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

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Reserved on: 18th June, 2020

Decided on: 26th June, 2020

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CS (COMM) 140/2020

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I.A. 4016/2020 (under Order XXXIX Rule 1 and 2 CPC)

GE POWER INDIA LTD.Plaintiff

Represented by: Mr.C.M. Lall, Sr.Advocate with
Ms.Nancy Roy and Ms.Tia Malik,
Advocates.

versus

NHPC LIMITED Defendant

Represented by: Mr.Sachin Datta, Sr.Advocate with
Mr.Piyush Sharma and Mr.Ayush
Shukla, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

J U D G M E N T

1. The hearing has been conducted through Video Conferencing.
2. As per the plaint, the plaintiff company which was initially known as Asea Brown Boveri Management Limited underwent a name change to Alstom Projects India Ltd. on 11th November, 2002. Subsequent thereto on 6th June, 2012 the plaintiff's name was changed to Alstom India Ltd. and pursuant to a global acquisition of Alstom India Ltd. by General Electric Company on 5th August, 2016 the plaintiff underwent another name change to GE Power India Ltd., i.e. the plaintiff herein.
3. The plaintiff's predecessor, that is, Alstom India Ltd. (earlier known as Alstom Projects India Ltd.) (in short 'Alstom') entered into a contract

with Lanco Infratech Limited (in short 'LIL') on 18th May, 2009 for the design, manufacture, test, delivering and commissioning of facilities, that is, Turbine, Generator, Main Inlet Valve, Governing system, Excitation system, Control System for Hydro Electric Project for Teesta VI (in short 'Teesta VI Project'). The Teesta VI Project was awarded to Lanco Teesta Hydropower Limited (in short LTHPL) a Special Purpose Vehicle Company, a part of Lanco Group of Companies. Alstom entered into an agreement with LIL inter alia for supply of engineering drawings which were covered by the copyrights owned by Alstom and on global acquisition of Alstom by the plaintiff company, subject to the confidentiality protections for which the plaintiff states that it received part payment and huge payments were still outstanding against LIL. The drawings and documents submitted by Alstom to LIL were used in Teesta VI Project subject to the copyright therein vesting with Alstom. The General Conditions of Contract (in short 'GCC') between Alstom and LIL also stipulated an undertaking of all confidential information given to LIL by Alstom in Clause 3.16.

4. On 7th August, 2017 insolvency proceedings commenced against LIL and the said company went into liquidation on 27th August, 2018. As regards LTHPL on 26th July, 2019 on the recommendation of Resolution Professional, a resolution plan was accepted by the NCLT by virtue whereof the defendant acquired the Teesta VI Project from LTHPL. On 11th February, 2020 the defendant sent an intimation to offer for a Single Vendor Tender to the plaintiff however, on 17th April, 2020 the bid of the plaintiff was not accepted on the ground "*that price of M/s GE Power Ltd. was abnormally higher than tender check document*". Thereafter on 5th May, 2020 the defendant issued an open tender for Teesta VI Project when it is

alleged by the plaintiff that the defendant published and disclosed to third parties six copyrighted and highly confidential drawings of the plaintiff and in the pre bid meetings the defendant expressed its intension to hand over all drawings in which the plaintiff claims copyright to the successful bidder.

5. Aggrieved by this violation of the plaintiff's copyright in the six drawing and the requirement to maintain confidentially being breached, plaintiff has preferred the present suit.

6. Learned counsel for the plaintiff contends that the present action by the plaintiff arises because of the defendant's action of infringement of the plaintiff's copyright and violation of the plaintiff's right in certain data and drawings including rights to prevent wrongful possession, publication and use of the plaintiff's proprietary and confidential information governed by common law rights and contract. The plaintiff's copyright is protected in the drawings and data which are also confidential in nature and without a license from the plaintiff or without explicit permission of the plaintiff, the defendant could not have used the drawings and data and publicised the same. The plaintiff's copyright in the drawings, grants the plaintiff exclusivity over its use. The drawings being highly confidential, the confidential proprietary rights of the plaintiff are being illegally possessed by the defendant and impermissibly published on the worldwide web resulting in not only the infringement of the plaintiff's copyright but also the right of the plaintiff to control the use and to preserve the confidentiality of the drawings and data. Plaintiff claims that the action of the defendant resulting in everyday listing of the said drawings and data on the worldwide web page is causing irreparable harm to the plaintiff and the defendant is liable to immediately pull down the said drawings and data from its

webpage. The plaintiff had granted a conditional and limited license of these drawings to LIL vide the contract entered into on 18th May, 2009 and the said contract/license has been terminated on 24th May, 2020. Even by the process of resolution of LIL or LTHPL the defendant could not have acquired the license/proprietary rights in the drawings and data which belong to the plaintiff. The defendant cannot be permitted to plagiarise the drawings merely because the defendant is a State owned company.

7. When the defendant floated the single vendor tender it was conscious of the fact that the plaintiff had the proprietary rights in the drawings and the data, thus, the draft terms sent by the defendant to the plaintiff clearly recognised the said rights of the plaintiff. Merely because the single vendor tender was declined by the defendant on the ground that price of the plaintiff was abnormally higher than the tender check document, the defendant does not get vested with the license/right to use the drawings and pass it on to the world at large by way of publishing on their webpage or even to a third party. The proprietary right of the plaintiff in the drawings and data is duly recognised even by the third parties who have raised queries about the manner in which the same can be acquired from the plaintiff. Defendant not only published the drawings but also deleted the identity of the owner, that is, Alstom and also deleted the disclaimer on the drawings that the same could not be published without permission. This act of the defendant is clearly unwarranted and illegal. The attempt of the defendant in including parts of the third parties into pre existing units supplied by the plaintiff completely compromises with the warranties and guarantees on the equipments already supplied and used in the project.

