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

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Judgment Reserved on: 24.07.2017
Judgment Pronounced on: 08.08.2017

+ ARB.P. 63/2017

M.V. OMNI PROJECTS (I) LTD Petitioner

Through Mr.O.P.Bhadani and Mr.S.S.Pandey,
Advs.

versus

GAIL GAS LTD & ANR Respondents

Through Mr. Dhruv Mehta, Sr. Adv. With
Ms.Purnima Maheshwari, Advocate
for R-1.

Mr. V.V.Monoharan and Ms.Shailaja
Singh, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking appointment of a sole arbitrator for adjudication of the disputes between the parties.

2. Some of the brief relevant facts are that respondent No.1 invited a bid for composite construction of CNG Stations at Vadodara through tender. The petitioner being a successful bidder was issued a letter of Award on 12.04.2010 and was allotted the work of commissioning CNG Stations at Vadodara. It is the case of the petitioner that due to non-availability of work, the petitioner requested respondent No. 1 to close the contract. Respondent No. 1 however requested the petitioner to take up job for two stations i.e.

M/s Swatik Sales and M/s Shreeji Associates. The petitioner states that as per the terms and conditions of the contract, the petitioner was awarded four different CNG Stations at Vadodara. A total work of Rs.23,21,196/- was awarded to the petitioner as against the contract value of a much higher amount. The awarded work being substantially low, the petitioner suffered losses by way of idle establishment charges and other business loss.

3. As disputes arose between the parties, the petitioner invoked the arbitration clause on 24.12.2014 requesting respondent No.1 to suggest a panel of three persons in terms of the arbitration agreement between the parties. As no steps were taken by respondent No.1, the present petition was filed.

4. When this matter came up for hearing before this court on 19.01.2017, learned counsel for respondent No.1 accepted notice and stated that under the Business Transfer Agreement signed between Gail Gas Ltd.(GGL) and Vadodara Gas Ltd. (VGL), the subject matter of the agreement has fallen to the responsibility of Vadodara Gas Ltd. On the request of learned counsel for respondent No. 1, the court impleaded Vadodara Gas Ltd. as respondent No.2 to the present petition.

5. Respondent No.2 entered appearance and have filed their reply. They have strongly objected to their being impleaded as a respondent without service of notice. It is urged that there is no privity of contract between the petitioner and respondent No.2. Hence, it is asserted that there can be no arbitration between the petitioner and respondent No.2. It is further urged that the petitioner seeks to claim that the final bill for their contract amount for construction of CNG Stations at Vadodara was submitted by them to respondent No.1 on 7th May, 2014. Hence, the said transaction was

completed between the petitioner and respondent No.1 before the date of the Business Transfer Agreement. Hence, the cause of action to file the present petition arose prior to the execution of the Business Transfer Agreement and respondent No.2 has no concern with the said liability. Further, it is urged that respondent No.2 has acquired only the rights of entitlement in the acquired business of respondent No.1 without acquiring any liability or responsibility of respondent No.1. Hence, it is claimed that even otherwise, respondent No.2 has no liability for the dues, if any, of the petitioner.

6. The respondent No.1 has filed a rejoinder specifically denying the contentions of respondent No.2.

7. I have heard learned counsel for the parties.

8. Learned senior counsel for respondent No. 1 has not disputed that an arbitration clause exists between the parties and an arbitrator should be appointed. Learned senior counsel relies on the Business Transfer Agreement dated 13.06.2014 executed between respondent Nos.1 and 2. Reliance is placed on Clauses 1.1.1 and 1.1.2 to contend that the entire project that is said to have been executed by the petitioner has now been taken over by respondent No. 2 and that respondent No. 2 is now liable for the dues, if any, that may arise due to the claims of the petitioner. It is clarified that under Clause 8.15 of the said Agreement, respondent No. 2 is not a successor for any of the pending litigation which were pending on the date of the Agreement. It is urged that the present litigation has commenced after the date of the Agreement and is hence not covered under Clause 8.15. It is further stated that the entire record now stands transferred to respondent No. 2 and hence even otherwise, respondent No. 1 would not be in a position to defend the litigation. Learned senior counsel has relied upon the judgment

of the Supreme Court in the case of *Chloro Controls (I) P. Ltd. vs. Severn Trent Water Purification Inc. and Ors.*, 2013 (1) SCC 641 and of this court in *Banas Sands TTC JV vs. PKSS Infrastructure Pvt. Ltd. & Ors.*, 2017 SCC OnLine Del. 7838 to contend that non-signatories to an agreement can also be referred to arbitration in certain circumstances.

