(2015) 08 BOM CK 0156

In the Bombay High Court

Case No : Arbitration Petition No. 560 of 2013

Welspun Enterprises Limited APPELLANT

Vs

ARSS Infrastructure Projects Limited and Others RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Constitution of India, 1950 — Article 299

Citation : (2015) 5 ARBLR 329 : (2015) 5 BomCR 292

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Vikram Nankani, Senior Advocate, Rhia Marshall and Mihika Jalan i/b. Economic Law Practice, for the Appellant; R. Banarjee, Senior Advocate, Ratnesh Rai and Gautam Tiwari instructed by Prateik Parija, Advocates for the Respondent

Final Decision : Disposed off

Judgement

R.D. Dhanuka, J.

1. By this petition filed under section 9 of the Arbitration and Conciliation Act, 1996, the petitioner seeks an injunction against the respondent no. 3 from making payment of the amount of Rs. 18,66,66,667/- or any other amount in relation to the project on account of cancellation of the concession agreement to the respondent no. 1 or any other person, except as and by way of refund to respondent no. 2. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. On 14th December, 2009 the Department of Commerce and Transport, Government of Odisha, invited proposals for the development of modern Baramunda Bus Terminal alongwith commercial facility at various locations including in Odisha including Bhubaneshwar on public private partnership mode i.e. on BOT basis.

3. Respondent no. 1 submitted a bid on 26th July, 2010 of Rs. 56 crores towards concession fee as premium for the development of the project and was selected as a preferred bidder in the development of the project. Respondent no. 3 issued a letter of acceptance in favour of the respondent no. 1. On 24th August, 2010 the respondent no. 2, a special purpose vehicle company was incorporated and was registered with the Registrar of Companies, Cuttack as a limited liability company.

4. On 24th August, 2010, the respondent no. 1 intimated respondent no. 3 of incorporation of respondent no. 2. On behalf of respondent no. 2 a sum of Rs. 2,33,24,038/- was paid as the project development fees to respondent no. 3 and also a sum of Rs. 18,66,667/- was paid also as the first installment towards the upfront concession fees. It is the case of the petitioner that those payments were capitalized in the books of accounts of respondent no. 2 and also reflected in the latest audited financial statement for the year ended 31st March, 2012. The upfront concession fee amount of Rs. 18,66,66,667/- was also reflected under the heading Capital Work in Progress of the said financial statement of the respondent no. 2.

5. On 25th August, 2010, on behalf of respondent no. 2 a bank guarantee dated 24th August, 2010 amounting to Rs. 18,66,66,667/- was furnished towards second installment and bank guarantee for Rs. 18,66,66,667/- towards third installment i.e. as security towards remaining amount of the concession fees of Rs. 56 crores. The bank guarantee charges/commission were also debited to the books of respondent no. 2 and are reflected in the audited financial statements of respondent no. 2 for the financial year 2011-2012.

6. On 29th September, 2010, the respondent no. 1 provided a bank guarantee of Rs. 1 crore towards construction performance security to respondent no. 3. On 20th December, 2010 on the order of Government of Odisha, General Administration Department allotted land to respondent no. 3 on which the project was to be developed. The respondent no. 3 was allowed to enter into a concession agreement with the highest bidder in order to expedite the process for development of modern bus terminal at Baramunda.

7. On 16th March, 2011 the respondent no. 1 described as ''Preferred Bidder'', respondent no. 2 described as ''the Concessionaire'' and respondent no. 3 described therein as ''the Grantor'' entered into a concession agreement for implementation of the said project. It is the case of the petitioner that in accordance with its obligation under the concession agreement, respondent no. 2 submitted the renewed bank guarantee for the second installment upto 23rd February, 2013.

8. It is the case of the petitioner that in the month of June 2011, the respondent no. 1 approached the petitioner with its intention of forming a joint venture with the petitioner by diluting its shareholding in respondent no. 2. The petitioner, respondent no. 1 and respondent no. 2 accordingly executed a Term Sheet on

4th July, 2011 outlining the terms of such joint venture.