8. The plea of the defendant of fair dealing protected under Section

52(1)(a) of the Copyright Act is misconceived for the reason fair dealing is only applicable to private or personal use including research and does not apply to commercial activity. Section 52(1)(x) of the Copyright Act applies only to architectural drawings or plans that are used for reconstruction of a building or structures “originally constructed” and therefore stipulates that the building or structure with the said drawings was made with the consent or license of the owner of the copyright in such drawings and plans. There is no exception prescribed under Section 52 of the Copyright Act which permits completion of an unfinished project via the use of the plaintiff’s copyright drawings to be used by a third party without a license issued by the plaintiff. Further Section 52 of the Copyright Act also does not create an exception for the using party to be State. The copyright being a right which is statutory in nature, it would be governed by the provisions of the Act. In case the proprietary items of a party are required to be used, in that situation the defendant can only issue a single vendor tender as the defendant did initially but for frivolous reasons rejected the same. Reliance is placed on the decision reported as 2006 (13) SCC 382 Nagar Nigam Meerut vs. Al Faheem Meat Exports Pvt. Ltd.

9. The plaintiff having granted a conditional and limited license to LIL in respect of its copyright drawings and data, the plaintiff cannot be treated to have passed on the copyright vested in the plaintiff in the drawings and data to either LIL or LHTPL or the defendant and the copyright in the said drawing and data would continue to vest in the plaintiff. Having accepted the conditional and limited license, LIL or its successors-in-interest cannot reverse the position and deny the existence of the copyright in favour of the plaintiff as held in the decision of this Court reported as 2012 (50) PTC 380

(Del.) Astrazeneca UK Ltd. & Anr. vs. Orchid Chemicals. Since LIL was a licensee, it was paying to the plaintiff the contract price in consideration of the performance by the plaintiff. In Clause 3.42.3 of the agreement between the plaintiff and LIL it was clearly provided that upon termination of the contract LIL shall pay to the plaintiff all payments specified and only then would the plaintiff deliver to the LIL all drawings/specifications and other documents prepared by the plaintiff. Further copyright is an intangible asset and cannot be divested from the party owning the copyright except by way of assignment or a license and admittedly the defendant has neither any assignment deed in its favour nor any license deed.

10. Learned counsel for the plaintiff states that the objection of the learned counsel for the defendant that this Court has no territorial jurisdiction to entertain the suit is also liable to be rejected. The defendant has floated an open tender and on the official website of the defendant and on the Central Public Procurement Portal (in short 'CPPP') the drawings of the plaintiff have been uploaded which infringe the copyright of the plaintiff. The CPPP website for e-procurement system of India is more than an interactive website and permits submission of the bid online through the said portal. At least two of the companies have accessed the website from Delhi and have raised queries before submitting the bid. Reliance is placed on the decision of this Court reported as 2009 SCC OnLine Del. 3780 Banyan Tree Holding (P) Ltd. vs. A. Murali Krishna Reddy & Anr. The drawings and data in which the plaintiff has copyright having been communicated at Delhi and copies of the work which were not in circulation already having been issued for circulation at Delhi, this Court has territorial jurisdiction to entertain the suit. In the decision reported as 2019 SCC

OnLine Del. 9193 Exxon Mobil Corporation vs. Exxoncorp Pvt. Ltd. it was clearly held that once reservations are made in respect of a particular jurisdiction even if the same does not materialise, the same is sufficient to attract the jurisdiction of the Court. When the plaintiff filed the suit there was imminent threat of infringement however, the threat materialised after the plaintiff filed the suit. The present suit even on an imminent threat within the territorial jurisdiction of this Court would be maintainable.

11. Further, the subject matter of the present suit being the infringement of the copyright of the plaintiff in the drawings and data which have been publicised by the defendant and not the plaintiff's claim against LIL for recovery of money for the user of the plaintiff's drawings, the said cause of action cannot be decided before the NCLT and the present suit is maintainable. Jurisdiction of NCLT under Section 60(5) Insolvency and Bankruptcy Code (in short IBC') is limited in respect of the claims by or against the corporate debtor including claims by or against any of its subsidiaries situated in India. The plaintiff is neither a subsidiary of LIL nor a corporate debtor itself. Reliance is placed on the decision reported as 2014 (16) SCC 51 Bhanwar Lal & Anr. vs. Rajasthan Board of Muslim Wakf & Ors. Since Alstom was not into liquidation nor a resolution plan prepared and acquired by the defendant qua the assets of Alstom, based on the cause of action pleaded in the suit, the plaintiff is not required to be relegated to the NCLT or NCLAT and the jurisdiction of the civil court is not ousted.

12. Objecting to the maintainability of the present suit learned counsel for the defendant submits that this Court has no territorial jurisdiction to try the suit as neither the plaintiff nor the defendant reside nor work for gain within the territorial jurisdiction of this Court. The plaintiff's registered office is in

Mumbai whereas the defendant's registered office is in Faridabad. Learned counsel for the defendant further submits that mere publishing the tender on CPPP would not entail the territorial jurisdiction of this Court on the ground that the cause of action has arisen within Delhi. Reliance of learned counsel for the plaintiff on the decision in Banyan Tree (supra) is incorrect, rather the said decision goes in favour of the defendant. In Banyan Tree (supra) the Division Bench of this Court held that only if it is an interactive website and the customers are specifically targeted within the jurisdiction of this Court by the interactive website, that this Court will have territorial jurisdiction to try the suit.

