
(2010) 09 CHH CK 0046
In the Chhattisgarh High Court

Bharat Aluminium Company	Vs	APPELLANT
Engineering Projects India and Others		RESPONDENT

Date of Decision : 22-09-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 16(1)
Constitution of India, 1950 — Article 12, 14, 16, 311

Citation : (2010) 09 CHH CK 0046

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Satish K. Agnihotri, J.

Writ petitions under Article 226 and 227 of the Constitution of India

1. W.P. No. 1398 of 2002 (for short "the first petition") & W.P. (C) No. 1781 of 2007 (for short "the second petition"), involve the same question of law and common facts and as such they are being considered and disposed of by this common order. However, for the purpose of this order the facts, as mentioned in the first petition are being referred.

2. The indisputable facts, in nutshell, as projected by the petitioner - Bharat Aluminium Company Ltd. (for short "BALCO"), are that vide invitation to tenders dated 6-11-1997 & 7-11-1997 (Annexures - P/1 & P/2, respectively to the first petition), BALCO invited tenders from the interested parties for civil and structural works for installation of New Cold Rolling Mills Project at Korba Aluminium Complex. Pursuant to the said tender notices, the respondent - Engineering Projects (India) Limited (for short "EPIL") submitted its offer to the aforesaid works on 23-12-1997 & 24-12-1997 (Annexures - P/3 & P/4, respectively to the first petition). On due consideration, vide letter of intents dated 16-7-1998 (Annexures - P/5 & P/6 to the first petition) BALCO placed the order in favour of EPIL. Thereafter, both the companies executed agreements on

7-1-1999 & 1-2-1999 (Annexures - P/7 & P/8, respectively to the first petition). Under Clause 9.22.1 of the general terms & conditions of the contract i.e. Schedule 9 of the contract agreement, they agreed to resolve the disputes and differences arising out of contract by way of arbitration (for short "the arbitration agreement") (Annexure - P/9 to the first petition).

3. On 2-3-2001 Government of India divested 51% of its shareholding in BALCO in favour of Sterlite Industries (India) Ltd. (for short "Sterlite") and accordingly the management of BALCO was transferred in favour of Sterlite. Therefrom BALCO has ceased to be a Public Sector Undertaking (for short "PSU"), and became joint venture.

4. Some disputes and differences arose between BALCO and EPIL. Accordingly, EPIL invoked the arbitration clause by way of letter dated 31-5-2001. Thereafter, the Government of India, Ministry of Mines vide its letter dated 23-7-2001 (Annexure - P/10 to the first petition) sought comments from BALCO with regard to the arbitration. BALCO vide its letter dated 9-8-2001 (Annexure - P/11 to the first petition) objected the arbitration to be conducted under the Permanent Machinery of Arbitration (for short "the PMA"), on the ground that BALCO did not remain a PSU after its disinvestment on 2-3-2001. However, BALCO agreed for the arbitration being conducted as per the procedure applicable for other than Public Sector Enterprises and Government Departments i.e. arbitration under the Indian Council of Arbitration.

5. In spite of the aforesaid facts, BALCO received a communication dated 19-12-2001 from Shri N.C. Jain (respondent No. 3 in the first petition) stating that he had been appointed as the Sole Arbitrator in the matter and had entered upon the reference under the PMA. Shri Jain further directed BALCO to file its statement of claim, reply and counter claim, if any, and fixed the matter for 14-3-2002.

6. Since BALCO has not received any response to its objection regarding the jurisdiction of the PMA, BALCO filed its reply and counter claim for an amount of Rs. 45.20 crores. In the said reply and counter claim BALCO raised the preliminary objection questioning the jurisdiction of the arbitrator under the PMA and submitted that the said reference was void ab initio on the ground that BALCO was not a PSU when the arbitration proceedings commenced or when the said clause was invoked by EPIL. EPIL filed its claim for an amount of Rs. 5,57,20,522.56 for civil works and an amount of Rs. 6,15,72,560=38 for structural works.