9. On 3rd August, 2011 the Share Subscription and Shareholders'' Agreement dated 3rd August, 2011 came to be executed between the petitioner, respondent no. 1 and respondent no. 2. Under the terms of the said agreement, the petitioner subscribed to 77,72,727 equity shares having its face value of Rs. 10 each of the respondent no. 2 constituting 45% of respondent no. 2''s equity share capital on a fully diluted basis. The petitioner paid a sum of Rs. 7,77,27,270/- to respondent no. 2 for subscribing to 7,77,27,270 equity shares. It is the case of the petitioner that out of all the moneys brought in by the respondent no. 1 and shown towards share application money in the books of account of respondent no. 2, 59,60,000 equity shares were freshly issued and 35,40,000 equity shares were acquired by respondent no. 1 from the original shareholders of respondent no. 2. Respondent no. 1 holds 95,00,000 equity shares of respondent no. 2.

10. It is the case of the petitioner that out of Rs. 7,77,27,270/- paid by the petitioner to the respondent no. 2, a sum of Rs. 7,70,00,000/- was immediately withdrawn/refunded to respondent no. 1 by respondent no. 2 on 4th August, 2011.

11. On 21st December, 2011, the respondent no. 2 addressed a letter to respondent no. 3 intimating respondent no. 3 about the shareholding pattern of respondent no. 2 as on 21st December, 2011 i.e. 55% shareholding of the respondent no. 1 and 45% shareholding of the petitioner.

12. Sometimes in the month of June, 2012, the shareholding of the petitioner was increased in the respondent no. 2 from 45% to 49% after obtaining necessary approvals from its shareholders including respondent no. 1 for which purpose petitioner paid a further sum into respondent no. 2 company.

13. It is the case of the petitioner that the respondent no. 1 was facing severe financial crisis and had approached its lenders for Corporate Debt Restructuring. The respondent no. 1 also approached the petitioner and expressed its inability to fund/invest the project beyond 26% shareholding in respondent no. 2.

14. On 6th September, 2012 the respondent no. 1 addressed a letter to the respondent no. 3 and pointed out its severe financial constraints and requested for respondent no. 3''s approval for diluting respondent no. 1''s equity share capital in respondent no. 2 company to 26% and increase the petitioner''s equity share capital to 74%.

15. On 28th November, 2011 Mr. Samir Mohanty filed a writ petition (30961 of 2011) by way of a public interest litigation before the Orissa High Court, inter alia praying that the concession agreement be quashed. By an order dated 20th December, 2012, Orissa High Court allowed the said writ petition and held that the concession agreement was void-ab-initio for non-compliance with the mandatory requirement of Article 299 of the Constitution of India and the other

provisions of law.

16. By virtue of the said order, the concession agreement executed between respondents stood cancelled. On 8th April, 2013, respondent no. 2 addressed a letter notifying respondent no. 3 that all transactions relating to payments by respondent no. 3 to respondent no. 2 and vis-a-versa shall be made through respondent no. 2''s bank account and also submitted audited accounts for the year ending 31st March, 2012 to respondent no. 3.

17. On 9th April, 2013, the Commissioner cum Secretary to Government, Commerce and Transport Department, Government of Odisha addressed a letter to respondent no. 2 stating that Government had decided not to prefer an appeal against the order passed by Orissa High Court and suggested to take immediate action i.e. for cancellation of concession agreement, for refund of the bank guarantee, payment made towards 1st installment of the concession fee etc. It is the case of the petitioner that the respondent no. 1 had made representation to the respondent no. 3 that refund of the 1st installment of concession fees of Rs. 18,66,66,667/- should be made to it rather than the respondent no. 2.