13. The portal not being an interactive website and even if initial bid is furnished online, the technical and financial bids in sealed cover have finally to be submitted to the defendant at Faridabad by hand, hence the cause of action, if any, arises at Faridabad. Offline submissions of the bid are mandatory at Faridabad and the payment has also to be made at Faridabad. Therefore, no commercial transaction can be concluded by the said website on which the offer for tender has been uploaded. The purpose of uploading the tender on the website is for information purposes only and not specifically targeting users in Delhi. The defendant is engaged in the business of power generation and all its business activities are carried out from its corporate headquarters at Faridabad or from various places where its power generating stations are located.

14. Learned counsel for the defendant further contends that the present suit is also not maintainable as the dispute, if any, is arising out of or in relation to the insolvency resolution process and can be decided only by the NCLT and the jurisdiction of civil court is thus barred. Referring to Section

60(5) of the IBC, it is contended that the said provision starts with a non-obstante clause and, therefore, any question arising in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under IBC will not be amenable to the jurisdiction of Civil Court. Referring to Sections 231 and 238 of IBC it is stated that the provisions of IBC override the provisions of other enactment. IBC being a complete Code and NCLT acting under the Code is empowered to grant a single window clearance for all actions as provided in the resolution plan approved by the NCLT. The fact that LTHPL is repository of all relevant rights arising out of contractual relationship between LIL and Alstom is a matter well within the knowledge of the plaintiff and that is why plaintiff has not impleaded LIL as a party to these proceedings. The present suit is also bad for non-impleadment of the necessary party i.e. LIL.

15. In the insolvency proceedings against LIL vide order dated 26th August, 2018 NCLT ordered liquidation of LIL, thereafter the plaintiff submitted its claim to the Liquidator of LIL and against the financial claim of ₹1,63,55,66,682/- the Liquidator approved the claim of the plaintiff only to the extent of ₹74,09,89,663/- which is duly reflected in the email dated 5th May, 2018 addressed by the Liquidator of LIL. In case not satisfied by the decision of the Liquidator, the remedy with the plaintiff is of filing an appeal before NCLAT and not the present suit. The financial entitlement of the plaintiff is inextricably linked with the issue pertaining to vesting of copyrights in respect of alleged drawings of the plaintiff's predecessor and there being a clear connection or relation between the financial claim and the claim of exclusive copyright, if any, the same is also required to be decided by NCLT. Reliance is placed on the decision of this Court reported

as 2019 (258) DLT 52 Liberty House Group Pvt Ltd. vs. State Bank of India & Ors.

16. According to learned counsel for the defendant, in the suit the plaintiff has failed to plead how the copyright owned by Alstom Projects India Ltd. vested in the plaintiff. In the absence of the said disclosure, the plaintiff cannot claim any copyright in the drawings on the pretext that it is a successor in interest of Alstom. Reliance is placed on the decision of this Court reported as MANU/DE/1896/2012 General Electric Canada Inc. vs. NHPC. Even considering the terms of the contract between Alstom and LIL, LIL was free to reproduce all drawings, documents and other material for the purpose of contract, including if required for the maintenance and operation of the facilities. The defendant being the successor-in-interest of LTHPL for whom LIL entered into agreement dated 18th May, 2009, the defendant cannot be prevented from using the documents, data, drawings and other information. Learned counsel for the defendant contends that a perusal of Clause 3.20.2 makes it clear that preparation of drawings was for the purpose of work to be carried out at the site and was a collaborative exercise between LIL and Alstom, hence, Alstom cannot have any exclusive copyright in respect of the drawings.

17. Reliance is further placed on Clause 3.42.3.2 which deals with the termination of the contract between LIL and Alstom on account of insolvency of LIL and provides that on such termination Alstom shall immediately deliver to the client i.e. LIL all drawings, specifications and other documents prepared by the contractor i.e. Alstom or its sub-contractors as of the date of termination in connection with the facilities. This provision is in contrast with Clause 3.42.1 wherein in the event of termination on

account of client's convenience only non-proprietary drawings were to be delivered to the client.

18. Contention of learned counsel for the plaintiff in respect of the purported admissions made by the defendant while issuing single vendor tender is misconceived. A perusal of the terms of offer of single tender indicates that the scope of work was preparation of all layout, interface and erection drawings which is now sought to be awarded by the defendant. It is thus only for the drawings to be made in future pursuant to the award of contract that the successful bidder will be required to grant an exclusive and non-transferable business to NHPC. Further the provision takes care that NHPC will be free to use the drawings and material for the purpose of contract including operations and maintenance hence there is no admission in the single vendor tender.

19. Learned counsel for the defendant states that the plaintiff's case in respect of the copyright is completely vague and plaintiff has shown no copyright in the drawings vested with it. Section 52 (1)(w) of the Copyright Act provides against perpetuation of any monopolistic rights in industrial drawings in the guise of copyright. The said provision recognizes the fair use of copyright in the contract of a technical drawing for industrial applications and specifically permits such use. Reliance is placed on the decision reported as (1982) RPC 133 Leco Instruments (U.K.) Ltd vs. Land Pyrometers Ltd. As the plaintiff has neither made out a prima facie case nor even a case of irreparable loss, the balance of convenience also lies in favour of the defendant no interim injunction be granted and the suit and the application be dismissed.

20. Before the suit and application can be proceeded forward on merits,

two preliminary objections of the defendant i.e. want of territorial jurisdiction and also lack of the subject matter jurisdiction of this Court to try the suit are required to be determined.

