not the Arbitration Agreement as embodied in Clause 15 of the MOU-I. Concededly, the aforesaid agreements executed on 25.11.2019 were in aid and in connection with the MOU-I. If these agreements are incorporated as a part of the MOU-II, it would also follow that the MOU-I and MOU-II are not completely disjunct. There is merit in the contention that the transaction between the parties was required to be performed in terms of the MOU-II. According to Ashav, the MOU-II was a further evolution of the transaction with the same purpose and object, that is, to acquire certain equity interest in RSIL.

49. In any view of the matter, the connection between the MOU-I and MOU-II cannot be disputed. Even according to the respondents, the documents/agreements executed on 25.11.2019 that were in aid of the transaction under the MOU-I were incorporated as part of the MOU-II. By virtue of Doctrine of Severability, an arbitration agreement even

though it is embodied as a clause in an agreement is required to be considered as severable and independent of that agreement. The Arbitration Agreement was also executed on 25.11.2019 as a part of the MOU-I. Once the parties had agreed to incorporate all other documents executed on 25.11.2019 in the MOU-II, it is difficult to accept that the parties had consciously excluded the Arbitration Agreement executed on that date and their intention was only to incorporate other documents/agreements executed on 25.11.2019 and not the Arbitration Agreement.

50. The learned counsel for the respondents had also made a feeble attempt to contend that the term 'documents' would not include 'agreements' and therefore, the reference to documents could not be to the MOU-I. This contention is clearly unmerited and militates against the respondents' stand that the documents referred to in Clause 15 of the MOU-II are only the ICD Agreements, Share-Pledge Agreements and Deeds of Guarantees. These documents also record the agreement between the parties and therefore, no distinction can be drawn between these agreements and the Arbitration Agreement as included in the MOU-I.

51. There is merit in Mr Prasad's contention that the reference in an agreement must be such as to incorporate an arbitration agreement in another document and language of Clause 15 of the MOU-II does not specifically refer to the Arbitration Agreement. There is no cavil with the proposition that the question whether an arbitration agreement is incorporated by reference must be answered by ascertaining the

intention of the parties. In ***M.R. Engineers & Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd*** (*supra*), the Supreme Court had explained that a general reference to another contract would not be sufficient to incorporate an arbitration clause and there should be a reference indicating mutual intention to incorporate an arbitration clause from another document into the contract. In that case, the Supreme Court had examined the question whether an arbitration agreement under the main contract was included in the sub-contract. The Work Order issued under the sub-contract expressly provided that the *"sub-contract shall be carried out on the terms and conditions as applicable to main contract unless otherwise mentioned in this order letter*". The Court held that reference to the main contract did not incorporate the arbitration clause under the main contract. The plain language merely indicated that the work under the sub-contract was required to be carried out on the terms and conditions as applicable in the main contract.

52. However, apart from the language of the clause incorporating the arbitration agreement, the intention of the parties can also be ascertained from the surrounding circumstances and the conduct of parties. In the present case, Clause 15 of the MOU-II provides that all documents/agreements executed on 25.11.2019 would form part of the MOU-II. *Prima facie*, the intention of the parties is to carry-forward the transaction as initially agreed under the MOU-I in the manner as specified in the MOU-II and with an enhanced investment value. Therefore, the agreement appears to be to carry forward the transaction

as agreed under the MOU-I except to the extent modified by the MOU-II.

53. Mr. Dewan has contended that DYMT and PGN are non-signatories to the Arbitration Agreement as they were not signatories to the MOU-I. He further submitted that they were not companies and therefore, could not be compelled to arbitrate under the Group of Companies doctrine. He also contended that the Group of Companies doctrine would apply only if there was a composite transaction. However, in the present case, the MOU-I is not required to be performed as the entire transaction had been re-negotiated and only the MOU-II was required to be performed.

54. This Court is not persuaded to accept that the Group of Companies doctrine under which a non-signatory may be compelled to arbitrate is limited only to incorporated entities. The doctrine would also apply to a cohesive group, which is acting for a common purpose.

55. In ***Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc. And Ors.*** (*supra*), the Supreme Court had referred to two theories under which non-signatories to an arbitration agreement could be compelled to arbitrate. The relevant extract of the decision of the Supreme Court referring to the said two theories is set out below:

> "103.1 The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties

> and, to a large extent, on good faith principle. They apply to private as well as public legal entities.
>
> 103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law."

56. The applicability of the said theories is also not contingent upon the entities being incorporated.

57. In the present case, Ashav has asserted that there is identity of the parties and all of the parties are under control of same set of individuals. It is material to note that MOU-I was signed by Mr. Ram Bharat as an authorized signatory of PAL, PPPL and the SPV. MOU-II was also signed by Mr. Ram Bharat on behalf of PAL, PPPL and PGN. It was signed by Shri Acharya Balakrishna on behalf of DYMT. It is also brought on record that Shri Acharya Balakrishna owns 98.54% of the paid up equity capital of PAL and is in absolute control of PAL. Both, Shri Ram Bharat and Shri Acharya Balakrishna are Directors of PAL. Shri Ram Bharat holds 80% of the paid up equity capital of PPPL. Shri Acharya Balakrishna is also the Chairman-cum-Managing Director of RSIL after its takeover and Mr. Ram Bharat is one of its whole time Directors. Thus, both Shri Acharya Balakrishna and Shri Ram Bharat are in control of RSIL as well as its shareholding entities. PAL, DYMT, PPPL and PGN were shareholders of the SPV and have acquired shares in RSIL by virtue of their shareholding in the SPV. It is thus, *prima*

facie, evident that the respondents are part of a single group acting in concert.