7. On 14-3-2002, during the course of arguments, BALCO raised the aforesaid objection before the arbitrator, but the said contention was rejected by the arbitrator vide order dated 21-3-2002 (Annexure - P/15 to the first petition) and fixed the matter for regular hearing on 22-5-2002. Thereafter, BALCO by its letter dated 6-5-2002 (Annexure - P/16 to the first petition) informed the arbitrator that they authorized M/s Kessar Dass & B. Associates, Advocates,

Solicitors & Consultants to represent BALCO in the arbitration proceedings. Thereafter, on 20-5-2002 (Annexure -P/17 to the first petition) the Advocate of BALCO moved an application before the arbitrator and stated that the venue of the arbitration would be at Korba and sought appropriate direction. EPIL filed an application vide Annexure - P/18 to the first petition opposing the appointment of Advocates by BALCO under the PMA Rules and sought a direction towards BALCO to represent through its officials only.

8. In view of the aforesaid objection raised by EPIL, M/s Kesar Dass & B. Associates did not appear before the Arbitrator on 22-5-2002 and the matter was represented by the officials of BALCO. The arbitrator rejected the application of BALCO with regard to venue of arbitration proceedings and adjourned the matter to 25-7-2002 by order dated 22-5-2002 (Annexure - P/20 to the first petition). Thus, BALCO filed the first petition before this Court on 12-7-2002.

9. This Court on 19-7-2002 passed an order in the first petition to the effect that "Meanwhile, if the meeting, if any, is held by the arbitrator, the decision thereof shall be subject to the orders to be passed by this Court".

10. During pendency of the first petition before this Court, the Ministry of Heavy Industries and Public Enterprises, Government of India, issued an office memorandum (for short "OM") dated 22-1-2004 (Annexure - P/21 to the first petition) directing that the procedure for settlement of disputes under the PMA will be applicable even to a Public Sector Enterprise, which has ceased to be the same, by reason of privatization due to disinvestment or otherwise. Thereafter, BALCO filed amendment application (I.A. No. 1) in the first petition on 12-3-2007, which was allowed by this Court on 30-3-2007. Accordingly, the amended writ petition was filed by BALCO on 7-4-2007.

11. BALCO also filed the second petition {W.P (C) No. 1781 of 2007} before this Court on 12-3-2007 in which it has been mentioned that BALCO was disinvested by the Government of India on 2-3-2001, as a result of which BALCO ceased to be a PSU. In the second petition, BALCO challenged the legality and validity of the OM dated 22-1-2004.

12. Shri Ratnanko Banerjee, learned Counsel appearing with Shri Tarun Aich and Shri Ghanshyam Patel, learned Advocates for BALCO would submit that the PMA could resolve the disputes only when there is a dispute or difference between the PSUs and the Government Departments to avoid wastage of public money and time, as all the inter departmental controversies may be settled at the Government level only in the light of observations made by the Supreme Court in Oil and Natural Gas Commission and Anr. v. Collector of Central Excise and Oil and Natural Gas Commission and Anr. v. Collector of Central Excise Accordingly, several O Ms were issued by the Government of India on 12-3-1985, 29-3-1989, 31-12-1991 & 24-1-1994 for setting up the PMA.

13. Shri Banerjee would further submit that forum of the PMA may not have jurisdiction to deal with the subject matter, as after disinvestment the

Government loses control over the present BALCO and, as such, the PMA also loses its jurisdiction. Thus, jurisdiction of the PMA would not continue, as the present BALCO is not a PSU. Learned Counsel placed his reliance upon the decision of the Supreme Court rendered in *Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd.* and upon the decision of the Bombay High Court rendered in *Fazlehussein Haiderbhoy Buxamusa and Ors. v. Yusufally Adamji and Ors.*

14. Shri Banerji would next submit that the arbitration clauses 9.22.1 and 9.22.2 are unambiguous and need no further interpretation. The plain language of the arbitration clause clearly provides for dispute resolution by the PMA only when disputes and differences arose between the PSUs and the Government Departments. A dispute and difference arising between a non-PSU and a PSU can be adjudicated by the PMA under the first part of Clause 9.22.1 of the contract. In support of his contention, Shri Banerji relies on a decision of the Supreme Court rendered in *Eastern Coalfields Limited v. Sanjay Transport Agency and Anr.*

15. Shri Banerjee would also submit that the Supreme Court in *BALCO Employees' Union (Regd.) v. Union of India and Ors.* at para 60, observed that as a result of disinvestment of 51% of the shares of the Company, the management and control, no doubt, has gone into private hands and, as such, by change of the status of BALCO, the employees would no longer be entitled to protection of Articles 12, 14, 16 and 311 of the Constitution of India. Thus, likewise, in the case on hand, after disinvestment, the present BALCO became a private company and the forum of the PMA would not be applicable.