21. Objection of learned counsel for the defendant that this Court has no territorial jurisdiction to entertain the present suit is liable to be rejected for the reason that part of cause of action has arisen in Delhi, even though neither the plaintiff nor the defendant may be residing or working for gain in Delhi. It is the admitted case of the defendant that the purported drawings of the plaintiff in which it claims copyright have been fed into the computer of the CPPP and uploaded on the website at Delhi. As per Section 14 (c)(i), (ii) and (iii) of the Copyright Act, 'Copyright' means the exclusive right subject to the provisions of the Copyright Act to do or authorise the doing of any act in respect of a work or substantial part thereof including storing it in any medium by electronic and other means, to communicate the work to the public and issuing copies of the work to the public not being copies already in circulation. Thus copies of the plaintiff's purported work having been issued by putting the same on the portal and circulating the same to the public including the public in Delhi would give rise to cause of action at Delhi.

22. Both learned counsels for the plaintiff and the defendant have relied upon the decision of the Division Bench of this Court in Banyan Tree (supra) wherein it was held:

"42. This Court holds that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state. The degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be

examined. For the "effects" test to apply, the Plaintiff must necessarily plead and show *prima facie* that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state. For the purposes of a passing off or an infringement action (where the plaintiff is not located within the jurisdiction of the court), the injurious effect on the Plaintiffs business, goodwill or reputation within the forum state as a result of the Defendants website being accessed in the forum state would have to be shown. Naturally therefore, this would require the presence of the Plaintiff in the forum state and not merely the possibility of such presence in the future. Secondly, to show that an injurious effect has been felt by the Plaintiff it would have to be shown that viewers in the forum state were specifically targeted. Therefore the "effects" test would have to be applied in conjunction with the "sliding scale" test to determine if the forum court has jurisdiction to try a suit concerning internet based disputes."

23. The Division Bench of this Court in Banyan Tree (supra) thus held that mere accessibility in the forum state based on the interactivity of the website is not sufficient to attract the jurisdiction of the forum court and it has to be examined whether the same results in a commercial transaction thereby causing an injurious effect on the plaintiff's business, goodwill and reputation within the forum state as a result of defendant's website being accessed in the forum state. Further the Hon'ble Supreme Court in the decision reported as 1994 (4) SCC 711 Oil & Natural Gas Commission vs. Utpal Kumar Basu and Ors. dealing with the territorial jurisdiction of the Court to entertain a writ petition in the case of tender held that merely because the plaintiff became aware of the advertisement in Calcutta, it submitted its bid or tender from Calcutta and made representations demanding justice from Calcutta on learning about the rejection of its offer

would not attract jurisdiction of the said Court. This is exactly what learned counsel for the defendant argues. However, in the present case, the distinguishing feature is that the cause of action as pleaded by the plaintiff is not the publishing of the bid by the defendant in Delhi but that while publishing the bid his copyright in the drawings has been infringed at Delhi by storing the same in the electronic medium, making copies of the same and uploading the same on the portal of CPPP to be viewed all over India including Delhi and thus pleads that the act of the defendant in storing and communicating the work of the plaintiff to the public including the public in Delhi amounts to infringement of its copyright under Section 14(c)(i), (ii) and (iii) of the Copyright Act hence the cause of action also arises in Delhi. The plaintiff also claims that the threat anticipated by the plaintiff actually came true and at least two parties downloaded the drawings in Delhi in the process of participation in the tender and hence there was infringement of its copyright. Since the cause of action as pleaded in the present suit is not issuance of the tender or an offer for a bid but uploading the drawings on the computer systems at Delhi and disclosure of the drawings of the plaintiff to the public, issuing copies thereof, which all amounts to infringement of the plaintiff's copyright giving rise to cause of action under Section 20 of the Copyright Act, this Court agrees with the submission of the learned counsel for the plaintiff that though in a case involving infringement/passing off the trademark an imminent threat of a commercial transaction taking place in the forum state would give rise to cause of action however, in a suit alleging infringement of the copyright, the cause of action would arise in the forum state where the infringement of the copyright in terms of the Copyright Act would take place. Hence the

first objection of the learned counsel for the defendant that this Court has no territorial jurisdiction to entertain the present suit deserves to be rejected.

24. Learned counsel for the defendant has vehemently argued that the dispute raised by the plaintiff in the present suit is not amenable to jurisdiction of a civil court and the remedy with the plaintiff if any lies before the NCLT or if aggrieved by the order thereof before the NCLAT. To decide this issue it would be necessary to advert to the pleadings of the plaintiff in the suit and the documents filed.

25. As per the plaint, plaintiff granted a conditional, limited license to these drawings to LIL vide the contract dated 18th May, 2009. Relevant provisions of the contract dated 18th May, 2009 are as under:-

***"3.0 General Conditions of Contract
A Contract and Interpretation***

3.1 DEFINITIONS

The following words and expressions shall have the meanings hereby assigned to them:

3.1.0 "Employer" means the Lanco Energy Private Limited, Plot No.-229, Udyog Vihar- Phase-1, Gurgaon-122016 and includes the legal successors or permitted assigns of the Client.

3.1.1 "Client" means the Lanco Infratech Limited, Plot No.229, Udyog Vihar - Phase 1, Gurgaon-122016 and includes the legal successors or permitted assigns of the Client.

3.1.2 *x x x*

3.1.3 *x x x*

3.1.4 "Contractor" means M/s Alstom Projects India Limited (APIL), having their office at via. E.R.D.A.road, G.I.D.C. Maneja, Vadodara-390013, Gujarat, whose bid has been accepted by the Client to perform the Contract and is named as such in the Contract Agreement, and includes the legal successors or permitted assigns of the Contractor.

x x x

3.1.17 "Contract" means the Contract Agreement entered into between the Client and the Contractor, together with the Contract Documents referred therein; they shall constitute the Contract, and the term "the Contract" shall in all such documents be construed accordingly."

