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

Reserved on: 21st February 2024
% ***Pronounced on: 28th June, 2024***

\+ **CS(OS) 1180/2002, I.A.9235/2020 & I.A.5313/2021**

LINK ENGINEERS (P) LIMITED
Link House,
4/3 Kaikaji Extension,
New Delhi - 110 019 ..... Plaintiff

Through: Mr. Aditya Bakshi and Ms. Tulna Rampal, Advocates

versus

M/S ASIA BROWN BOVERY LIMITED
Riot No.22-A,
Shah Industrial Estate, 1st' Floor,
Off Veera Desai Road
Andheri (West), Mumbai - 400 053

…..Defendants

Through: Mr. Ratan K. Singh, Mr. Nikhilesh Krishnan, Ms. Ritika Priya and Mr. Abhishek Singh, Advocates for D1.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

1. The plaintiff has filed the Suit for recovery/damages seeking recovery of an amount of Rupees Five Crores Twenty-Nine Lacs and Ninety Thousand (Rs. 5,29,90,000/-) and the interest thereon @ 18% per annum till the realization of outstanding amount from the defendants.

2. Briefly stated, defendant No. 1 was carrying on the business of manufacturing and supplying power plant equipment, and services with M/s

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BHEL as the main competitor in India which was getting preference as the Public Sector Undertakings. The defendant No.1 felt that if it can enter in a Joint Venture Company with National Thermal Power Incorporation Limited (**NTPC**), it would be placed in a more advantageous position for future power projects from NTPC and various State Electricity Boards and also in relation to R&M Projects in existing power units. The defendant No. 1, who had earlier availed the service of plaintiff towards liasoning in relation to securing numerous Projects, sought to engage its service to assist the defendant No. 1 in entering into a Joint Venture with NTPC for Rehabilitation, Remuneration and Modernisation of thermal power stations. Accordingly, after several personal meetings and telephonic discussions, the Plaintiff and defendant No. 1 entered into an *Agreement dated 15.07.1998* whereby the plaintiff agreed to provide the Defendant No. 1 with its service and expertise, and to assist it in entering into a Joint Venture with NTPC. The total consideration to be paid by defendant No. 1 was in two parts i.e. Rs. 20,00,000/- as an upfront service charged on entering into a suitable Agreement with NTPC and an amount of Rs. 5 crores immediately upon the R&M business coming through i.e. Projects being awarded to defendant No. 1 and/or the Joint Venture Company.

3. It is asserted that because of the services of liasoning and image building work, a 50-50 Joint Venture Company was formed by the defendants with the NTPC in September 1999, to provide comprehensive services to the customers relating to rehabilitation, renovation and modernisation of Power situation in India and in other countries. Therefore, the plaintiff has become entitled to upfront payment of Rs.20,00,000, which the Defendants have failed to pay.

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4. The plaintiff has claimed that it has come to know in definite terms that the defendants have received technically and commercially clear Orders as per the Brochure of Joint Venture Company as envisages in Agreement dated 15.07.1998 between the plaintiff and defendant No. 1. Therefore, the defendants are liable to pay a sum of Rs. 20 lakhs to the plaintiff in terms of the *Agreement dated 15.07.1998 (hereinafter referred to as an Agreement)*. The Defendants further agreed that on the allotment of Korba Amarkantak Rehabilitation Projects, an amount upto Rs. 5 crore over and above this Rs. 20 lakhs, shall be released to the plaintiff.

5. Moreover, the Defendants showed the Letters dated 18.03.1999 written by Madhya Pradesh Electricity Board *vide* which they had written that all future R&M Projects in India including the aforesaid Projects shall be solely dealt by the Joint Venture Company (**JVC**) formed by the defendant No.1 and NTPC. It is claimed that the aforesaid Projects have been assigned to the JVC which was formed solely due to the expertise and specialised service of the plaintiff. It has rendered its service to the Defendants who are bound to fulfil their obligations under the Agreement.

6. The plaintiff sent a *Legal Notice dated 27.11.2001* to defendant No. 1 and made a demand of its legitimate dues. *The defendant No. 2 and 6* gave a Reply dated 05.12.2001 stating that the defendant No.2 and 6 are not aware of any transaction as claimed by the plaintiff in its Notice. *The defendants No. 1, 3, 4, and 5* also gave a Reply dated 15.12.2001 which contained only bald denials of their liabilities.

7. Another Letter dated 15.02.2002 was written on behalf of *defendant No. 1, 3, 4 and 5* who asserted that pursuant to the *Scheme of Demerger under Section 391 to 394 of the Companies Act, 1956* filed in Bombay High

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Court, the defendant No. 1 has demerged and hived off an entire undertaking relating to the Power Business of defendant No. 1 in favour of defendant No. 2 on *an ongoing concern basis* including all liabilities and debts pertaining to the Power Business of defendant No. 1. The consequences of the Demerger has been that all debts and liabilities pertaining to the Power Undertaking of defendant No. 1, has automatically been transferred and vests in defendant No. 2. Defendant No. 1 therefore, cannot be held responsible or liable for any of the obligations under the Agreements which it may have entered in with the plaintiff. Furthermore, no benefits have been reaped by defendant No. 1 and it is defendant No. 2 which is the real beneficiary of the Contract and therefore, no claim is maintainable against defendant No. 1.