18. On 11th April, 2013, the respondent no. 3 addressed a letter to the respondent no. 1 and requested that respondents shall attend the meeting convened by respondent no. 3 on 12th April, 2013 to resolve the issue regarding the refund of Rs. 18,66,66,667/- and regarding the bank guarantees. It is the case of the petitioner that the said meeting was attended by the representative of respondent no. 1 who claimed that respondent no. 3 should refund the amounts including Rs. 18,66,66,667/- to respondent no. 1 and not to the respondent no. 2.

19. On 12th April, 2013, the respondent no. 2 addressed a letter to the respondent no. 3 with a copy marked to Commissioner Cum Secretary Commerce and Transport Department and annexed therewith the submissions made by respondent no. 2 to respondent no. 3.

20. By a letter dated 30th April, 2013, addressed to respondent no. 2, respondent no. 3 terminated the concession agreement on the grounds of force majeure. On 10th May, 2013 the petitioner addressed another letter to the respondent no. 3 not to release any payment in favour of the respondent no. 1.

21. The petitioner thereafter filed this petition on 20th May, 2013 inter alia praying for interim measures and applied for ad-interim reliefs. By an order dated 30th May, 2013, this court granted ad-interim relief in terms of prayer (a) thereby restraining the respondent no. 3 from making payment of Rs. 18,66,66,667/- or any other amount in relation to the project on account of cancellation of the concession agreement to respondent no. 1 or any other person, except as and by way of refund to respondent no. 2. This court also took cognizance of the fact that the 1st respondent had applied for refund of the said amount from the third respondent and was unable to make any statement that till application of respondent no. 2 filed before the High Court of Orissa was

decided, respondent no. 1 would not receive any amount from respondent no. 3. This court also prima facie observed that the present application was made by the petitioner who holds 49% share of the 2nd respondent company and was thus entitled to seek the reliefs under section 9 of the Act independently. This court however kept the issue of maintainability raised by the respondent no. 1 open and clarified that the same would be decided at the time of admission of the present petition.

22. On 19th June, 2013 this court directed the respondent no. 2 to pursue the application filed by respondent no. 2 before Orissa High Court expeditiously and not later than four weeks from the date of the said order and continued the ad-interim order dated 30th May, 2013 till the disposal of the arbitration petition.

23. Mr. Nankani, learned senior counsel appearing for the petitioner invited my attention to various documents annexed to the petition and also the allegations made by the respondent nos. 1 and 2 in their affidavits and submits that in view of the provisions of Share Subscription and Shareholders'' Agreement dated 3rd August, 2011 and more particular under clause 12 thereof, it is clear that the costs mentioned in the cost statements which reflected the costs contributed by respondent no. 1 was to be considered as costs incurred by respondent no. 1 to subscribe to the equity share capital of the respondent no. 2 and respondent no. 2 shall not be liable to return the said amount to the respondent no. 1.

24. It was further provided that if any further issue beyond the equity shares to its shareholders was to be issued to respondent no. 1, the respondent no. 1 would not be liable to pay to the respondent no. 2 any moneys in connection with such further issue till such time the amount mentioned in the costs statements less Rs. 9,50,00,000/- equaled the costs of subscription to such further issue and once the adjustment amount was extinguished, the respondent no. 1 shall be required to pay to the company the same cost of subscription as applicable to the other shareholders in connection with further issues of equity shares by the company. It is submitted that by virtue of this provision, the amounts paid by the respondent no. 1 in its individual capacity to the respondent no. 3 were converted into the equity share capital of the respondent no. 1 in respondent no. 2. The respondent no. 2 has already issued equity shares in favour of the respondent no. 1 and to the extent the amount reflected in the costs statement are not equal to the cost of subscription account, if further shares are issued if any, the respondent no. 1 would not be liable to pay such amount to the respondent no. 2.

25. It is submitted that in view of this agreement arrived at between the parties, the respondent no. 1 could not make any claim for refund of the amount from the respondent no. 3 which was payable to the respondent no. 2 upon termination of the concession agreement. He submits that the said amount paid to the respondent no. 3 was all throughout treated as the amount as if paid by the respondent no. 2 and the contract was also executed by the respondent no. 3 with the respondent no. 1 and respondent no. 2 in which the respondent no. 1

was described as ''preferred bidder''.