X X X

"3.1.23 "Drawings" shall mean all;

- 1) Drawings furnished by the Client as a basis for bid
- 2) Supplementary drawings furnished by the Client to clarify and to define in greater detail the intent of the Contract.
- 3) Drawings submitted by the Contractor with his bid and subsequently during execution of the Contract and duly approved by the Client.
- 4) Drawings furnished by the Client to the Contractor during the progress of the work on the Facilities; and
- 5) Engineering data and progress of the work on the Facilities provided such drawings are acceptable to the Client.

X X X

"3.9 CONTRACTOR'S RESPONSIBILITIES"

3.9.1 The Contractor shall design, manufacture (including associated purchases and/or Sub Contracting), install and complete the Facilities with due care and diligence in accordance with the Contract."

3.9.2

X X X

X X X

D. Intellectual Property

3.15 COPYRIGHT

3.15.1 The copyright in all drawings, documents and other materials containing data and information furnished to the Client by the Contractor herein shall remain vested in the contractor or, if they are furnished to the Client directly or through the contractor by any third Party, including supplies of materials, the copyright in such materials shall remain vested in such third Party.

The Client shall, however, be free to reproduce all drawings, documents and other material furnished to the Client for the purpose of the Contract, including, if required, for operation and maintenance of the Facilities.

3.16 CONFIDENTIAL INFORMATION

3.16.1 *The Client and the Contractor shall keep confidential and not, without the written consent of the other party hereto, divulge to any third party any documents, data or other information furnished directly or indirectly by the other Party hereto in connection with the Contract, whether such information has been furnished prior to, during or following termination of the Contract.*

Notwithstanding the above, the Contractor may furnish to its Sub Contractor (s) such documents, data and other information it receives from the Client to the extent required for the Sub-Contractor (s) to perform its work under the Contract, in which event the Contractor shall obtain from such Sub Contractor (s) an undertaking of confidentiality similar to that imposed on the Contractor under this GCC Clause 3.16.

3.16.2 *The Client shall not use such documents, data and other information received from the Contractor for any purpose other than the operation and maintenance of the Facilities and for any information to be furnished to Governing Authorities under the applicable law and regulations. Similarly, the Contractor shall not use such documents, data and other information received from the Client for any purpose other than the design, procurement of Plant and Equipment, construction or such other work and services as are required for the performance of the contract.*

3.16.3 *The obligation of a Party under GCC Sub-Clauses 3.16.1 and 3.16.2 above, however, shall not apply to that information which*

- (a) now or hereafter enters the public domain through no fault of that Party.*
- (b) can be proven to have been possessed by that Party at the time of disclosure and which was not*

previously obtained, directly or indirectly, from the other Party thereto.

- (c) otherwise lawfully becomes available to that Party from a third Party that has no obligation of confidentiality.*

3.16.4 The above provisions of this GCC Clause 3.16 shall not in any way modify any undertaking of confidentiality given by either of the Parties hereto prior to the date of the Contract in respect of the Facilities or any part thereof.

3.16.5 The provisions of this GCC Clause 3.16 shall survive termination, for whatever reason, of the Contract.

3.42 TERMINATION

3.42.1 Termination for Client's Convenience

3.42.1.1 xxx xxx

3.42.1.2 xxx xxx

3.42.1.3

3.42.3 Termination by contractor

3.42.3.1 If (a) the Client has failed to pay the Contractor any sum due under the Contract within the specified period, has failed to approve any invoice or supporting documents without just cause pursuant to Appendix 1 (Terms and Procedures of Payment) of the Contract Agreement or commits a substantial breach of the Contract, the Contractor may give a notice to the Client that requires payment of such sum, with interest thereon as stipulated in GCC Sub-Clause 3.12.3, requires Approval of such invoice or supporting documents, or specifies the breach and requires the Client to remedy the same as the case may be. If the Client fails to pay such sum together with such interest, fails to approve such invoice or supporting documents or give its reasons for withholding such Approval, fails to remedy the breach or take steps to remedy the breach within fourteen (14) Days after receipt of the Contractor's notice.

Or

- (b) the Contractor is unable to carry out any of its obligations under the Contract for any reason attributable*

to the Client, including but not limited to the Client's failure to provide possession of or access to the Site or other areas or failure to obtain any governmental permit necessary for the execution and/or completion of the Facilities, which the Client is required to obtain as per provision of the Contract or as per relevant applicable laws of the Country,

then

the Contractor may give a notice to the Client thereof, and if the Client has failed to pay the outstanding sum, to approve the invoice or supporting documents, to give its reasons for withholding such Approval, or to remedy the breach within twenty-eight (28) Days of such notice, or if the Contractor is still unable to carry out any of its obligations under the Contract for any reason attributable to the Client within twenty-eight (28) Days of the said notice, the Contractor may by a further notice to the Client referring to this GCC Sub-Clause 3.42.3.1 forthwith terminate the Contract.

3.42.3.2 The Contractor may terminate the Contract forthwith by giving a notice to the Client to that effect, referring to this GCC Sub-Clause 3.42.3.2, if the Client becomes bankrupt or insolvent has a receiving order issued against it, compounds with its creditors, or being a corporation, if a resolution is passed or order is made for its winding up (other than a voluntary liquidation for the purposes of amalgamation or reconstruction) a receiver is appointed over any part of its undertaking or assets or if the Client takes or suffer any other analogous action in consequence of debt.