16. Shri Banerjee would further submit that BALCO has also disclosed the shareholders agreement and share purchase agreement with the Government of India dated 2-3-2001 pursuant to which the shares were divested, in the application filed in the first petition on 3-9-2010 from which it will be evident that there is no clause with regard to BALCO being obliged to appear before the PMA for adjudication of disputes after disinvestment. In fact, Clause 7.6 of the share purchase agreement which lists the pending suit, action, litigation or arbitration proceedings or claim pending against BALCO, there is no reference to the claim of EPIL in the particulars given in schedule 7.6. This clearly shows that the Government never contemplated any pending arbitration by the process of the PMA as against BALCO, for the claim of EPIL.

17. Shri Banerjee would next contend that the PMA and the Government of India very well knew that a new agreement would be required for method of arbitration and the same is evident from the orders dated 9-3-2010, 10-5-2010 and 26-7-2010 of the PMA. The PMA wanted BALCO to sign on the new agreement, as is evident from the application dated 21-6-2010 in the second petition.

18. The impugned OM dated 22-1-2004 is wholly without jurisdiction. The Government is only a minority shareholder in BALCO and, as such, the OM dated

22-1-2004 would not be applicable whereby a unilateral change in the arbitration agreement was sought to be introduced without any authority of law between a PSU and a private undertaking i.e. BALCO. Thus, the OM dated 22-1-2004 is illegal, unjustified and without any authority of law.

19. Shri Banerjee would further submit that the office memorandum dated 22-1-2004 has been issued in an illegal and arbitrary manner without having jurisdiction and against the principles of settled law. The Ministry of Heavy Industries and Public Enterprise cannot impose a settlement procedure of PMA on BALCO by issuing the office memorandum dated 22-1-2004. The said memorandum has been issued with mala fide intention and with some ulterior motive.

20. It is further contended by Shri Banerjee that by reason of subsequent events, it is well settled that even the Court may lose jurisdiction over the subject matter. EPIL very well knew the fact that in the event BALCO becomes a private under taking on account of any reasons may be disinvestment, the second part of the arbitration agreement would be applicable. BALCO has objected the jurisdiction of the PMA in its letter dated 9-8-2001 and even in the reply and counter claim filed by BALCO before the arbitrator there was a preliminary objection with regard to jurisdiction of the PMA, which was rejected by the PMA on 21-3-2002.

21. On the other hand, Shri Sunil Otvani, Advocate appearing for EPIL, would submit that the disputes and differences arose between BALCO and EPIL prior to change of Management of ownership in BALCO and claims were lodged by EPIL before BALCO vide letters dated 7-10-2000, 16-11-2000 and 5-2-2001 (Annexure - R2/6, R2/7 & R2/8, respectively to the second petition). The said claims were rejected by BALCO on 3/5-2-2001 & 12-2-2001 (Annexure - R2/9 & R2/10, respectively, to the second petition). Therefore, the contract cannot be altered merely because one party to the contract subsequently became a joint venture company due to the change of management of the company and could not possible affect or nullify. BALCO has not approached this Court with clean hands and has made incorrect and misconceived averments in this petition. In fact, the OM was issued by the authorities by exercising their power properly, lawfully and in the interest of public at large.

22. Shri Otvani would further submit that admittedly the OM was issued on 22-1-2004 whereas BALCO challenged the same after lapse of more than three years and, as such, the petition may be dismissed on the ground of delay and laches. Even otherwise, BALCO has failed to make out any case in its favour.

23. Ms. Fouzia, Mirza, learned Assistant Solicitor General appearing for the Union of India, would submit that the Government of India has rightly and correctly issued the OM. There is no arbitrariness in issuing the OM dated 22-1-2004 and the Government of India is the only authority as per the law of the land to issue such guidelines. Ms. Mirza would further submit that as per the arbitration clause

executed between the parties, the award of the arbitrator in the PMA shall be binding upon the parties to the dispute. No legal right or vested right of BALCO is effected by the OM dated 22-1-2004. BALCO and its shareholders are bound by the obligation under the contract and terms & conditions thereof already entered into by BALCO prior to its disinvestment.