9. Learned counsel for respondent No.2 reiterates that they are not a signatory to the Agreement and hence cannot be made to participate in the arbitration proceedings. He has further submitted that respondent No. 2 has no liability for the project. He reiterates relying upon Clause 1.1.6 read with the 6th Schedule of the Business Transfer Agreement that respondent No. 2 would have no liability for the present project. He has relied upon the judgment of the Supreme Court in the case of *Deutsche Post bank Home Finance Ltd. vs. Taduri Sridhar & Anr.*, (2011) 11 SCC 375 to support his contentions.

10. A perusal of the Business Transfer Agreement between respondent No. 1 and respondent No. 2 shows that respondent No. 1 had entered into a Share Holders' Agreement on 13.07.2013 with Vadodara Mahanagar Seva Sadan, an autonomous body registered and functioning as per the Gujarat Provincial Municipal Corporation Act, 1949. Under the said share holders' agreement, respondent No.2 was incorporated and the business was transferred to respondent No.2 as a growing concern on slump sale basis. Clause 8.15 of the agreement reads as follows:-

“Clause 8.15

The Purchaser shall not be a successor to any litigation pending against the Vendor and all litigation and whatsoever nature even if related to the Acquired Business, shall in so far as the same

relates to a claim in damages, be continued by the Vendor at the Vendor's cost. Any legal proceedings which has a continuing legal impact and which is likely to affect the Purchaser when it commences its business after the Closing shall be defended by the Vendor. The Vendor shall inform the Purchaser of any proceedings commenced after the Closing if it relates to any action of a continuing nature against the Acquired Business. The Vendor represent that there is presently no such proceedings against the Acquired Business except as listed in SCHEDULE 15. The Vendor shall at all times continue to be bound by and be liable to discharge any judgment that may result from the legal proceedings listed in SCHEDULE 15.”

11. Respondent No. 1 seeks to interpret the above clause and other terms of the agreement to contend that the liability that may arise from the present litigation, if any, would be of respondent No. 2. Hence, respondent No.1 seeks reference to arbitration alongwith respondent No.2 even though respondent No.2 is not a signatory to the Arbitration Agreement.

12. The Supreme Court in the case of ***Chloro Controls (I) P. Ltd. vs. Severn Trent Water Purification Inc. and Ors. (supra)*** held that a non-signatory or a third party can in exceptional cases be subject to arbitration. The court held as follows:-

“73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of

such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

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86. Alan Redfern and Martin Hunter in *Law and Practice of International Commercial Arbitration*, (Fourth Edition) have opined that when several parties are involved in a dispute, it is usually considered desirable that the dispute should be dealt with in the same proceedings rather than in a series of separate proceedings. In general terms, this saves time, money, multiplicity of litigation and more importantly, avoids the possibility of conflicting decisions on the same issues of fact and law since all issues are determined by the same arbitral tribunal at the same time. In proceedings before national courts, it is generally possible to join additional parties or to consolidate separate sets of proceedings. In arbitration, however, this is difficult, sometimes impossible, to achieve this because the arbitral process is based upon the agreement of the parties.

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165. Having dealt with all the relevant issues in law, now we would provide answer to the questions framed by us in the beginning of the judgment as follows:

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165.2 In the facts of a given case, the Court is always vested with the power to delete the name of the parties who are neither necessary nor proper to the proceedings before the Court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing

between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.”

13. In that case the Supreme Court was dealing with a matter where various agreements constituted a composite transaction like mother agreement and other ancillary agreements. The court held that for effective and complete implementation of the mother agreement, the court may have to make a reference to arbitration even of disputes existing between signatory and non-signatory parties.