3.42.3.3. If the Contract is terminated under GCC Sub-Clauses 3.42.3.1 or 3.42.3.2, then the Contractor shall immediately

(a) cease all further work, except for such work as may be necessary for the purpose of protecting that part of the Facilities already executed or any work required to leave the Site in a clean and safe condition.

(b) terminate all subcontracts except those to be

assigned to the Client Pursuant to paragraph (d) (ii)

(c) *remove all Contractor's Equipment from the Site and repatriate the Contractor's and its Subcontractor's personnel from the Site.*

(d) *In addition, the Contractor, subject to the payment specified in GCC Sub-Clause 3.42.3.4 shall*

(i) deliver to the Client the parts of the Facilities executed by the Contractor up to the date of termination.

(ii) to the extent legally possible, assign to the Client all right, title and Benefit of the Contractor to the Facilities and to the Plant and Equipment as of the date of termination, and, as may be required by the Client, in any subcontracts concluded between the Contractor and its Subcontractors.

(iii) deliver to the Client all drawings, specifications and other documents prepared by the Contractor or its Subcontractors as of the date of termination in connection with the Facilities.

3.42.3.4 *If the Contract is terminated under GCC Sub-Clauses 3.42.3.1 or 3.42.3.2 the Client shall pay to the Contractor all payments specified in GCC Sub-Clause 3.42.1.3 and reasonable compensation for all loss or damage sustained by the Contractor arising out of in connection with or in consequence of such termination.*

3.42.3.5 *Termination by the Contractor pursuant to this GCC Sub-Clause 3.42.3 is without prejudice to any other rights or remedies of the Contractor that may be exercised in lieu of or in addition to rights conferred by GCC Sub-Clause 3.42.3.*

(Emphasis Supplied)

26. From the terms of the contract dated 18th May, 2009 arrived at between Alstom and LIL it is evident that LEPL was the employer, LIL the client and Alstom was the contractor including their legal successors or permitted assigns. This Court raised queries to learned counsels for the

plaintiff and defendant in regard to the relationship between LIL, Lenco Energy Power Ltd. (in short LEPL) i.e. the employer and LTHPL the successor-in-interest of the defendant. In this regard the defendant has placed on record the certificate of incorporation of LTHPL which was earlier known as Lanco Teesta Hydro Power Pvt. Ltd. and originally incorporated as Lanco Energy Pvt. Ltd., that is, LEPL, the employer mentioned in the agreement dated 18th May, 2009 between LIL and Alstom, the predecessor in interest of the plaintiff.

27. Though learned counsel for the plaintiff has repeatedly urged that the plaintiff had no privity with LTHPL and LTHPL being a third party in the absence of an assignment as mandated under Section 19 of the Copyright Act, LIL could not have parted with the drawings to LTHPL who in turn parted the drawings to NHPC who are further making copies and transmitting the same unauthorisedly, infringing the plaintiff's copyright, however, at this stage, it would be appropriate to note pleadings of the plaintiff in para-8 of the plaint i.e. *"Though the plaintiff claims that as LIL went into liquidation by virtue of an order dated 27th August, 2018 passed by the NCLT, Hyderabad Bench, the plaintiff believed that defendant improperly obtained plaintiff's copyrighted and confidential drawing when the defendant acquired the LIL's Special Purpose Vehicle, that is, LTHPL in the CIRP proceedings."* It is thus evident that there is an admission of the plaintiff that LTHPL was a special purpose vehicle of LIL. Further, in the agreement dated 18th May, 2009 between Alstom and LIL there is a recognition of LEPL, the successor-in-interest of LTHPL as the employer.

28. No doubt assignment of the copyright in a drawing has to be by way of a written agreement between the parties and even for a purpose of license

there has to be a document duly signed by the owner of copyright or his authorised attorney. In the absence of an assignment or a license in writing by the plaintiff, the defendant did not automatically have a right on the assets of the plaintiff which were not even the assets of LIL in terms of Section 36 (4) of IBC. Further, though Section 36 (3) (d) includes intellectual properties as intangible assets however, sub-section (4) clarifies that the assets which cannot be included in the liquidation estate assets include other contractual arrangements which do not stipulate transfer of title but only use of the assets. No document has been produced by the defendant to assert the right that there was any assignment of the copyright of the plaintiff to LIL or LTHPL or to the defendant. From the agreement dated 8th May, 2009, at best a license for use was issued to LIL for the purposes of Teesta VI Project and was subject to delivery to LIL on termination of the contract due to insolvency of LIL.

29. In terms of Clause 3.15.1 of the GCC the copyright in all the drawings, documents and other materials containing data and information furnished to the client i.e. by the contractor i.e. Alstom remained vested in the contractor however, the client was free to reproduce all drawings, documents and other materials to the client for the purpose of the contract including if required for the operation and maintenance of the facilitates. As per Clause 3.16.1 as noted above the client and the contractor were to keep the drawings, documents, data and information confidential and without the written consent of the other party hereto was prohibited from divulging to any third party with a rider that the contractor was required to furnish the documents, data and information to its sub-contractor for performance of the contract. Further on termination of the contract by the contractor due to

insolvency of the client which is the reason assigned in the notice dated 24th May, 2020, the contractor subject to payments specified in GCC sub-clause 3.42.3.4 was required to deliver to the client all drawings, specifications and other documents prepared by the contractor or its sub-contractors as on the date of termination in connection with the facilities. It is for these terms in the agreements between the plaintiff and LIL that defendant contends that since the contract with LIL has been terminated due to LIL's insolvency, the plaintiff was required to deliver all the drawings, specifications and other documents to LIL and defendant having been assigned all the rights of the employer i.e. LTHPL successor-in-interest of LEPL on as is where is basis, the defendant steps into the shoes of employer, that is, LEPL and is thus retaining the right to use the drawings.