24. Ms. Mirza would next submit that since the initial agreement was signed between the then BALCO and EPIL (PSUs), on advice, it is submitted that the arbitration agreement as signed earlier would be applicable to the present management of BALCO also. The present BALCO is not a private company, but it has become a joint venture on its disinvestment, as 51% of the shareholdings have gone in favour of Sterlite. The PMA has the jurisdiction to interpret the arbitration clause and to decide as to whether the present BALCO would be governed under the PMA. The OM dated 22-1-2004 was one of the several guidelines issued by the Government of India from time to time, which is not applicable to BALCO, but all the Enterprises wherein the PSUs after their respective disinvestment have gone into the hands of the private parties. Thus, the Government of India is fully competent to issue the OM dated 22-1-2004. It is a policy matter and the same cannot be challenged before any Court.

25. I have heard learned Counsel appearing for the parties, perused the pleadings and the documents appended thereto.

26. It is evident that to execute civil and structural works agreements were executed between the then BALCO and EPIL on 7-1-1999 & 1-2-1999. The Arbitration agreement provides for settling all the disputes and differences arising between the parties by the method, as specified therein.

27. Arbitration clauses 9.22.1 & 9.22.2 read as under:

9.22 ARBITRATION 9.22.1 For Public Sector Enterprises and Government Department

In the event of any disputes or differences relating to the interpretation and application of the provisions of the contracts, such disputes or differences shall be referred by either party to the Arbitration of one of the Arbitrators in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in charge or the Board of Public Enterprises. The Indian Arbitration and Conciliation Act, 1996 shall not be applicable to the arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special/Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The parties to the dispute will share equally the cost of arbitration as intimated by the "Arbitrator".

For other than Public Sector Enterprises and Government Department

All Disputes or differences, whatsoever, arising between the parties out of or in relation to the construction, meaning and operation or effect of this contract or breach there of shall be settled amicably. If, however, the parties are not able to resolve them amicably, the same shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. The Arbitrator/ Arbitrators will give reasoned award.

9.22.2 Work under the contract shall be continued by the Contractor during the arbitration proceedings unless otherwise directed in writing by the Purchaser or unless the matter is such that the works cannot possibly be continued until the decision of the arbitrators or of the Umpire, as the case may be, is obtained and save as those which are otherwise expressly provided in the contract, no payment due or payable by the Purchaser shall be withheld on arbitration proceeding unless it is the subject matter or one of the subject matter thereof.

28. EPIL raised a dispute on 31-5-2001 before the Secretary, Department of Public Enterprises. Thereafter, by letter dated 23-7-2001 (Annexure - P/10 to the first petition) BALCO was requested to furnish information/comments on the following issues:

- i) whether the said contract between EPIL & BALCO is still valid;
- ii) whether in BALCO's view, EPIL may invoke the said arbitration clause for the dispute pertaining to pre- disinvestment period;
- iii) would BALCO commit themselves to the arbitration; and
- iv) if so, what is BALCO's stand on the dispute raised by EPIL.

29. BALCO, by its letter dated 9-8-2001 (Annexure - P/11 to the first petition), responded that the resolution of disputes and differences could be resolved only under the second part of the Arbitration agreement under heading "Other than Public Sector Enterprises and Government department", not under the PMA. The Government of India, without passing an order on the letter dated 9-8-2001 of BALCO, appointed Shri N.C. Jain, Joint Secretary, Legal Adviser as Sole Arbitrator. On 19-12-2001 the arbitrator ordered both the parties to appear for hearing on 14-3-2002 and further directed to file their pleadings with documents including the statement of claim or the CSF/counter claims.

30. Pursuant to the said order, BALCO filed its reply and counter claim with preliminary objection that EPIL is not entitled to invoke arbitration provisions of Clause 9.22.1 under the heading "for Public Sectors Enterprises and Government Department". The objection of BALCO was rejected by the arbitrator on 21-3-2002 (Annexure - P/15 to the first petition) holding that the PMA has jurisdiction to decide the arbitration case between BALCO and EPIL. Thus, the first petition was filed by BALCO before this Court on 12-7-2002.