26. Learned senior counsel invited my attention to the balance-sheet of the respondent no. 2 and also correspondence exchanged between the respondent no. 1 and respondent no. 3 in which the respondent no. 1 had applied for permission from respondent no. 3 to dilute its equity share capital in respondent no. 2 and to increase the equity share capital of the petitioner to 74%. He submits that admittedly, the respondent no. 1 has been facing financial crisis and has applied for reliefs under Corporate Debt Restructuring.

27. Learned senior counsel for the petitioner invited my attention to clause 32.2 of the agreement entered into between the petitioner, respondent no. 1 and respondent no. 2 which records an arbitration agreement and also to clause 32.2.8 which provides for jurisdiction of court at Mumbai in case of dispute between the parties arising out the said share subscription and shareholders'' agreement.

28. Learned senior counsel also invited my attention to various portions of the balance-sheet and would submit that even the bank guarantee commission charges which were paid by the respondent no. 1 were admittedly debited to the account of the respondent no. 2 which would also indicate that the contract awarded in favour of the respondent no. 1 was transferred to respondent no. 2. He submits that after the petitioner contributed substantial amount for acquiring 45% initially, the respondent no. 1 had withdrawn substantial amount from respondent no. 2 out of the amount paid by the petitioner. He submits that since the arbitration proceedings are pending, the respondent no. 1 cannot be allowed to withdraw any amount from the respondent no. 3 and the ad-interim order passed by this court shall be confirmed.

29. Dr.Saraf, learned counsel appearing for the respondent no. 2 submits that the respondent no. 2 is a separate legal entity and is entitled to get the refund of the amount paid by the respondent no. 2 to the respondent no. 3 upon termination of the said contract. He submits that there are various statutory liabilities and creditors of respondent no. 2 which are required to be cleared and which can be cleared only if the amount lying with the respondent no. 3 are received by the respondent no. 2.

30. Mr. Banarjee, learned senior counsel appearing for respondent no. 1 on the other hand invited my attention to the various correspondence and various agreements entered into between the parties to the present proceedings and would submit that prior to the incorporation of the respondent no. 2, respondent no. 1 had paid various amounts to the respondent no. 3 admittedly under the said concession agreement which was awarded to the respondent no. 1. He submits that the petitioner had admittedly not contributed any such amount at that stage. He submits that respondent no. 2 was incorporated after such payments were made by the respondent no. 1 to the respondent no. 3. It is submitted that the petitioner was not even a party to the concession agreement

dated 16th March, 2011 which was entered into between the respondent no. 1, respondent no. 2 and respondent no. 3.

31. It is submitted that the dispute about the refund of the amount by the respondent no. 2 in favour of the respondent no. 1 or respondent no. 2 would be a dispute arising under concession agreement to which the petitioner was not even a party. He submits that the dispute about the refund of the amount recoverable of respondent no. 3 would not be a dispute under the Share Subscription and Shareholders'' Agreement dated 3rd August, 2011 and thus the present petition filed under section 9 by invoking arbitration agreement recorded in the Share Subscription and Shareholder''s agreement recorded in the Share Subscription and Shareholders'' Agreement is not maintainable on that ground alone.

32. It is submitted by the learned senior counsel that since the respondent no. 3 was not a party to the said Share Subscription and Shareholders'' Agreement and was not party to the arbitration agreement recorded therein, no relief can be granted by this court under section 9 of the Arbitration Act against the respondent no. 3. He submits that the petitioner has sought direct relief against respondent no. 3 in the present petition.