30. Defendant claims that the defendant received the drawings from LTHPL in terms of clause 16 sub-clause (b) of the resolution plan of LTHPL which reads as under:

"16. BASIS OF PREPARATION

The Resolution Applicant has prepared this Resolution Plan on the basis of the following, and upon approval of this Resolution Plan by the NCLT, the Corporate Debtor and the Resolution Applicant, as the case may be, shall be entitled to the following:

(a) Consents and approvals, authorizations etc.

xxx xxx xxx

(b) Licenses/Approvals / Contractual Rights and Benefits

(i) Upon approval of this Resolution Plan by the NCLT and since the Resolution Applicant will acquire the Corporate Debtor on a going concern basis, all subsisting consents, incentives, licenses, approvals, rights, entitlements, benefits and privileges whether under law, contract lease or license granted in favour of Corporate Debtor or to which the Corporate Debtor is entitled or accustomed to shall

notwithstanding any provision to the contrary in their terms, be deemed to continue without disruption for the benefit of the Corporate Debtor.

(ii) For the avoidance of doubt, it is hereby clarified that all consents, licenses, approvals, rights, entitlements, benefits and progress whether under law, contract lease or license granted in favour of the Corporate Debtor or to which the Corporate Debtor is entitled or accustomed to, which have expired as of the Completion Date shall be deemed to continue without disruption for the benefit of the Corporate Debtor until renewed by the relevant authorities. Without any liability for the non-compliance during the time specified above, the Resolution Applicant undertakes to cause the Corporate Debtor to expeditiously identify such expired consents, licenses, approvals, rights, entitlements, benefits and privileges whether under law, contract, lease or license, granted in favour of the Corporate Debtor or to which the Corporate Debtor is entitled Or accustomed to evaluate the steps required to address the same and take steps to remedy the same to the extent practically possible. Upon approval of this Resolution Plan by the NCLT, any claims by any person (whether filed / verified / admitted or not, due or contingent, crystallized or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future) against the Corporate Debtor accruing due to the commencement or pendency of insolvency proceedings against the Corporate Debtor , whether arising under the terms of subsisting consents, licenses, approvals, rights, entitlements benefits and privileges whether under law, contract, lease or license, granted in favour of the Corporate Debtor or any contractual arrangements entered into by the Corporate Debtor shall notwithstanding any provision to the contrary in their terms stand extinguished without any resource.

31. Sub-clause (b) of Clause 16 of the resolution plan thus clarifies that all consents, licenses, approvals, rights and entitlements, benefits, privileges whether under law, contract, lease or license granted in favour of the

corporate debtor or to which the corporate debtor is entitled or accustomed to shall notwithstanding any provision to the contrary in their terms be deemed to continue without disruption for the benefit of the corporate debtor. Thus, the use of terms 'entitled or accustomed to' are of wide amplitude and ensure continuity of all benefits in favour of LHTPL to continue with the defendant.

32. Further, Sections 60, 63, 231 and 238 IBC which are relevant to ascertain as to whether the present dispute is required to be decided in this suit or before the NCLT, read as under:

60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

63. No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.

231. No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.

238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

33. Sections 63 and 231 IBC create a bar on the jurisdiction of the civil court in respect of any matter in which the NCLT and NCLAT has jurisdiction under the IBC and the adjudicating authority under the Code is

competent to pass any order. Further, clause (c) sub-Section (5) of Section 60 IBC vests the jurisdiction in NCLT to entertain and dispose of any question of priorities or any question of law or fact, arising out of or in relation to the insolvency resolution for liquidation proceedings. Therefore, the jurisdiction vested in NCLT while dealing with a resolution plan is of wide ambit and any question of law or fact in relation to the insolvency resolution has to be determined by the NCLT.

34. On consideration of the provisions of Section 60, 63, 231 and 238 of the IBC, this Court in Liberty House Group (supra) following the decision of the Hon'ble Supreme Court's reported as 2019 SCC OnLine SC 73, Swiss Ribbons Pvt. Ltd. Vs. Union of India, held that the words used in the statute are of wide amplitude and that the IBC was enacted to bring insolvency laws in India under a single unified umbrella with the object of speeding up of the insolvency process by reorganizing insolvency resolution of corporate debtors in a time bound manner and by maximising the value of assets. Therefore, IBC seeks to provide for designated NCLT thereby ousting the jurisdiction of the Civil Court. It was held:-

*"22. Supreme Court recently in **Swiss Ribbons Pvt. Ltd. Vs. Union of India** 2019 SCC OnLine SC 73, while dealing with the challenge to the constitutional validity of various provisions of the Code, has reiterated (i) that till the Code was enacted, the regime of previous legislation had failed to maximize the value of stressed assets and had focused on reviving the corporate debtor with the same erstwhile management; all these legislations had failed, as a result of which, the Code was enacted to reorganize insolvency resolution of corporate debtors in a time bound manner, to maximize the value of assets; (ii) there is a paradigm shift from the erstwhile management of a corporate debtor being in possession of the stressed assets, to creditors who now*