31. In *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited and Ors.*, the Supreme Court observed as under:

8 ...If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or "arbitrator" or "arbitrators" has been used in the agreement. It is also not necessary that agreement to arbitration should appear in the document containing the other terms of agreement between the parties. Law is well settled that arbitration clause may be incorporated by reference to a specific document which is in existence and whose terms are easily ascertainable. It is to be noted, however, that the question whether or not the arbitration clause contained in another document is incorporated in the contract, is always a question of construction. It should also be noted that the arbitration clause is quite distinct from the other clauses of the contract. Other clauses of agreement impose obligation which the parties undertake towards each other. But arbitration clause does not impose on any of the parties any obligation in favour of the other party. Such arbitration agreement embodies an agreement between the parties that in case of a dispute, such dispute shall be settled by arbitrator, or umpire of their own constitution or by an arbitrator to be appointed by the Court in an appropriate case. It is pertinent to mention that there is a material difference in an arbitration agreement inasmuch as in an ordinary contract the obligation of the parties to each other cannot, in general, be specifically enforced and breach of such terms of contract results only in damages. The arbitration clause however can be specifically enforced by the machinery of the Arbitration Act. The appropriate remedy for breach of an agreement to arbitrate is enforcement of the agreement to arbitrate and not to damages arising out of such breach. Moreover, there is a further significant difference between an ordinary agreement and an arbitration agreement. In an arbitration agreement, the courts have discretionary power of dispensation of a valid arbitration agreement but the courts have no such power of dispensation of other terms of contract entered between the parties. This very distinctive feature of an agreement for arbitration has been highlighted in the decision in *Heyman v. Darwins Ltd.* It has been held in *North Western Rubber Company and Huttenbach & Co., Re* (overruled in *Produce Brokers Co. v. Olympia Oil and Cake Co.* on other points), that an arbitration agreement in no way classifies the right of the parties under the contract but it relates wholly to the mode of determining the rights..

32. The Supreme Court in *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. and Ors.*, has made it clear that the arbitration clause would perish in case where either there is a substitution of a new contract, or rescission or alternation of the original contract.

33. In *National Insurance Company Limited v. Boghara Polyfab Private Limited*, the Supreme Court relied on earlier decision in *The Union of India v. Kishorilal Gupta and Bros.*, observed as under:

16. In *Union of India v. Kishorilal Gupta & Bros.* this Court considered the

question whether the arbitration clause in the contract will cease to have effect, when the contract stood discharged as a result of settlement. While answering the question in the affirmative, a three-Judge Bench of this Court culled out the following general principles as to when arbitration agreements operate and when they do not operate: (AIR p.1370, para 10)

(i) An arbitration clause is a collateral term of a contract distinguished from its substantive terms; but none the less it is an integral part of it.

(ii) Howsoever comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; and the arbitration clause perishes with the contract.

(iii) A contract may be non est in the sense that it never came legally into existence or it was void ab initio. In that event, as the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void.

(iv) Though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it, solely governing their rights and liabilities. In such an event, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it.

(v) Between the two extremes referred to in paras (iii) and (iv), are the cases where the contract may come to an end, on account of repudiation, frustration, breach, etc. In these cases, it is the performance of the contract that has come to an end, but the contract is still in existence for certain limited purposes, in respect of disputes arising under it or in connection with it. When the contracts subsist for certain purposes, the arbitration clauses in those contracts operate in respect of those purposes.

The principle stated in para (i) is now given statutory recognition in Section 16(1) (a) of the Act. The principle in para (iii) has to be now read subject to Section 16(1)(b) of the Act. The principles in paras (iv) and (v) are clear and continue to be applicable. The principle stated in para (ii) requires further elucidation with reference to contracts discharged by performance or accord and satisfaction.

34. With regard to sanctity of the arbitration agreement in *Indian Oil Corporation Limited and Ors. v. Raja Transport Private Limited*, the Supreme Court observed as under:

14. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties, etc. A party to the contract cannot claim the benefit of

arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause.

15. It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the arbitrator, are neither void nor unenforceable..

35. There is no dispute that the contract agreement as well as the arbitration agreement was duly signed by the then BALCO and EPIL. According to the terms and conditions and further in respect of the method of resolution of disputes and differences neither EPIL nor BALCO has raised the dispute before other party to the dispute in respect of arbitration clause. BALCO has also not asked EPIL to invoke arbitration in accordance with the Rules of Arbitration of Indian Council of Arbitration, though all the disputes were pending before the Government of India. If BALCO was under the impression that the dispute could be resolved only under the method prescribed in the agreement and in accordance with the Rules of Indian Council of Arbitration, BALCO ought to have written to the other party i.e. EPIL and on failure, ought to have taken recourse to other statutory forum that may be available under the provisions of law. Objection was raised under the settlement method, which was sought to be enforced for PSUs and the Government departments.