8. The *plaintiff gave his Rejoinder dated 02.01.2002* stating that no cognisance can be taken of these bald denials by the Defendants.

9. It is asserted that no individual Notice has been issued to the plaintiff calling upon it to attend and vote at the meeting of unsecured creditors of defendant No. 1, as is required under Section 391-394 of the Companies Act, 1956.

10. Thus, the plaintiff is entitled to *Rs.5,29,90,000/-* along with interest @ *18 % p.a.,* for which the present Suit has been filed.

11. **The defendant No. 1, in its Written Statement** to the amended plaint has submitted that the entire claim of the plaintiff arises out of the *Agreement dated 15.07.1998*, allegedly executed between the plaintiff and defendant No.1. It is submitted that under this alleged Agreement, the terms of payment were yet to be finalized and was ridden with uncertainty and in

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fact, there was no Agreement at all and it is *non est* in law. At best, this document reflects a broad and general understanding that in the event, defendant No. 1 forms a Joint Venture, the services of the plaintiff may be utilized on the terms to be mutually agreed by the parties. The basis of the Understanding was on the happening of defendant No. 1 entering into suitable arrangement with NTPC. Since no such Agreement materialized, the essential pre-condition for the aforesaid Understanding to come into force and effect, was never achieved. Therefore, there was no valid contract between the plaintiff and defendant No. 1. Furthermore, the plaintiff has not provided any services under the alleged Agreement and also the Defendant No. 1 is not a beneficiary in any respect thereof in any manner whatsoever. There is therefore, no cause of action against the defendant No. 1.

12. It is further submitted that the perusal of this alleged Agreement makes it apparent that the services of the plaintiff were engaged for assisting in preparation of Report, collection of the relevant information and pursuing various related matters in connection with the Joint Venture Proposal with NTPC. For this, the plaintiff was required to follow up the Tender with NTPC, deploy sufficient manpower for follow up and hold the discussions from time to time. Further, the plaintiff was required to report periodically on the development of the proposals and communicate the suggestive strategy in respect thereof. The plaintiff failed to do so and did not provide any of the aforesaid services in terms of the alleged Agreement. The present Suit also does not contain any specific details of the service allegedly rendered by the plaintiff pursuant to the Agreement. The entire aspect relating to the performance by the plaintiff and its obligations under the alleged Agreement are vague, inconclusive, non-descript, unsubstantiated,

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and evasive terminology has been used like "*the plaintiff successfully carried out the liasoning and image building work*" and "*Joint venture was formed solely due to the efforts and service of the plaintiff*", which do not further the cause of the plaintiff.

13. Moreover, the payment of upfront service charges of Rs.20,00,000/- was contingent upon and subject to defendant No. 1 entering into a Suitable Agreement with NTPC for the Joint Venture Proposal. However, no Joint Venture or any Agreement ever got formed between defendant No. 1 and NTPC. Admittedly, the Memorandum of Understanding (**MOU**) in respect of the Joint Venture was entered into between NTPC and ABB Kraftwerke AG, Germany, which is an entity different from the defendant no.1.

14. Since the event as contemplated did not happen and the purpose was not achieved, the alleged Agreement is void and not enforceable in law. It is also a case of uncertainty. Furthermore, admittedly, the Power Business Undertaking of defendant No. 1 stands de-merged in favour of Defendant No. 2 with effect from 01.10.1999; as the consequences of this Demerger, any liabilities relating to Power Business of defendant No. 1 stands automatically transferred and vested in defendant No. 2. The Defendant No. 1, under no circumstances can be held responsible and liable for any of its obligations under the alleged Agreement in relation to the Power Business which stands transferred to defendant No. 2.

15. It is further submitted that the *Scheme of Demerger* had undergone the process of obtaining all the requisite approvals from the shareholders and creditors of defendant No. 1, the Central Government and the High Court of Bombay in accordance with Provisions 391 and 394 of the Companies Act. The proposal of the Scheme was widely advertised and circulated inviting

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claims from the Public at large and creditors generally. It was incumbent upon the plaintiff to allege or assign a claim, if any, and seek adequate safeguard from the Court to protect its interest at the time of hearing of the petition by the High Court. Having failed to do so, the plaintiff is now estopped form alleging any claim in relation to the Power Business of defendant No. 1. It is further submitted that defendant No. 1 has been impleaded mischievously by the Plaintiff in order to unjustly enrich itself knowing full well that defendant No. 1 has no personal liability under the Agreement.

16. The plaintiff and defendant No. 2 had entered into discussions and communications vide letter dated 05.09.2000, 26.09.2000 and 23.05.2001 in relation to the *Agreement dated 15.07.1998* and the Settlement of alleged dues under the Agreement. The exchange of letters between plaintiff and defendant No. 2 reflects that they had discussions even prior to filing of the present Suit. Having entered into such discussions, the Plaintiff and defendant No. 2 cannot now plead ignorance to the discussions that they had even prior to filing of the Suit. The present Suit against defendant No. 1 has been filed with collateral motives, as an afterthought. The plaintiff therefore, cannot claim that it was not aware of the transfer of all the rights and liabilities of defendant No. 1 to defendant No. 2 nor can defendant No. 2 deny the existence of the alleged *Agreement dated 15.07.1998* and its rights and obligations there under.