assume control from the erstwhile management and are able to approve resolution plans of other better and more efficient managers, which would not only be in the interest of the corporate debtor itself but in the interest of all stakeholders namely all creditors, workers and shareholders other than shareholdings of the erstwhile management; (iii) past judgments have mandated a judicial hands-off when it came to laws relating to economic regulation; (iv) the Bankruptcy Law Reforms Committee in its Report dated 4th November, 2015 had reported that the current state of the bankruptcy process was a highly fragmented framework, with powers of the creditor and the debtor under insolvency being provided for under different Acts; it is problematic that these different laws are implemented in different judicial fora giving rise to problems in implementation of the resolution framework; there is lack of clarity of jurisdiction, with decisions being appealed against; if economic value is indeed to be preserved, there must be a single forum that hears both sides of the case and makes a judgment based on both; in such an environment of legislative and judicial uncertainty, the outcomes on insolvency and bankruptcy are poor; if we are to bring financing patterns back on track with the global norm, we must create a legal framework to make debt contracts credible channels of financing; speed is of essence for the working of the bankruptcy code - the longer the delay, the more likely it is that liquidation will be the only answer, with the liquidation value going down with time as many assets suffer from a high economic rate of depreciation; (v) there was thus a need to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process; laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc.; the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation

dealing with economic matters; in the matter of economic laws, the Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation, than in other areas where fundamental human rights are involved; (vi) while the legislature has affirmative responsibility, the Courts have only the power to destroy, not to reconstruct; (vii) the Court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry; (viii) every legislation, particularly in economic matters, is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses; there may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid; (ix) the Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary; (x) the objective of the Code was to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues; (xi) the Code seeks to provide for designating NCLT and Debt Recovery Tribunal as the Adjudicating Authorities for corporate persons for resolution of insolvency, liquidation and bankruptcy; (xii) Insolvency Professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code; (xiii) timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support

the development of credit markets; (xiv) Rule 11 of the National Company Law Tribunal Rules, 2016 saves the inherent powers of the NCLT to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal; (xv) once the Code gets triggered by admission of a creditor's petition, the proceeding i.e. before the NCLT, being a collective proceeding, is a proceeding in rem and being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim; (xvi) till the CoC is constituted, a party can approach the NCLT directly, which may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, allow or disallow an application for withdrawal or settlement; this will however be decided after hearing all the concerned parties; (xvii) vide Section 60 of the Code, the CoC does not have the last word on the subject of withdrawal; if the CoC arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code; (xviii) the RP has no adjudicatory powers; the RP cannot act in a number of matters without the approval of the CoC and which in turn decides by two-thirds majority; the RP is really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and by the Adjudicating Authority; (xix) the Statement of Objects and Reasons of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 amending the Code w.e.f. 23rd November, 2017 records that the Code does not restrict or bar any person from submitting a resolution plan or participating in the acquisition process; concerns have been raised that unscrupulous persons may participate in the resolution process; in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, it was deemed appropriate to entrust the responsibility on the CoC to give a reasonable period to repay overdue amounts and become eligible; and, (xx) the legislature should be

permitted to experiment the Code with the working of the code being monitored and amendments being carried out thereto from time to time; this is an ongoing process and should not be interfered with by the Court.

23. The reasons given me above are not controverted by the aforesaid judgment; rather it supports my reasons. The judgment also expressly negates the argument of the senior counsel for the plaintiff, of jurisdiction of NCLT being limited and the Code not providing for NCLT to be approached in such matters.

35. Though there is a dispute between the parties on the aspect that in the absence of any assignment or a license issued in favour of LTHPL by the plaintiff how the benefit of such a license issued in favour of LIL could extend to the LTHPL however, neither party has filed the terms of agreement between LIL and LTHPL to clarify this aspect. However, as noted above, plaintiff has stated in the plaint that LTHPL was a SPV of LIL and that the Teesta VI Project was awarded to LTHPL. It is also the case of the plaintiff that the drawings and data were used for Teesta VI Project as is also evident from the agreement dated 18th May, 2009 between plaintiff and LIL. Further, as per the resolution plan, dispute of the entitlement to the licenses or the benefit/privilege under the contract or license to which the corporate debtor is entitled or accustomed notwithstanding any provision to the contrary is a provision of wide amplitude and the disputes raised between the party would fall in relation to this right if that accrues in favour of the defendant. Thus the dispute raised in the present suit falls within the ambit of Section 60 (5) IBC as the same arises out of and/or is in relation to the insolvency resolution plan of LTHPL hence has to be adjudicated by the NCLT and the proceedings in the civil court are barred.

36. Learned counsel for the plaintiff vehemently contends that the license for the use, if any, by the plaintiff of his copyright in the drawings and data including the confidential data was given in favour of LIL. LIL without any written permission of the plaintiff could not have passed on the said data to LTHPL or to the defendant and even if passed down, in the absence of any written assignment or the license, the user thereof by the defendant is illegal. The contention of learned counsel cannot be decided in the present proceedings in the absence of LIL and LTHPL being parties. In the absence of the said two parties it cannot be determined how the rights of use with LIL were transferred to LTHPL or whether the plaintiff had consented to the same. Thus the present suit would also be not maintainable in the absence of necessary parties LIL and LTHPL. It appears that LIL has deliberately not been made a party as the very impleadment of the LIL which has gone into liquidation would have ousted the jurisdiction of this Court to entertain the present suit. Even assuming that LTHPL had wrongly usurped or was infringing the copyright of the plaintiff in the drawings which is not the case of the plaintiff in the present suit, the defendant's right to use cannot be decided in the present proceedings.

37. In view of the discussion aforesaid, the present suit and application are dismissed as not maintainable before this Court in view of Sections 230 and 231 read with Section 60(5) of the Insolvency and Bankruptcy Code.

38. Order be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

JUNE 26, 2020
‘vn’