33. In support of his submission that various payments were made by the respondent no. 1 to respondent no. 3, the learned senior counsel invited my attention to various recitals and clauses of the concession agreement which records the payments made by the respondent no. 1 to respondent no. 3. He invited my attention to the averments made in the arbitration petition by the petitioner and in particular paragraph V and (6) of the petition and also the prayer clauses in which the petitioner has admitted that the respondent no. 3 was liable to refund the amount to the respondent no. 2. He submits that since no relief is prayed by the petitioner individually in its favour and the reliefs being sought in favour of respondent no. 2, the action of the petitioner would be a derivative action and cannot be pursued by the petitioner in its independent capacity on behalf of the respondent no. 2. In support of his submission, learned senior counsel placed reliance on the judgment of this court in case of Onyx Musicabsolute.com Pvt. Ltd. and Others Vs. Yash Raj Films Pvt. Ltd. and Others, Onyx Mobile Pvt. Ltd. and Virtual Marketing India P. Ltd., (2008) 5 ALLMR 26 : (2008) 6 BomCR 418 : (2010) 2 CompLJ 341 and in particular paragraphs 4, 5, 14, 17 and 18. He also placed reliance on the judgment of Calcutta High Court in case of Pesticides and Brewers Ltd. Vs. Narendra kumar Berlia and Others and in particular paragraphs 11 and 12 in support of the aforesaid submissions.

34. The next submission of the learned senior counsel for the respondent no. 1 is that since the application filed by the respondent no. 2 before the High Court of Orissa in Writ Petition (C) No. 30961 of 2011 inter alia praying for a direction to the respondent no. 3 not to release any amount in favour of the respondent no. 1 until the entity who is entitled to refund of the said amount is decided is rejected, no relief in favour of the petitioner in the present proceedings against

respondent no. 3 can be granted by this court.

35. Learned senior counsel for the respondent no. 1 also invited my attention to the order passed by the Company Law Board on 20th August, 2013 in Company Petition No. 183 of 2013 which was filed by the respondent no. 1 against the respondent no. 2 and others. By the said order, the Company Law Board has passed an ad-interim order restraining the respondent nos.1 and 2 both from receiving and claiming any money from any State Authority in the name of the respondent no. 2 company and in case any such name is already received in the account of the respondent no. 2 company, the said company is directed not to utilize such money for any purpose without taking the leave of the Company Law Board. Learned senior counsel submits that the said order passed by the Company Law Board on 20th August, 2013 is in force. He submits that in view of the said order passed by the Company Law Board, this court cannot direct the respondent no. 3 to pay any amount either to the petitioner herein or to respondent no. 2.

36. Mr. Nankani, learned senior counsel for the petitioner in rejoinder once again placed reliance on clause 12 of the Share Subscription and Shareholders'' Agreement and submits that the respondent no. 1 could not have demanded any payment from respondent no. 3 in its own name on the premise that the original investment was made by the respondent no. 1 when the contract was awarded to the respondent no. 1 by the respondent no. 3. Insofar as submission of the learned senior counsel for the respondent no. 1 whether action of the petitioner would be of the nature of derivative action or not, learned senior counsel distinguished the judgment of this court in case of Onyx Musicabsolute.com Pvt. Ltd. (supra) and the judgment of Calcutta High Court in case of Narendra Kumar Berlia (supra) on the ground that the facts before this court and also before the Calcutta High Court in the said judgment was totally different. He submits that in this case, the petitioner has applied for interim measures for protecting the rights of the petitioner and not simplicitor the respondent no. 2. Learned senior counsel placed reliance on the judgment of this court in case of Rajiv Vyas vs. Johnwin Manavalan and others delivered on 6th July, 2009 in Arbitration Petition no. 222 of 2008 and would submit that after adverting to the judgment of this court in case of Onyx Musicabsolute.com Pvt. Ltd. (supra), this court has held that the proceedings filed by a shareholder to protect his rights and shareholding in the company cannot be in the nature of derivative action. Reliance is placed on paragraphs 18, 21 to 23 of the said judgment.