17. It is further asserted that the JV between ABB Germany and NTPC had materialized because of the mutual efforts and commitments of the respective parties. It is evident from the MOU dated 10.12.1998 that a detailed selection process was undertaken by NTPC, which had placed an

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open call for selection of a JV partner. It is only after following the detail of the due procedure of the NTPC selected ABB Germany as its Joint Venture partner. It is therefore wrong of the plaintiff to allege that it had provided any services in relation to the JV or that the JV was the result of the efforts of the plaintiff.

18. The defendant No. 1 has claimed t*hat its neither a necessary nor a proper party* as the defendant No. 1 has no obligations under the alleged Contract and Agreement, since the Power Business of defendant no. 1 stands transferred.

19. The defendant No. 1 has explained that subsequent to the MOU executed between the ABB Germany and NTPC, they entered into a Joint Venture. After March 2002, even ABB Germany has ceased to be Joint venture partner as all the rights and obligations in respect of the Power business have been taken over by ALSTOM. It was thus, asserted that the Suit is bad for non-joinder of the necessary parties.

20. The ***defendant No. 1 asserts*** that the plaintiff in Paragraph 12 and 14 of the plaint claimed that it had definite knowledge of two Contracts namely, Korba Amarkantak Rehabilitation Projects and Project worth Rupees 240 crores were allegedly awarded to the alleged Joint Venture between the defendant No. 1 and NTPC, however, in Paragraph 17 of the plaint it pleads ignorance about the Contracts awarded to the JV, for the purpose of calculating the amount of Court Fees. The defendant asserts that the plaintiff has deliberately framed the Suit in a manner to avoid payment of court fee on the entire amount of Rs. 5 crores and thus, the Plaint is liable to be struck of as frivolous and abuse of process of the law. Moreover, this *Agreement dated 15.07.1998 is not properly stamped* and cannot be read into evidence.

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21. **On merits,** all the averments made in the plain were denied and the Defendant No. 1 reiterated that there was no valid agreement and there are no obligations and liabilities arising against the Defendant No. 1 under the said Agreement.

22. **The defendant No. 2 and 6 in their Written Statement** took the preliminary objection that admittedly, *there is no Agreement* between the plaintiff and defendant No. 2 and *there is no cause of action* disclosed against the defendants and Suit is *bad for mis-joinder of the parties.* Their names are liable to be deleted from the array of parties. Furthermore, as per the arrangement for Demerger between defendant No. 1 and 2, the existence of the Agreement was never disclosed by defendant No.1 to defendant No. 2 nor was there any provision for the liability made or disclosed as a contingent liability by defendant No. 1 to defendant No. 2. Therefore, by no stretch of imagination, the answering defendants can be called as successor in interest of defendant No. 1 and are not liable to pay any amount as claimed by the plaintiff.

23. Without prejudice to the aforesaid, it is asserted that the perusal of this *Agreement dated 15.07.1998* would clearly show that this Agreement is *not enforceable being vague and uncertain and is therefore, void.* The alleged Agreement does not describe nature of the service nor the manner in which the alleged fee was to be paid. It was contingent upon the defendant No. 1 entering into a suitable Agreement with NTPC. No such Agreement has in fact, been entered into and it is also not enforceable as per its own terms, as no JV between NTPC and defendant No. 1 ever materialized.

24. It is further asserted that Mr. G.K. Sahi, who had allegedly signed this Agreement on behalf of defendant No. 1, was not an authorized signatory as

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per the knowledge of defendant No. 2 and 6. Furthermore, this Agreement is claimed to have not been validly stamped and therefore, not enforceable. **On merits,** all the averments made in the plaint are denied.

25. ***The defendant No. 3 and 4 and the plaintiff in their Written Submissions*** took the similar pleas of the Suit being *bad for misjoinder of parties* for having wrongly impleaded the Defendants as they were merely the employees of defendant No. 1 and are not personally liable for the business of defendant No. 1. It was claimed that *no cause of action is disclosed against them* and the Suit is liable to be rejected. It was further asserted that the *requisite Court Fee* has not been paid by the plaintiff. Moreover, the material facts t*o disclose cause of action* have not been stated in the plaint.

26. The ***plaintiff in its replication*** to the ***respective*** Written Statements of the Defendants, has re-affirmed its assertions made in the plaint.

27. Though, ***Defendant No. 3 to 5*** *had filed their Written Statement as stated above, but they* ***were deleted*** *from the array of parties vide Order dated 07.08.2006 on their application under Order VII Rule 11 CPC. The* ***Defendant No. 6 was also deleted*** *Order dated 28.08.2006, by observing that there was no cause of action disclosed against him.*

28. I.A.12942/2012 was filed under Order XXIII Rule 1 CPC on behalf of the plaintiff for withdrawal of the Suit against the defendant No. 2. It was submitted in the application that the plaintiff, is satisfied that there is no liability of defendant No. 2 *qua* the plaintiff. In keeping with good business, it sought permission to withdraw the Suit against defendant No. 2. This

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Application of the plaintiff was allowed vide Order dated 03.08.2012, and ***the Suit was permitted to be withdrawn against defendant no.2.***