14. Reference may also be had to the judgment of the Supreme Court in the case of ***Purple Medical Solutions Pvt. Ltd. vs. MIV Therapeutics Inc. and Anr., 2015 15 SCC 622***. The Supreme Court noted the issue of joinder of non-signatory parties to arbitration. It noted that the same is not unknown in arbitration jurisprudence. In that case, the plea of the petitioner was that the second respondent (party not a signatory to the arbitration agreement) is an alter ego of the first respondent and that the first respondent was a corporate veil of the said respondent. The Supreme Court relied upon on the earlier decisions of the court in *Chloro Controls (I) P. Ltd. vs. Severn Trent Water Purification Inc. and Ors.(supra)* and allowed the prayer of the petitioner then. The court noted as follows:-

“107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as

being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

15. This Court in the case of *Banas Sands TTC JV vs. PKSS Infrastructure Pvt. Ltd. & Ors.(supra)* had held as follows:-

"39. In other words the Court has to carefully examine whether a composite reference would serve the ends of justice. The further observations of the Court in this regard are contained in para 107, which reads as under:

"107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

16. In my opinion, there is no such similarity of facts in the present case. It is a simple claim for dues and damages being made by the petitioner for payment against respondent No. 1. In fact, the petitioner never sought impleadment of respondent No.2 as a party to the present proceedings. It was on the submission of respondent No. 1 that respondent No. 2 was made a party. In the present case, there is no principle agreement or subsidiary agreement. There is a serious dispute between respondent No. 1 and respondent No. 2 about who would have to bear the liability in case any is fastened on account of the present litigation commenced by the petitioner. In my opinion, making a composite reference to the learned arbitrator as is being argued by respondent No. 1 is neither necessary nor desirable. The said dispute between the respondents under the Business Transfer Agreement dated 13.07.2013 is totally alien to the claims which are sought to be raised by the petitioner. The claims of the petitioner are not dependent upon or connected to the disputes inter se respondent No.1 and respondent No.2. It cannot be termed to be a composite dispute. Further if a composite reference is made, the main dispute raised by the petitioner i.e. claim for his dues and damages would end up taking a back stage. The dispute between the respondents about their inter se liability would become the main dispute to be adjudicated. In these facts, the judgment of the Supreme Court in the case of *Chloro Controls (I) P. Ltd. vs. Severn Trent Water Purification Inc. and Ors.(supra)* would have no application.

17. Reference may be had to judgment of a Coordinate Bench of this Court in the case of ***Sudhir Gopi vs Indira Gandhi National Open University 2017 SCC On-line Delhi 8345***. The issue therein related to

sustainability of an award passed against an individual who was not a signatory to the arbitration agreement. The court noted as follows:-

“35. Arbitration agreement can be extended to non-signatories in limited circumstances; first, where the Court comes to the conclusion that there is an implied consent and second, where there are reasons to disregard the corporate personality of a party, thus, making the shareholder(s) answerable for the obligations of the company. In the present case, the arbitral tribunal has proceeded to disregard the corporate personality of UEIT. The arbitral tribunal has lifted the corporate veil only for the reason that UEIT's business was being conducted by Mr Sudhir Gopi who was also the beneficiary of its business being the absolute shareholder (barring a single share held by Mr Fikri) of UEIT. This is clearly impermissible and militates against the law settled since the nineteenth century. Any party dealing with the limited liability company is fully aware of the limitations of corporate liability. Business are organised on the fundamental premise that a company is an independent juristic entity notwithstanding that its shareholders and directors exercise the ultimate control on the affairs of the company. In law, the corporate personality cannot be disregarded. Undisputedly, there are exceptions to this rule and the question is whether this case falls within the scope of any of the exceptions.

36. A corporate veil can be pierced only in rare cases where the Court comes to the conclusion that the conduct of the shareholder is abusive and the corporate façade is used for an improper purpose, for perpetuating a fraud, or for circumventing a statute.”

18. In my opinion, the arbitration proceedings in this case should be between the two parties who were signatories to the arbitration agreement, namely, the petitioner and respondent No. 1. If some award is made against respondent No. 1 and respondent No. 1 is of the view that the liability would be of respondent No. 2, respondent No. 1 would be free to take steps for such

recovery from respondent No. 2. Hence, I delete respondent No.2 from the array of parties.

19. Respondent No. 1 has forwarded a panel of arbitrators. The petitioner has requested to appoint Sh.S.M. Chopra, ADJ (Retd.), (Mobile No.9213230349) as the sole Arbitrator. Petitioner No. 1 has no objection to the same. Accordingly, I appoint Sh. S.M. Chopra, ADJ (Retd.) as the sole Arbitrator to adjudicate the disputes between the petitioner and respondent No. 1. He is free to fix his fees in consultation with the learned counsel for the parties.

20. With the above, the petition stands disposed of.

(JAYANT NATH)
JUDGE

AUGUST 08, 2017/rb