REASONS AND CONCLUSIONS

37. A perusal of the concession agreement dated 16th March, 2011 indicates that the said agreement was entered into between the respondent no. 1, respondent no. 2 and respondent no. 3. The respondent no. 1 was referred to in the said agreement as the ''preferred bidder''. In the said agreement, various payments made by the respondent no. 1 to the respondent no. 3 have been described towards project development fee and 1st installment of concession fees. Various

bank guarantees were executed by the respondent no. 1 in favour of respondent no. 3 have been also described. It is not in dispute that the petitioner herein was not a party to the said concession agreement.

38. A perusal of the Share Subscription and Shareholders'' Agreement dated 3rd August, 2011 which was entered into between the petitioner, respondent no. 1 and respondent no. 2 clearly indicates that on the date of the execution of the said agreement, respondent no. 1 held 100% of the equity share capital of the respondent no. 2. The party agreed to record the terms and conditions of the petitioner subscribing to the subscription shares and its rights and obligations as a shareholders in respondent no. 2 and also in relation to the organization management and operation of the respondent no. 2 company.

39. Under the said agreement, ''costs statements'' had been defined which means the monies contributed by the respondent no. 1 to fund the expenses incurred by the respondent no. 2 in connection with the company''s business and more particularly setout in Schedule E. The petitioner agreed to subscribe to the subscription share of respondent no. 2 company on the terms and conditions setout therein. The respondent no. 2 agreed to allot and deliver the subscription share fee and clear all encumbrances and together with all rights, title, interest and benefits appertaining thereto. The parties agreed that the subscription amount shall be utilized by the respondent no. 2 company exclusively for its business in a manner as may be decided by the board from time to time. Each of the party to the said agreement had a corporate power and authority to execute and deliver the terms and provisions of the said agreement and had agreed not to contravene any of the provision of any applicable law, statute, rule or regulation or any order, writ, injunction or decree of any court or governmental instrumentality to which it was subject, violate any provision of its memorandum and articles of association or any other similar constitutional documents. There was also a provision about the appointment of nominees on the board of respondent no. 2 by the petitioner and respondent no. 1. Under clause 6 of the said agreement, the respondent no. 2 also was under obligation to comply with various terms and conditions setout therein in respect of the contract awarded to the respondent no. 2 company.

40. Under clause 12 of the said agreement, it was clearly provided that the costs mentioned in the cost statements shall be considered as the costs incurred by the respondent no. 1 to subscribe to the equity share capital of the respondent no. 2 and shall further not be liable to be returned by the respondent no. 2 to the respondent no. 1. It was further provided that upon the respondent no. 2 coming out with further issue of equity shares to its shareholders, respondent no. 1 shall not be liable to pay to the respondent no. 2 any monies in connection with such further issues till such time the amounts mentioned in the costs statement less Rs. 9,50,00,000/- equaled the costs of subscription to such further issue. It was agreed that once the adjustment amount was extinguished, the respondent no. 1 was required to pay to the respondent no. 2 the same cost of subscription as

applicable to the other shareholders in connection with further issues of equity shares by the respondent no. 2. There were also various other restrictions provided in the said agreement of transfer of shares.

41. Clause 26.2 provides for consequences of events of default committed by the respondent no. 1. Clause 26.4 provided for consequences of a shareholder''s event of default. Clause 32.2 provided for dispute resolution by the arbitration. Clause 32.2.4 provided that such arbitration shall be held in Mumbai. Clause 32.2.8 provided that the court in Mumbai shall have jurisdiction in connection with the said agreement. The costs statement was annexed at Schedule E to the said agreement.

42. It is not in dispute that the respondent no. 1 vide their letter dated 6th September, 2012 informed the respondent no. 3 about its financial constraints faced by the respondent no. 1 and the respondent no. 1 going through a process of ''Corporate Debt Restructuring''. In the said letter, the respondent no. 1 also expressed that the said situation adversely affected its financial ability to entirely fund the project and it had become difficult for them to make available the entire funds for the implementation of the project. By the said letter, the respondent no. 1 requested the respondent no. 3 for approval for diluting their equity share capital in the concessionaire to 26% and to increase the stake of the petitioner in the project to 74%. It was also stated that the respondent no. 1 was signatory to the concession agreement and as per the said agreement, the respondent no. 1 was jointly and severally liable to the respondent no. 3 for the concessionaire''s obligations to implement the project as per the requirements of the concession agreement. The said letter was also signed by the respondent no. 2.