29. ***The suit of the plaintiff thus, survives only against the defendant no.1.***

30. **Issues** on the pleadings were framed on 28.08.2006 and 03.12.2007 as under:

> *Issue No.1: Whether relating to the agreement dated 15.07.1998, plaintiff is entitled to a sum of Rs. 20 lacs? If yes, from which defendant? OPP*
>
> *Issue No.2: Whether the plaintiff is entitled to a preliminary decree for rendition of accounts? If yes, against which defendant? OPP*
>
> *Issue No.3: Relief.*

31. The plaintiff in support of this case examined ***PW-1 SK Sikka***, the Chairman of the Plaintiff Company who, proved its Certificate of Incorporation as exhibit PW-1/1. The Board Resolution dated 11.07.2002 in his favour is exhibit PW-1/2. He has deposed on similar lines as the averments contained in the plaint. The detailed testimony shall be considered subsequently.

32. The defendant No.1 examined DW-1 Vivek Kler, AR who has also deposed on similar lines as the defence taken by defendant No. 1 in its Written Statement.

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33. The detailed arguments were addressed and Written Submissions filed on behalf of both the parties. **The record and the evidence perused. The issue wise findings are as under:**

Issue No.1: Whether relating to the agreement dated 15.07.1998, plaintiff is entitled to a sum of Rs. 20 lacs? If yes, from which defendant? OPP

34. The present Suit involves the interpretation of the Commercial contracts. The Apex Court in the case of *Dhanrajamal Gobind Ram v. Shamji Kali AS and Co*. AIR 1961 SC 1285 held that where the intention of parties are not clear in commercial contracts then the rule to apply is to infer the intention from the terms and nature of the contract from general.

35. In the case of *Swarnam Ramachandran (SMT) v. Aravacode Chakungal Jayapal* (2004) 8 SCC 689 the Apex Court while deciding the issue of whether time was of the essence of a contract observed that intention of parties can be ascertained from the (i) express words used in the contract; (ii) nature of the subject-matter property; (c) nature of contract; and the surrounding circumstances.

36. In the case of *Khardah Company Limited v. Raymon and Co. (India) Pvt. Ltd.* (1963) 3 SCR 183 the Apex Court observed that the terms of a contract can be express or implied from what has been expressed and it would be legitimate to take into account surrounding circumstances for construction of the contract.

37. These judgements do not aid the case of the plaintiff as the intention of parties is clearly expressed from the terms of *Agreement dated 15.07.1998* whereby the plaintiff agreed to provide the Defendant No. 1

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with its service and expertise, and to assist it in entering into a Joint Venture with NTPC.

38. Guided by these principles, the facts of the present case may be now considered. The claim of the plaintiff rests solely on the *alleged Agreement dated 15.07.1998* written by defendant No.1/ M/s Asea Brown Boveri Limited for engaging the services of plaintiff to assist defendant No.1 in preparation of Report, etc. relating to proposed projects of Thermal Power Station in India which it intended to get, by entering into a Joint Venture with NTPC.

39. According to the plaintiff, defendant No.1 entered into a Joint Venture with NTPC in 1998 about which it came to know through the **PW-1/31A** Brochure of NASL (NTPC-ABB Alstom Power Services Limited).

40. The defendant No.1 has taken multiple defences; ***firstly***, defendant No.1 got demerged in October, 1999 and its power division was absolutely transferred to defendant No.2; ***secondly*** there was never any Joint Venture constituted between defendant No.1 and NTPC; and ***thirdly*****,** that no services whatsoever, were rendered by the plaintiff in getting the Joint Venture with NTPC.

I. Demerger of defendant No.1 and transfer of its Power Division to defendant No.2 in October, 1999:

41. **The first aspect** which thus, needs to be considered is whether the entire Power division of defendant No.1/Asea Brown Boveri Ltd. got transferred to Asea Brown Boveri Management Ltd. (subsequently the name was changed to POWERCO)/ defendant no.2 w.e.f. 01.10.1999. To understand the terms of demerger, it is pertinent to ***refer to scheme of demerger dated 17.11.1999*** which was accepted by Bombay High Court.

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42. *Clause 1 of the Scheme* dealt with the definitions. *Sub-clause (e) defined POWERCO* and *Sub-clause (h) defined Undertaking*, as under:

Clause 1(e) defined "POWERCO" as under:

" (e)*"**POWERCO**" means ASEA BROWN BOVERI MANAGEMENT LIMITED, a company incorporated under the Companies Act, 1956 and having its Registered Office at Vaswani Chambers, 264-265, Dr Annie Besant Road, Mumbai 400 025, Maharashtra.*"

*"**Clause 1(h) defined "Undertaking" as under:***
***"Undertaking shall mean all power generation activities carried out by INABB** (the defendant no. 1 herein) on a going concern basis consisting of the following:*
i) ……. vii)
And shall include (without being limited to) the following:-

i) All assets of or pertaining to the undertaking including those specified in Schedule A hereto:-

ii) All liabilities and debts pertaining to the Undertaking including those specified in Schedule B hereto:
iii) ….. duties and obligations of all contracts agreement and arrangements ….
iv) .....
v) .....
vi) all necessary record files, papers, and information …. And the records in connection with and/or relating to the undertaking."

