ORDER OD – 4

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/595/2025

SREI INFRASTRUCTURE FINANCE LIMITED & ANR.
VS
ORISSA STEEL EXPRESSWAY PRIVATE LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 7th May 2026

Appearance:

Mr. Debnath Ghosh, Senior Advocate
Mr. Biswaroop Mukherjee, Advocate
Ms. Pubali Sinha Chowdhury, Advocate
Ms. Rajeshwari Prasad, Advocate
... for the petitioner.

Mr. Rohit Das, Advocate
Ms. Kishwar Rahman, Advocate
Ms. Sristi Roy, Advocate
... for the respondent.

The Court : This is an application under Section 11 of the Arbitration and Conciliation Act, 1996.

The petitioners pray for appointment of an arbitrator for adjudication of the disputes and differences between the parties, which arose out of an assignment agreement dated September 29, 2018.

In or about October 2021, Corporate Insolvency Resolution Process (CIRP) had been initiated against the petitioners namely, SREI Infrastructure Finance Limited (SIFL) and SREI Equipment Finance Limited (SEFL) before the learned National Company Law Tribunal, Kolkata (NCLT).

By an order dated October 8, 2021, the Learned NCLT was pleased to appoint an Administrator in respect of both the companies.

The Administrator preferred an application before the NCLT seeking consolidation of the CIRP of the petitioners.

By an order dated February 14, 2022, the Administrator was directed to constitute a consolidated and integrated committee of the creditors to conduct the CIRP of both SEFL and SIFL. The Administrator called for submission of a Resolution Plan by prospective resolution applicant. National Asset Reconstruction Company Limited (NARCL) submitted a consolidated resolution plan for both SEFL and SIFL which was subsequently approved by the creditors of both the companies. By an order dated August 11, 2023, the Learned NCLT approved the said consolidated resolution plan submitted by NARCL.

By virtue of the said consolidated resolution plan which was approved by the NCLT, SIFL and SEFL came to be fully owned, run and managed by NARCL.

NARCL is a Government entity, 51% ownership being held by public banks and the rest by private banks. It is registered with the Reserve Bank of India as an Assets Reconstruction Company, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act].

The petitioners contend that, prior to commencement of CIRP, SIFL and SEFL had entered into a business transfer agreement for transfer of SIFL's entire fund based business division, its lending business, along with all its assets and liabilities to SEFL with effect from October 1, 2019. The petitioners further contend that, with effect from the date of transfer i.e., October 1, 2019, all sums outstanding and payable by the debtors of SIFL, being part of the receivables of the transferred business, stood assigned to SEFL, along with all rights and interest. By placing reliance on the order of the NCLT approving the resolution plan of NARCL, it is contended by the petitioners that, SEFL shall be considered as the lender for all purposes in

respect of all loans obtained by the borrowers from SIFL in terms of the said business transfer agreement dated August 16, 2019.

On the basis of such pleadings, the application has been filed by SEFL as well. Such factual background was relied upon to support how the arbitration agreement can also be invoked by SEFL, a non-signatory to the assignment agreement executed between SIFL and the respondent.

The claim is for adjudication of the disputes which arose out of the assignment agreement entered into between the respondent and SIFL.

The respondent is a Company within the meaning of the Companies Act, 2013 and primarily engaged in the business of developing roads and highways. In October, 2016, the respondent approached SIFL for financial assistance. A loan agreement was entered into between the parties and SIFL had lent and advanced a sum of Rs.150 crores on the terms and conditions contained therein. The respondent had a construction contract with the National Highway Authority of India (NHAI). Apart from the aforementioned amount several other advances were made by SIFL to the respondent for the purpose of business, between August 2013 and February, 2017.

In view of the foreclosure of the contract by NHAI, in respect of the work allotted by them to the respondent, differences and disputes arose and an arbitration proceeding had commenced between the respondent and NHAI. The respondent also defaulted in making payment to SIFL under the loan agreement and certain sums became due. The respondent was not in a position to repay the outstanding amount to SIFL. Thus, it agreed to assign all monies receivable under the arbitral award to be passed in the proceeding between the respondent and NHAI, as and when the same would be received. Accordingly, on such premise, the assignment agreement was entered into

between the respondent and SIFL. The respondent unequivocally admitted that, as on that date, a sum of Rs.129.56 crores would be due to SIFL.

The arbitral proceeding between the respondent and the NHAI culminated into an award on March 31, 2019 and the learned Arbitrator published an award in favour of the respondent for a sum of Rs.322.78 crores. The arbitral award was challenged by the NHAI before the High Court at Delhi and NHAI had deposited the sum in the Delhi High Court as a pre-condition for stay of the execution.

The proceeding before the Delhi High Court challenging the award initiated by NHAI stood dismissed. The arbitral award published in the said proceeding became final and the respondent had withdrawn the said amount. It is also the categorical contention of the respondent that the amount which had crystallised at the time of execution of the assignment agreement was to the extent of Rs.129.56 crores, which had been paid to the petitioners.