43. In my prima facie view the amount paid by the respondent no. 1 to the respondent no. 3 under the said project was converted into its equity share capital in view of clause 12 of the said Share Subscription and Shareholders'' Agreement and after execution of the said agreement between the petitioner, respondent no. 1 and respondent no. 2, respondent no. 1 could not have applied for refund of the amount to the respondent no. 3. It is not in dispute that the petitioner no. 1 has 49% equity share capital whereas respondent no. 1 has 51% equity share capital of the respondent no. 2.

44. A perusal of the petition indicates that the petitioner has filed the present proceedings under section 9 to protect not only the interest of the respondent no. 2 company but also its own interest having equity share capital of 49% of the respondent no. 2. In my view, merely because the petitioner has stated in the petition that the said amount is liable to be refunded by the respondent no. 3 on termination of the concession agreement to the respondent no. 2, it cannot be construed as if action of the petitioner would be a derivative action. The petitioner is entitled to protect its own interest being a shareholder of the respondent no. 2 company who is entitled to recover substantial amount from the respondent no. 3 upon termination of the agreement.

45. This court in case of Rajiv Vyas (supra) has considered similar facts and after adverting to the judgment of this court in case of Onyx Musicabsolute.com Pvt. Ltd. (supra) has negatived the contention of the respondent to the said proceedings that the petition was not maintainable on the ground that the petition was in the nature of derivative action. This court has held that the arbitration agreement did not bar any dispute between the parties arising out of agreement between them under any of the clauses contained therein. It is held that the shareholders have every right to refer the disputes arising out of the breach of non compete and non solicitation clause to the arbitral tribunal. In my view the principles laid down by this Court in case of Rajiv Vyas (supra) squarely applies to the facts of this case.

46. A shareholder who is entitled to certain benefits under the provisions of the said Share Subscription and Shareholders'' Agreement having substantial part of equity share capital is a party aggrieved in case of another shareholder committing any breach of its obligation under the said Share Subscription and Shareholders'' Agreement thereby affecting its right and is thus entitled to protect the interest not only of the company but also of itself. Such dispute in my view can be agitated under the arbitration agreement entered into between the parties recorded in the said Share Subscription and Shareholders'' Agreement. In my view such proceedings under section 9 thus cannot be construed as an action in the nature of derivative action.

47. Insofar as judgment of this court in case of Onyx Musicabsolute.com Pvt. Ltd. (supra) and judgment of Calcutta High Court in case of Narendra Kumar Berlia (supra) relied upon by the learned senior counsel appearing for the respondent no. 1 are concerned, in my view both these judgments would not assist the respondent no. 1. The facts in those two judgments before both these courts were totally different. In any event the judgment of this court in case of Onyx Musicabsolute.com Pvt. Ltd. (supra) has been interpreted by this court in the subsequent judgment of this court in case of Rajiv Vyas (supra) which judgment in my view applies to the facts of this case. I am respectfully bound by the judgment of this court in case of Rajiv Vyas (supra).

48. Insofar as submission of the learned senior counsel appearing for respondent no. 1 that since application filed by respondent no. 2 before the Orissa High Court for interim relief has been rejected and thus no relief can be granted to the petitioner in this case is concerned, a perusal of the said order passed by Orissa High Court clearly indicates that the relief was rejected in favour of the respondent no. 2 on the ground that this court had already granted injunction against respondent no. 3 from releasing any amount in this petition. The application filed by the respondent no. 2 has not been rejected on merits but has been disposed of as infructuous in view of the similar reliefs already having been granted by this court. In my view there is thus no merit in this submission of the learned senior counsel for the respondent no. 1.