Part II, Clause 3(a), (b) and (e) of the Scheme read as under:

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*"**3(a)** With effect from the Appointed Date, the Undertaking shall, pursuant to the provisions contained in section 394, of the Act, without any further act, deed, matter or thing, be and the same shall stand transferred to and vested in or be deemed to be transferred to and vested in POWERCO as a going concern so as to become the property of POWERCO with effect from the Appointed Date, subject to -the charges existing thereon on the Appointed Date in favour of the financial agencies and/or the concerned secured creditors of INABB if and only if such charges are in relation to or pertaining to the liabilities and debts of the Undertaking. The assets and liabilities pertaining to the Undertaking shall be transferred at their book values as on April 1,1999.*

***3(b)** All assets pertaining to the Undertaking acquired by INABB after the Appointed Date and prior to the Effective Date for operations of the Undertaking shall also stand transferred to and vested in POWERCO at their book values, upon the coming into effect of the Scheme.*

...

***3(e)** It is hereby clarified that the rest of the assets and liabilities (other than those specified in Schedule 'A' and 'B'), if any, of INABB shall continue to vest in INABB.*"

43. From these Clauses, it is quite evident that the Power division of defendant No.1 got demerged and was taken over by defendant No.2.

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Furthermore, it was taken over as a *going concern* which implies that all the existing transactions including subsisting Agreements, Contracts together with the debts and liabilities as specified in Clause 3(e), got transferred to defendant No.2.

44. The plaintiff has taken an objection that the scheme of Demerger is not binding without proper service or intimation to a creditor, for which reliance is placed on *Miheer H. Mafatlal v. Mafatlal Industries Ltd* (1997) 1 SC 579; *Bank of India v. Official Liquidator* (1999) 1 CAL LT 322(HC); and *In Re: Birla VXL* [2006] 66 SCL 69 (Guj). However, in the present case, requisite Public Notice were given for the scheme of demerger which has been affirmed by Bombay High Court. This objection of the plaintiff is therefore, without merit.

45. **A further plea has been set up** that there was no mention of this alleged *Agreement dated 15.07.1998* in the list of assets and liabilities and therefore, there was no transfer of the obligations under this Letter *dated 15.07.1998* to defendant No.2. This argument is totally not sustainable in terms of the express Clauses, especially Clause 1(h)(ii) which defined liabilities as "***including those specified in Schedule B hereto"***, thereby making it explicit that the liabilities were not limited but were inclusive of Schedule B. The defendant No.2 had taken over the Power division of defendant No.1 as *a going concern* which implies that all the subsisting and existing activities pertaining to power division of defendant No.1 had been taken over by it. The liabilities under the alleged *Agreement dated 15.07.1998* were ongoing subsisting liabilities (if any) and therefore, they along with the Power Division, got transferred to defendant No.2. To claim that there was no mention of this particular Agreement in the list of assets

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and liabilities, is absolutely not tenable for the simple reason that it was the *ongoing business* along with all the liabilities and debts, which stood transferred in terms of *Clause 3(a)of the Scheme.*

46. *The first objection* taken is that the liabilities if any, that were existing against defendant No.1 did not get transferred to defendant No.2 is completely not borne out from the record. Once the defendant No.2 took over all the liabilities which included those arising under Agreement dated 15.07.1998, they can be enforced only against defendant No.2. Defendant No.1 having transferred its Power division business including its liabilities if any, under this Agreement dated 15.07.1998, it cannot be now held liable, thereunder.

47. Pertinently, plaintiff has withdrawn its suit against defendant No.2 vide Order dated 03.08.2012. While permitting the withdrawal this Court observed that "*if any consequence flows in favour of any of the defendant on account of plaintiff withdrawing the suit against defendant No.2, such issue shall be examined during the course of disposal of the suit*".

48. The plaintiff as has been stated in the application under Order XXIII Rule 1 CPC by its own understanding was convinced that there was no subsisting liability against defendant No.2 which prompted it to withdraw the suit. This may have been the understanding of the plaintiff, but the documents and the evidence on record clearly establish that the liability, if any, that existed under this *Agreement of 15.07.1998*, got transferred to defendant No.2. **Since defendant No.2 ceases to be a party to the present suit, there survives no cause of action against defendant No.1 and the plaintiff is not entitled to any relief.**

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II. Whether any Joint Venture constituted between defendant No.1 and NTPC came into existence:

49. Independent of this finding, the Agreement dated 15.07.1998 be considered to understand whether any obligations in favour of plaintiff got created. We may now examine contents of this Agreement dated 15.07.1998, the relevant parts of which read as under :

> ***"RE: NTPC JOINT VENTURE PROPOSAL FOR R & M THERMAL***
> ***POWER STATION***
> *With reference to your letter dated 13th June, 1998 and subsequent discussions you had with us on the above subject* ***we are pleased to engage your services for assisting us in the preparation of the report. Collection of relevant information and pursuing various related matter in connection with our proposal for the captioned project on an exclusive basis.***
> ***In the event of our entering into a suitable agreement with NTPC, we agree to pay you upfront service charge of Rs. 2 MINR****. In addition,* ***you shall also be required to extend necessary professional assistance to support the marketing efforts leading to the success of the proposed joint Venture Company. Depending on the size of the first 2/3 project undertaken by the proposed NTPC-ABB (JV), for execution, additional service charge upto Rs. 50 MINR shall be paid to you after receipt of technically & commercially clear order****, relating to these projects Modalities of payment shall be mutually discussed and finalised.*
> ***The above is subject to the terms & conditions mentioned below:***
> · *You will render your services for the follow-up of above tender on an exclusive basis for which you will deploy sufficient manpower for follow up and discussions from time to time*

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· *You will report to us periodically the developments of the proposal and shall also communicate to us suggested strategies.*

· *You will maintain all the information given to you from time to time in strict confidence and will not divulge any part of it to other parties."*

.