36. On perusal of Clause 9.22.1 of the Arbitration agreement, it appears that the first part was applicable in respect of the dispute between EPIL and BALCO and the second part of resolution of dispute in accordance with the Rules of Indian Council of Arbitration was referable to the dispute, which arose between other than Public Sector Enterprise and Government department.

37. By no stretch of imagination, it can be held that the second clause for settlement of dispute for other Public Sector Enterprise and Government department was incorporated keeping in view that in future management of BALCO may be changed on account of its disinvestment. It cannot be held that the second clause would be applicable in case of disputes and differences between BALCO and EPIL.

38. Hon"ble Single Judge of the Supreme Court while deciding the application under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 in Geo-Group Communications Inc. v. IOL Broadband Limited observed as under:

31. There is no manner of doubt that the respondent Company is the successor-in-interest of Exatt. After amalgamation of Exatt with the respondent, all the liabilities and obligations of Exatt, including those mentioned in SHA dated 1-12-2005 stood transferred, in law, to the respondent Company. This position of law was fairly admitted by the learned Counsel for the respondent at the time of hearing of the application. Even Clause 3.3 of the scheme of amalgamation inter alia specifically provides that the respondent Company will be bound by all the

obligations and liabilities of any nature of Exatt. Therefore, Clause 11.7 of SHA dated 1-12-2005 is applicable to the respondent Company in the same manner as it was applicable to Exatt.

39. There is no dispute that the management of BALCO has gone into the private hands i.e. Sterlite on disinvestment of BALCO held on 2-3-2001.

40. The Supreme Court in BALCO Employees' Union (Regd.) (supra) observed as under:

60. As a result of disinvestment of 51% of the shares of the Company, the management and control, no doubt, has gone into private hands. Nevertheless, it cannot, in law, be said that the employer of the workmen has changed. The employees continue to be under the Company and change of management does not in law amount to a change in employment.

41. Clause 7.12 of the Representations and Warranties of the Company (Article 7) of the Share Purchase Agreement among Government of India, Sterlite & BALCO it is clearly observed that the company will be able to carry on its business on substantially the same basis as its business is presently carried on. Thus, BALCO would be governed by the Arbitration agreement, as entered into between the then BALCO and EPIL in respect of civil and structural works.

42. Clause 7.12 of the Representations and Warranties of the Company (Article 7) of the Share Purchase Agreement reads as under:

7.12 The Company is not a party to any agreement which would materially and adversely affect the business operations of the Company after the Closing. After the Closing,, excepting the impact or consequences that arise due to the Company no longer being treated as a "Government Company" or a "public sector undertaking", the company will be able to carry on its business on substantially the same basis as its business is presently carried on

43. On disinvestment, which came into effect on 2-3-2001, 51% shareholding of the then BALCO was held by the present BALCO. Thus, the management of the then BALCO was transferred to the present management of BALCO. It cannot be held that the Government of India has lost its complete control, as the Government of India has still retain 49; shares in the present BALCO. Thus, it is not a case where it can be held that the ownership of the then BALCO has been transferred to new private enterprise. This is a case of only transfer of management on account of disinvestment.

44. BALCO has further not written to EPIL for either executing a new arbitration agreement, or rescission or alternation of the original contract. BALCO has not produced any document wherein and whereby BALCO requested EPIL for the above stated purposes.

45. Reliance of the learned Counsel appearing for the petitioner upon the decision of the Supreme Court rendered in Jindal Vijayanagar Steel (supra) and

upon the decision of the Bombay High Court rendered in *Fazlehussein Haiderbhoy Buxamusa* (supra) are not applicable to the facts of the present case, as in both the cases the territorial jurisdiction of a Court was under consideration. Thus, it cannot be held that BALCO is not bound by the arbitration clause, as entered into between the then BALCO and EPIL. Needless to mention here that the present management is continuing under the old name & style of Bharat Aluminium Company Limited.

46. It is well settled principle of law that if the intention of the parties to refer the dispute to arbitration can clearly be ascertained from the terms of the agreement. The arbitration agreement is different from the agreement under the Contract Act. The arbitration agreement does not classify the right of the parties under the contract, but it relates wholly determining the rights.