By a letter dated July 14, 2024, SEFL called upon the respondent and its director to remit the cash flow proceeds arising from the arbitral award. By a letter dated September 3, 2024, the respondent informed the petitioners that the assignment agreement and the conditions therein had been complied with.

According to the petitioners, by the assignment agreement the respondent had unequivocally agreed to assign the entire receivables from the award and not only the amount of Rs.129.56 crores. Thus, disputes arose between the parties and the petitioners have laid great emphasis on the consequence of default contained under clause 7.2 of the assignment agreement. Clause 8.1 of the assignment agreement contains the arbitration clause. Courts at Kolkata are to have jurisdiction to try all disputes and differences arising out of the said assignment agreement. Therefore, the notice invoking arbitration was issued by the petitioners on May 10, 2025.

The respondents replied to the said notice, inter alia, denying the factual allegations made by the petitioners and also the claim of the petitioners, but proposed the name of a retired Chief Justice to act as the arbitrator. In such background, the application has been filed before this court seeking appointment of an arbitrator for adjudication of the disputes which have arisen between the parties under the assignment agreement.

Mr. Rohit Das, learned advocate for the respondent, submits that the assignment agreement had been entered into between the respondent and SIFL. Thus, the application is misconceived and SEFL being a non-signatory, cannot maintain this application along with SIFL.

It is next pointed out by Mr. Das that, the alleged business transfer agreement which is being relied upon by the petitioners, does not exist. The same did not get any sanction in the order of approval of the resolution plan passed by the NCLT. Thirdly, it is submitted that proceedings between the same parties before the NCLT under Section 66 of the Insolvency and Bankruptcy Code (IBC) for similar reliefs is pending and a parallel arbitral proceeding should not be permitted. Taking note of section 238 of the IBC, this Court should hold that the application for reference to arbitration is barred by law. The application filed under of the IBC should be given preference, inasmuch as, NCLT will be the exclusive forum to adjudicate the issues, as the IBC has an overriding effect over all other laws.

By distinguishing the decision of *Gluckrich Capital Pvt. Ltd. vs. State of West Bengal and Others, reported at 2023 SCC OnLine SC 1187,* it is submitted that, the Hon'ble Apex Court was dealing with a situation when, despite a proceeding being pending before NCLT against officers and management of the corporate debtor, the successful resolution applicant or the resolution professional could also have claims against third parties who

would not be covered by the jurisdiction of NCLT. Only in such cases, recourse to the civil court or to an arbitral tribunal could be taken.

With regard to the issue of a non-signatory invoking the arbitration agreement, this court finds that the petitioners have relied on a business transfer agreement in respect of the contention that, the rights, liabilities, assets etc. and also the lending business of SIFL had been transferred to SEFL by the business transfer agreement. It is submitted that, there is an order of the NCLT approving the resolution plan of NARCL, and SEFL is to be treated as the lender as per the plan. Mr. Das on the other hand submits that, no such observation was made by NCLT.

In my view, this is a disputed question of fact, which requires adjudication on trial. Whether the business transfer agreement subsists, what is the fate of such business transfer agreement, what is the stake of SEFL under the said business transfer agreement and whether SEFL can claim the dues of SIFL from the respondent, are to be adjudicated by the learned Arbitrator. All issues with regard to the mis-joinder, non-joinder and addition or deletion of parties to an arbitral proceeding, must be decided by the learned Arbitrator. Prima facie, it appears that SEFL is connected to the underlying contract by virtue of the transfer agreement.

In the matter of ***ASF Buildtech Private Limited vs. Shapoorji Pallonji and Company Private Limited*** reported in ***2025 SCC OnLine SC 1016,*** the Hon'ble Apex Court held as follows:-

> "113. It is well within the jurisdiction of the Arbitral Tribunal to decide the issue of joinder and non-joinder of parties and to assess the applicability of the Group of Companies Doctrine. Neither in Cox and Kings (I) (supra) nor in Ajay Madhusudhan (supra), this Court has said that it is only the reference courts that are empowered to determine whether a non-signatory should be referred to arbitration. The law which has developed over a period of time is that both 'courts and tribunals' are fully empowered to decide the issues of impleadment of a non-signatory and Arbitral Tribunals have

been held to be preferred forum for the adjudication of the same.

114. In the case of Ajay Madhusudhan (supra), this Court, placing reliance on Cox and Kings (I) (supra), has expressly held that Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal and the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal.

115. The case of Ajay Madhusudhan (supra) also recognizes that the legal relationship between the signatory and non-signatory assumes significance in determining whether the non-signatory can be taken to be bound by the Arbitration Agreement. This Court also issued a caveat that the 'courts and tribunals should not adopt a conservative approach to exclude all persons or entities who are otherwise bound by the underlying contract containing the arbitration agreement through their conduct and their relationship with the signatory parties. The mutual intent of the parties, relationship of a non- signatory with a signatory, commonality of the subject matter, the composite nature of the transactions and performance of the contract are all factors that signify the intention of the non-signatory to be bound by the arbitration agreement'.