50. The defendant No.1 engaged the services of the plaintiff for the preparation of Report, collection of relevant material etc. on an exclusive basis. It further stated that on entering into a suitable Agreement with NTPC, an upfront charges of Rs. 20 lakhs shall be paid and if they were able to get further 2-3 Projects an amount upto Rs.5 crores shall also be payable.

51. This Agreement was subject to fulfilment of the conditions by the plaintiff that it shall render services for the follow up of Tender, shall report periodically about the development of the proposals and suggest strategies and shall also maintain all the information given to them from time to time in strict confidence. The ***first condition,*** therefore, *was a Joint Venture Agreement between defendant No.1 and NTPC.* It has come in evidence that a Joint Venture got executed between ABB Kraftwerke AG, Germany and NTPC on 10.12.1998. It is the case of the plaintiff itself that because of its effort JV was formed between NTPC and ABB Kraftwerke AG, Germany which is the German entity and sister concern of defendant No.1. The plaintiff itself admits that a Joint Venture of NTPC was not with defendant No.1 but with its German entity in which it had 100% subsidiary. It needs no explanation that ABB German entity may be a sister concern in which defendant No.1 had 100% subsidiary, but the fact remains that defendant No.1 and ABB Kraftwerke AG, Germany are two independent Companies.

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52. In the case of *Vodafone International Holdings BV vs. Union of India & Anr* (2012) 6 SCC 613 the Apex court has observed that the legal relationship between a holding Company and wholly owned subsidiary is that of two distinct legal persons, the holding Company does not own the assets of the subsidiary and the management of business of the subsidiary vests in its Board of Directors.

53. Merely because the Joint Venture was entered into with a German entity of defendant No.1, it cannot be said that the foundational requirement of there being a Joint Venture between plaintiff and defendant No.1, got satisfied. *In fact, there is not a single document to corroborate that a Joint Venture ever came into existence between Defendant No.1 and NTPC has been produced by the plaintiff.* Rather PW.1 Sh. S. K. Sikka has made significant admissions in his cross examination, relevant parts of which are reproduced as under.

Further Cross dated 06.02.2013 of PW-1 Sh. S. K. Sikka:

> *"Q. I put it to you that neither any JV agreement between ABB India and NTPC was formed nor any business including Korba R & M or over Rs.400 Crores business gone to alleged JV as alleged y you in para 13 of your affidavit"*
> *A. Whatever is written by me in para 13 is correct.*
> *Q. Have you filed any document to show over Rs. 400 Crores business gone to alleged JV?*
> *A. No.*
> *Q. Can you show any document to reflect that Joint Venture was formed between NTPC and ABB?*
> *A. I cannot show but it is a fact. It is incorrect to suggest that Korba project was not to go to ABB.*
> ***It is correct that Korba project went to Alstom.*** *Vol. It was understanding between Alstom and ABB because at*

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that time ABB was being taken over by Alstom. There is no document regarding this understating. Vol. It was internal matter between the two. It is incorrect that there was no such understanding and my averments in this regard are totally baseless and incorrect. It was within our knowledge that Korba project was going to Alstom. We did not raise any protest in this regard, as both ABB and Alstom were our regular clients.
Q. Is it correct that Korba project did not go to the alleged JV as per you but went independently to Alstom?
A. Not independently. Went to Alstom based on understanding with ABB who were in process of transferring power generation system to Alstom.
I do not have and I cannot have any document regarding the said understanding. It is incorrect to suggest that there was no such understanding.
Q. What is the basis of your averment that Korba project was equivalent to two/three projects taken together?
A. It was based on our experience that R & M Projects are normally smaller in size to start with.
Q. Is there any material in support of your above averment?
A. My experience is enough.
It is incorrect to suggest that quantum of Korba project was not equivalent to two/three projects taken together."

***Cross dated 23.02.2013 of PW-1Sh. S.K. Sikka**:*

Q. I put it to you that no JV came to be formed between ABB India and NTPC?
A. It is correct Vol. ABB India had informed us that one of the ABB Group Company will sign the agreement with NTPC as per previous contractual practices with ABB India for which the plaintiff rendered the services.
It is incorrect to suggest that volunteered part of my above answer is incorrect.
Q. Have you filed any document in support of your above volunteered statement?

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A. I do not remember.
I cannot disclose as to who from ABB told me that one of the ABB Group Company will sign the agreement with NTPC.
Q. I put it to you that there was no such present or past practice as stated by you is your above volunteered statement.
Ans. It is incorrect.
Q. I put it to you that there was no such communication form ABB India as stated by you in your volunteered statement.
Ans. It is incorrect.