49. Insofar as submission of the learned counsel for the respondent no. 2 that

the respondent no. 2 is a separate legal entity and is entitled to get the refund of the amount from the respondent no. 3 and to spend the said amount for the purpose of clearing statutory dues and other creditors is concerned, a perusal of the order passed by the Company Law Board clearly indicates that the respondent no. 2 as well as other three parties to the said proceedings have been restrained from receiving or claiming any money from any state authority in the name of respondent no. 2 company and in case any such money is already received in the account of the said company, the said company has been directed not to utilize such money for any purpose without taking leave of the Company Law Board. The said order passed by the Company Law Board is in force. In my view no order thus can be passed in favour of the respondent no. 2 as canvassed by the learned counsel appearing for the respondent no. 2 at this stage. A perusal of the record indicates that even according to the respondent no. 1, it has been facing financial crisis and was unable to spend any further amount on the project. Respondent no. 1 itself had requested the respondent no. 3 to permit the respondent no. 2 to dilute the shareholding of respondent no. 1 and to increase equity share capital of the petitioner to 74%. In my prima facie view since the respondent no. 1 cannot seek any refund in its own name in view of clause 12 and other provisions of the said Share Subscription and Shareholders'' Agreement, it would be appropriate if the respondent no. 3 is directed to deposit the said amount due and payable to respondent no. 2 in this court which order will protect the interest of petitioner, respondent no. 1 as well as respondent no. 2.

50. Insofar as submission of the learned senior counsel for the respondent no. 1 that the respondent no. 3 being not a party to the share purchase subscription agreement and thus no relief can be granted against respondent no. 3 in this proceedings is concerned, in my view if a party who is likely to be affected by any order proposed to be passed under section 9 of the Arbitration Act, such party can be impleaded as a respondent to such proceedings. Admittedly the respondent no. 3 had to pay certain amount to the respondent no. 2 in which petitioner as well as respondent no. 1 has equity share capital in the ratio of 49% and 51% respectfully. Though respondent no. 3 has been impleaded in the present proceedings and have been served with notice as well as copies of the proceedings, no objection has been raised by the respondent no. 3 that no relief could be granted by this court against respondent no. 3 on the ground that it was not a party to the share purchase and subscription agreement. The rights and obligation of the party have to be considered not only under the provisions of share purchase subscription agreement but also under the provisions of the concession agreement. In my view there is thus no substance in the submission of the learned senior counsel for the respondent no. 1 that no relief could be granted by this court against respondent no. 3.

51. It is not in dispute that ad-interim order was already passed by this court as far back as on 30th May, 2013 against respondent no. 3 herein in terms of prayer clause (a) which order has not been impugned by any of the respondents

including respondent no. 3. In my view the present petition filed by the petitioner for reliefs as claimed is thus maintainable under section 9. This court is empowered to mould the reliefs claimed by the petitioner.

52. I, therefore, pass the following order :-

(a) Respondent no. 3 is restrained from making payment of amount of Rs. 18,66,66,667/- or any other amount in relation to the project on account of cancellation of the concession agreement to respondent no. 1, petitioner or respondent no. 2.

(b) Respondent no. 3 is directed to deposit the aforesaid amount with the Prothonotary and Senior Master of this court within two weeks from the date of communication of this order by the petitioner. Upon such deposit of the amount by the respondent no. 3 as directed, Prothonotary and Senior Master shall invest the said amount in a fixed deposit of any nationalized bank initially for a period of two years and for like period after obtaining further orders from this court. The deposit of the said amount would be subject to further orders as may be passed by the arbitral tribunal.

(c) Petitioner, respondent no. 1 and respondent no. 2 are directed to proceed with the arbitral proceedings without any further delay.

(d) Parties to the present proceedings to act on the authenticated copy of this order.

53. Arbitration petition is disposed of in the aforesaid terms. There shall be no order as to costs.