58. It is also material to refer to Recital 'A' to the MOU-I, which expressly records that PAL and PPPL (rereferred to as 'Holding Companies') are part of the consortium of companies lead by the SPV referred to as 'P Group'. It is recorded that 'P Group' had agreed to acquire majority of the equity shares representing not less than 98.87% of the equity share capital and control of RSIL. Undisputedly, the respondents have acquired shares of RSIL on the merger of the SPV with RSIL. It is apparent that the respondents are part of the consortium referred to as 'P Group' in Recital 'A' of the MOU-I.

59. Undisputedly, the 'P Group' had proposed the Resolution Plan for RSIL and had also promoted the SPV for the said purpose. The recitals of MOU-I do indicate that PAL, PPPL and the SPV had entered into MOU-I with Ashav with a common object of financing the Corporate Resolution of RSIL. Recital 'C' of the MOU-I also expressly states that PAL and PPPL (the Holding Companies) had approached Ashav to make an investment to enable them *"together with other companies of 'P Group' to invest in the Target Company [RSIL] and to implement the NCLT Resolution Plan".* It is, thus, clear that Ashav had agreed to provide the investment for a common objective of PAL, PPPL, DYMT and PGN. It also appears that PAL, PPPL and the SPV were acting for a consortium referred to as 'P Group' in entering into MOU-I with Ashav. Thus, even on the principle of agency, DYMT and PGN are required to be joined as parties to arbitration.

60. Ashav had asserted that the funds provided by it were used by the 'P Group' for the resolution of RSIL. In that sense, DYMT and PGN had derived benefit from the said funds as they are also part of the consortium that had proposed the Resolution Plan for RSIL. In ***Life Techs. Corp. v. AB Sciex Prop. Ltd.: 803 F.Supp. 2d 270, 273-274 (S.D.N.Y. 2011)***, it was held that "*a non-signatory may be estopped from avoiding arbitration where it knowingly accepted the benefits of an agreement with an arbitration clause. The benefits must be direct – which is to say, flowing directly from the agreement*".

61. In ***Mahanagar Telephone Nigam ltd. v. Canara Bank & Ors: (2020) 12 SCC 767***, the Supreme Court had, *inter alia*, observed as under:

> "**10.3.** A non-signatory can be bound by an arbitration agreement on the basis of the "group of companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non signatory parties. Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract."

62. Given the aforesaid circumstances, DMMT and PGN can be compelled to arbitrate. It is also relevant to mention that in the present case, DYMT and PGN are *sensu stricto* not non-signatories. They are signatories to MOU-II by virtue of Clause 15 of the MOU-II, which

provides that all documents executed on 25.11.2019 are incorporated in MOU-II.

63. Given the factual context, it, *prima facie,* appears that the intention of the parties was to carry out the transaction under the MOU-I in the re-negotiated form while accepting all other attendant agreements. It is for this reason all ICDs, Share-Pledge Agreements and Deeds of Guarantees, which were executed on 25.11.2019, were incorporated as part of the MOU-II. There is no reason to exclude the Arbitration Agreement, which was also executed on the same date, from the scope of incorporation by reference under Clause 15 of the MOU-II

64. It is also the respondents' case that the question as to the existence of the Arbitration Agreement must be left open for the Arbitral Tribunal to decide. Paragraph 76 of the reply filed by the respondents to Ashav's application under Section 9 of the A&C Act [O.M.P.(I)(COMM.) No.259/2021] is relevant and reads as under:

> "76. Further, as there is a genuine controversy on the very existence of the arbitration agreement which is required to be gone into at length, it is fitting for the said issue to be determined by the arbitral tribunal with the benefit of substantial pleadings on the issue, and any relief sought can be granted under Section 17 of the Act."

65. There is merit in the aforesaid contention and the respondents cannot be permitted to resile from their stand in the reply to Ashav's petition under Section 9 of the A&C Act.

66. The Court will decline appointment of an arbitrator if it finally concludes that an arbitration agreement does not exist. However, the Court needs only to be *prima facie* satisfied as to the existence of an arbitration agreement for the arbitrator to be appointed. In this context, it is relevant to refer Paragraphs 32 and 33 of the Law Commission's 246th Report. The same are set out below:

> "32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.* [*Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234], (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.
>
> 33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that

> there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

67. This Court is *prima facie* satisfied as to the existence of an arbitration agreement. Thus, this Court considers it apposite to allow the present petition. It is, however, clarified that this would not preclude the respondents from contesting the existence of an arbitration agreement before the Arbitral Tribunal.

68. Justice (Retd.) Aftab Alam, a former Judge of the Supreme Court (Mob.:9868219005), is appointed as the Sole Arbitrator to adjudicate the disputes between the parties subject to the learned Sole Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act. The parties are at liberty to approach the learned Sole Arbitrator for further proceedings.

69. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

JANUARY 31, 2022
pkv/gsr/v