Q. Can you show me any document in support of statement made by you in para 26 of your affidavit?
Ans. I cannot produce any document as on today.
It is incorrect to suggest that the contents of para 26 of my affidavit are incorrect."

54. There are categorical admissions by PW.1 Sh.S. K. Sikka in his evidence that it has no documents to prove the creation of JV between the Defendant No.1 &2 but has referred to some internal understanding between the two of which there is no cogent evidence. PW-1 has also admitted that the Projects went to Alstom and not to ABB, but tried to buttress it by asserting that there was an internal understanding that ABB was going to Alstom.

55. The plaintiff has taken a plea that ABB Kraftwerke Germany AG is the *alter ego of defendant No.1* and even in previous transaction, defendant No.1 had paid commission on behalf of ABB Kraftwerke Germany AG for previous transactions. However, none of these transactions have been proved by the plaintiff. Furthermore, payment of commission per se would not

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make ABB Kraftwerke Germany AG the alter ego of defendant No.1. This entity is incorporated in Germany and it subsequently became ABB Alstom Power Services Ltd. and then it became Alstom Power India Ltd. i.e. defendant No.2 which is a totally different entity. Therefore, the allegation of plaintiff that ABB Kraftwerke Germany AG was the alter ego of defendant No.1 is not established.

56. **Further, the plaintiff has taken a plea that t**he *corporate veil* should be lifted to establish this fact of defendant No.1 being the alter-ego of the German entity. For this, plaintiff has placed reliance on *Arcelor Mittal India Pvt. Ltd. vs. Satish Kumar Gupta & Ors.* (2019) 2 SCC 1. to enlist circumstances in which Corporate Veil can be lifted, which are: (i) *where the statute itself lifts the corporate veil;* (ii) *where protection of public interest is of paramount importance*, or (iii) *where a Company has been formed to evade obligations imposed by the law.*

57. *Firstly*, no such plea of ABB Kraftwerke Germany AG being the alter ego of defendant No.1 has been taken in the amended plaint. *Secondly,* has observed that the *corporate veil* may be lifted. *Secondly,* in the present case, the plaintiff has not been able to prove on record the existence of any of such circumstances as laid down by the Apex Court in the case of *Arcelor* (supra) and thus, this judgment is of little assistance to the plaintiff. There is no evidence whatsoever in this regard.

58. ***It is abundantly clear from the testimony of PW-1 Sh. S. K. Sikka that indeed no JV came into existence as has been claimed by the plaintiff.***

III. Services Rendered by the Plaintiff:

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59. Even if it is accepted that the Joint Venture between the Germany entity which is a 100% subsidiary of defendant No.1 was sufficient to be considered as a foundational basis for the *plaintiff to raise its charges under the Agreement,* it needs to be further examined whether the plaintiff indeed rendered its services in accordance with the *three terms and conditions* which were mentioned in the *letter dated 15.07.1998*. The **first requirement was** the follow up of the Tender on an exclusive basis for which sufficient man power was to be deployed by the plaintiff for the purpose of follow up and discussions from time to time. **The second requirement** was to *report periodically* about the development of proposal and to communicate the suggested strategies. **The third requirement** was to *maintain all the information* given to the plaintiff from time to time in strict confidence and not to divulge any part of it to any other parties.

60. The plaintiff in its pleadings as well as in its evidence, is blissfully *silent about any of these activities undertaken or Services rendered by it*. Not a single document has been produced to support that it had deployed man power or there was any follow up of the Tender. No record has been produced to establish that it had been reported periodically about the developments or proposals or that it had suggested any strategies. Pertinently, the plaintiff has not even alleged or produced any of the letters or the documents forwarded to it by defendant No.1 in respect of which the confidentiality was to be maintained. *In fact, there is not a single document to corroborate that a Joint Venture ever came into existence between Defendant No.1 and NTPC or about the efforts of the plaintiff in facilitating the Joint Venture to come through.* The upfront payment or subsequent payment were all contingent upon the JV being formed and the rendering of

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services by the plaintiff for the Joint Venture to come through and thereafter get the Projects.

61. **PW1** S.K. Sikka has also been evasive in his cross-examination and was unable to given the details of the professional services rendered by it in terms of the Agreement dated 15.07.1998. The relevant part of cross-examination reads as under :

> "**Cross dated 10.12.2012 of PW-1Sh. S. K. Sikka:**
> *"Q. Please explain what spade work was done by you as mentioned in para 16 of your affidavit ?*
> *A. We have introduced ABB Directors to concerned persons in NTPC to Govt. authorities so that the joint Venture Agreement can be accepted.*
> *Q. Can you tell me name of the Directors of ABB who you introduced as per you in NTPC to Government authorities. Name of officials of NTPCs, Name of Government authorities, dates when the meeting as per you took place and documents in support thereof?*
> *A. In view of confidentiality understanding with the Defendant management. I cannot disclose the information.*
> *Q. Have you been asked by ABB in writing to not disclose the information as stated by you? Kindly give the dates thereof.*
> *A. As per international practices. Such facts are not disclosed and* ***as such there was no written request from ABB.***
> *Q. Kindly tell us what Liaoning and image building work you did with details thereof as mentioned by you in para 19 of your affidavit?*
> *A. It cannot be explained.*
> *It is incorrect to suggest that we did not do any liaisoning and image building word as stated in para 19 of my affidavit."*