116. Recently, a coordinate bench of this Court in Adavya Projects Pvt. Ltd. v. Vishal Strcturals Pvt. Ltd., 2025 INSC 507, also held that an arbitral tribunal under Section 16 of the Act, 1996 has the power to implead the parties to an arbitration agreement, irrespective of whether they are signatories or non-signatories, to the arbitration proceedings. This Court speaking through. P.S. Narasimha J. observed that since an arbitral tribunal's jurisdiction is derived from the consent of the parties to refer their disputes to arbitration, any person or entity who is found to be a party to the arbitration agreement can be made a part of the arbitral proceedings, and the tribunal can exercise jurisdiction over him. Section 16 of the Act, 1996 which empowers the arbitral tribunal to determine its own jurisdiction, is an inclusive provision that covers all jurisdiction question including the determination of who is a party to the arbitration agreement, and thus, such a question would be one which falls within the domain of the arbitral tribunal. It further observed that, although most national legislations do not expressly provide for joinder of parties by the arbitral tribunal, yet an arbitral tribunal can direct the joinder of a person or entity, even if no such provision exists in the statute, as long as such person or entity is a party to the arbitration agreement. Accordingly, this Court held that since the respondents therein were parties to the underlying contract and the arbitration agreement, the arbitral tribunal would have the power to

implead them as parties to the arbitration proceedings in exercise of its jurisdiction under Section 16 of the Act, 1996. The relevant observations read as under: -

"24. As briefly stated above, the determination of who is a party to the arbitration agreement falls within the domain of the arbitral tribunal as per Section 16 of the ACA. Section 16 embodies the doctrine of kompetenz-kompetenz, i.e., that the arbitral tribunal can determine its own jurisdiction. The provision is inclusive and covers all jurisdictional questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement. and the scope of disputes referrable to arbitration under the agreement. Considering that the arbitral tribunal's power to make an award that binds the parties is derived from the arbitration agreement, these jurisdictional issues must necessarily be decided through an interpretation of the arbitration agreement itself. Therefore, the arbitral tribunal's jurisdiction must be determined against the touchstone of the arbitration agreement."

The next contention of Mr. Das is that, the proceeding under section 66 of the IBC would take precedence and as such this court should not refer the disputes to arbitration. Under such situation section 66 of IBC is quoted below :

"**66. Fraudulent trading or wrongful trading.—(**1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-

> section(2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per Section 10A."

The code provides that, during the corporate insolvency process or a liquidation process, if it is found that any business of the corporate debtor had been carried on with the intent to defraud the creditors of the corporate debtors or for any fraudulent purpose, the adjudicating authority may, on the application of the resolution professional, pass an order that persons who were parties to the business shall be liable to make such contribution to the assets of the corporate debtor, as it may deem fit.

It is contended by Mr. Das that, in the application under section 66 of the IBC, the respondent is also one of the parties and the specific allegation of the petitioners in the said application are that the money which was actually lent to the respondent by SIFL and which resulted in the execution of the loan agreement as also the assignment agreement, were all fraudulent transactions. Thus, it is contended by Mr. Das that, the petitioners had already availed of a remedy under the IBC which has supremacy over any other civil law. Under such circumstances, this application should not be allowed and the petitioners should be relegated to the NCLT for the adjudication of the issues raised therein. In the event the petitioners are successful in the proceeding before the NCLT, the money as is being claimed in this proceeding, and which has allegedly given rise to the dispute, can also be directed to be paid by the NCLT.

This court of the view that section 66 of IBC is limited to fraudulent transfer and recovery of money from such persons found guilty of fraudulent business. Whether the loan amount which was given by SIFL to the respondent and execution of the assignment agreement were fraudulent in nature or not, or whether SIFL had actually released those amount by

indulging in ever-greening or round tripping, are matters of evidence which will have to be weighed by the learned Arbitrator. Thus, the question of arbitrability of the disputes and supremacy of IBC over the arbitral proceeding, will have to be decided by the learned Arbitrator, upon appreciation of evidence.

As the scope of the referral court is limited only to the satisfaction of the existence of the arbitration agreement, Mr. Das's contentions against the maintainability of this application are not accepted.

Under such circumstances, the application is allowed, without any observation on the merits of the issues which have been raised by either of the parties. The respondent is at liberty to raise all questions, including the question of jurisdiction, arbitrability, admissibility of the claim before the learned Arbitrator and the learned Arbitrator will decide all these issues in accordance with law.

Under such circumstances, The Hon'ble Justice T.S. Sivagnanam former Chief Justice of the Calcutta High Court, is appointed as the learned Arbitrator, to arbitrate upon the disputes between the parties.

This order is passed subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

The learned Arbitrator shall fix his remuneration in terms of the Schedule of the Act.

AP-COM/595/2025 is accordingly disposed of.

(SHAMPA SARKAR, J.)

TR/pkd.