47. Contention of the learned Counsel appearing for the petitioner that in the disinvestment agreement there was a list of disputes and differences, which were transferred to the present management of BALCO. There is no reference to the present dispute. There is no denying the fact that EPIL entered into contract for civil and structural works, which was completed and at that point of time there was no dispute or difference between BALCO and EPIL. Even otherwise, if there was no mention in the list of disputes, EPIL cannot be deprived of its right of settling the disputes and differences in respect of the works performed by EPIL. In view of foregoing, it is held that, present BALCO is successor-in-interest.

48. Lord Hoffmann (House of Lords) in *Premium Nafta Products Limited* (20th Defendant) and Ors. (Respondents) v. *Fili Shipping Company Limited* (14th Claimant) and Ors. (Appellants) in respect of the construction of an arbitration clause opined as under:

1. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction...

49. The Supreme Court in *J.K. Jain and Ors. v. Delhi Development Authority and Ors.*, observed as under:

7. It is true that there must be an arbitration agreement, to confer jurisdiction on the arbitrator to hear and decide the dispute. Where there is no such agreement there is an initial want of jurisdiction. That is why it has been impressed by courts that one of the essential ingredients of submission to arbitration is that the parties should agree that the dispute should be determined by an arbitrator. Where there is an arbitration clause in a contract, it amounts to two contracts into one, one relating to the execution of the work entrusted in the manner prescribed and the other how to resolve the dispute in event any such dispute

arises in respect of the said contract. Whenever one party to the dispute asserts that there is an arbitration agreement by which the parties had agreed to refer the dispute to an arbitrator which is disputed and challenged by the other party to the agreement, it has to be examined and determined. To constitute "an arbitration agreement" it is not necessary that there should be a formal agreement or that the terms should all be contained in one document. All that is necessary is that from documents it must appear that the parties had agreed to submit present or future differences to arbitration.

50. The contention of the learned Counsel appearing for the petitioner that mechanism of the PMA is not binding on the present management of BALCO is unmerited. The PMA was created admittedly to resolve the disputes and differences arising between the PSUs and the Government Departments and between the PSUs and PSUs, as explained in the O Ms dated 12-3-1985, 29-3-1989, 31-12-1991 & 24-1-1994 for setting up the PMA. (See Oil and Natural Gas Commission (supra), Oil and Natural Gas Commission (supra) and Chief Conservator of Forests, Govt. of A.P. v. Collector and Ors.).

51. The facts of the instant case are different. It is not a case where for the first time the PMA mechanism is being enforced on the present management of BALCO. The PMA mechanism was accepted by the parties by way of an arbitration agreement, when BALCO and EPIL were PSUs. Now after disinvestment, the management of BALCO has been transferred to the present management of BALCO on holding of 51% shares. Thus, there is no question of enforcement of the PMA mechanism, but the method to resolve the disputes is derived from the agreement signed between the parties, which have come down in succession to the present management of BALCO. BALCO is admittedly a joint venture. It is not a private enterprise, wherein all shares are held by a private party (parties).

52. The Supreme Court in *New Horizons Limited and Anr. v. Union of India and Ors.*, has defined the "joint venture" as under:

24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p.117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil,

chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p.342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart: Joint Ventures in East Asia - Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.

53. The OM dated 22-1-2004 is not applicable or indisputable by itself. The OM has to be followed by an agreement. Admittedly, in the case on hand, there is no arbitration agreement between the parties following the OM dated 22-1-2004. Thus, the same would not have any effect on the relationship of the parties, which is derived from the arbitration agreement executed between BALCO and EPIL.

54. The validity of the OM dated 22-1-2004 cannot be decided in the case on hand, as it is an enabling circular, which comes into effect only if both the parties agree and sign the arbitration agreement accordingly. Thus, no opinion is expressed on the validity of the OM dated 22-1-2004.

55. For the reasons mentioned hereinabove, there is no illegality or infirmity in the orders dated 19-12-2001, 21-3-2002 & 22-5-2002 passed by the arbitrator. Even otherwise, it well settled principle of law that the objection to jurisdiction of the Arbitral Tribunal cannot be questioned under the writ jurisdiction. The same may be questioned at the appropriate stage as and when it is available to the petitioner.

56. Thus, for the reasons and analysis aforestated, I do not find any merit in the petitions, warranting interference with the resolution method of the PMA. Accordingly, both the writ petitions are dismissed.

57. There shall be no order as to costs.