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62. The next Claim of the plaintiff is that the Projects were allotted to JV which were of more than 400 crores which entitled him to a further payment of Rs.5 crores. In the end, it may also be observed that the amount that was to be paid was ***up to Rs.5 crores*** depending upon the value of the Projects. The plaintiff has relied upon a Brochure to assert that two Contracts namely, Korba Amarkantak Rehabilitation Projects and Project worth Rupees 240 crores were allegedly awarded to the alleged Joint Venture between the defendant No. 1 and NTPC, but at the same time has also admitted that Korba Amarkantak Rehabilitation Project went to Defendant No.2. The plaintiff has miserably failed to prove that the Projects got allotted to the Joint Venture which could entitle it to claim additional amount of Rs. Rs.5 crores. Furthermore, **PW1 S.K. Sikka** during its cross-examination admitted that it had no documents to show that over Rs. 400 crore business has gone to alleged Joint Venture. The plaintiff in its entire evidence, has also not been able to give any details of the quantification of the Projects and has not been able to justify the amount of Rs.5 crores which it is claiming. There is no calculation on the basis of which Rs.5 crores have been claimed when in fact Rs.5 crores was a cap upto which the amount was payable depending upon the quantification of the Joint Venture; it was not a fixed amount.

63. **PW1 S.K. Sikka** has relied upon communication dated 17.03.1999 and 18.03.1999, but only the photocopies of the documents have been produced which have been denied by defendant No.1. Even in the cross-examination, no evidence whatsoever, has been led by the plaintiff to prove these two Letters.

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64. In the case of *The Roman Catholic Mission vs. The State of Madras*, AIR 1966 SC 1457 and *R.V.E Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple & Another* (2003) 8 SCC 752, it has been held that photocopies even if marked as exhibit, are inadmissible in evidence. Therefore, these two Letters relied upon by the plaintiff are of no assistance to it.

65. Plaintiff, therefore, has admittedly neither filed any documents nor has it adduced any cogent evidence to prove its assertions that business of more than 400 crores went to the alleged JVC because of its efforts. Furthermore, Korba Amarkantak Projects which had gone to defendant No.2 as per the Annual Report of defendant No.2, is not a JV. The allegation of the plaintiff that the Korba/Amarkantak Projects got diverted to defendant No.2 instead of JV is also totally unsubstantiated. Rather, the averments of the plaintiff itself shows that the Project of Korba Amararkantak Project was not a business which went to the JV Company.

66. ***The plaintiff had thus, miserably failed to prove that it had rendered the services which would have entitled him to upfront payment of Rs.20 lakhs***.

67. Plaintiff has relied upon *Mackay v. Dick* (1881) 6 App. Cas. 25 where the House of Lords held that in a conditional contract of sale and delivery where the buyer prevents the possibility of the seller fulfilling the condition then the contract is to be taken as satisfied; and *Secretary Dept. of Irrigation and Ors. v. Millars Machinery Co. Ltd.* 1985 KLJ 734 wherein the Hon'ble Kerala High Court reiterated the settled principle that if a promisor is

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prevented by the promisee from performing his part of the contracts then the promisor is deemed to have performed his part of the contract. These judgements do not aid the case of the plaintiff as it is evident from the facts of the case that the defendant No. 1 did not obstruct the plaintiff in fulfilling the terms of the *Agreement dated 15.07.1998* whereby the plaintiff agreed to provide the defendant No. 1 with its service and expertise, and to assist it in entering into a Joint Venture with NTPC.

68. ***To conclude,*** *First and foremost,* the JVC which got formed was not between defendant No.1 and NTPC. It was between German entity of defendant No.1 and NTPC, as has been already observed. *Secondly,* the entire liabilities of defendant No.1 got transferred to defendant No.2 against which the suit stands withdrawn. *Thirdly,* as has been discussed in detail above, PW.1 has admitted in his cross examination that the Projects went to Alstom. *Fourthly,* even if it is accepted that the Joint Venture Company had got Projects of more than 400 crores, the plaintiff has not been able to establish its contribution or the services rendered by it to the JVC in getting these projects.

69. It is, therefore, held that in the light of above discussion, plaintiff is not entitled to the amounts as claimed.

70. The issue No.1 is decided against the plaintiff.

Issue No.2: Whether the plaintiff is entitled to a preliminary decree for rendition of accounts? If yes, against which defendant? OPP

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71. In view of the findings on Issue No.1, the plaintiff is not entitled to rendition of accounts.

72. The issue No.2 is decided against the plaintiff.

Issue No.3: Whether the plaintiff is entitled to interest? If yes, at what rate and for which period. OPP

73. In view of findings on Issue No.1 and 2 the plaintiff is not entitled to any interest.

74. The issue No.3 is decided against the plaintiff.

Relief:

75. In view of the findings above, **the suit of the plaintiff is hereby dismissed.** Pending applications, if any, are also hereby dismissed.

76. Parties to bear their own costs. Decree sheet be prepared.

(NEENA BANSAL KRISHNA)
JUDGE

JUNE 28, 2024
PT/VA

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