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

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Date of decision: 25.07.2019

+ CS(COMM) 658/2017

GLOBAL INFONET DISTRIBUTION PVT. LTD. Plaintiff
Through Mr.Asit Tewari and Ms.Ankita
Rastogi, Advs.

versus

LENOVO (INDIA) PRIVATE LIMITED & ORS. Defendants
Through Mr.Sanjeev Anand, Mr.Arush Khanna
and Ms.Shreya Singh, Advs. for D-1.
Mr.Sudhir Kumar and Ms.Ashna
Abrol, Advs. for D-2.
Mr.Purushattam Kr.Jha, Adv. for D-3.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

IA Nos.2827/2018, 2458/2018 & 4464/2018

1. These three applications are filed by defendants No.1, 2 and 3 respectively under section 8 of the Arbitration and Conciliation Act, 1996. The present suit is filed by the plaintiff for recovery of a sum of Rs.17,70,39,462/-. It is pleaded in the plaint that the plaintiff is engaged in trading and distribution of computers, laptops computer hardware etc. It is stated that defendant No.1 approached the plaintiff company in 2014 and represented to the plaintiff company that defendant No.1 is a good business partner and plaintiff company shall attain good volume of business and profits by becoming a regional distributor of defendant No.1. The plaintiff agreed to accept the business distributorship with defendant No.1. The

plaintiff it is stated was given distributorship for the State of Punjab on 10.2.2014 and subsequently for other States. The plaintiff was given distributorship for the said States/Territories/Region through defendant No.2 and was required to purchase the products under distributorship from defendant No.2 only and was required to make payments for the bills/invoices raised by defendant No.2 to the defendant No.2 only. The plaintiff was made to execute respective Regional Distribution Agreement with defendants No.1 and 2 for various territories.

2. It is further stated that defendant No.1 subsequently assessed the performance of the plaintiff and implemented the direct distributorship arrangement whereby plaintiff was to directly purchase the products from defendant No.1 and to make the payments through the financial arrangements made through defendants No.3. It is pleaded that from the very inception defendant No.1 in collusion with defendant No.2 as well as defendant No.3 devised a unique and ingenious strategy in respect of pricing and marketing and imposed the said strategy on the plaintiff through the dominant position of defendant No.1 which ensured that defendants are always overpaid and the plaintiff was at the mercy of the defendants. It is further pleaded that defendants No.1 and 2, however, failed to keep up to their promises and assurances given to the plaintiff. Defendants No.1 and 2 started committing breach of promises and assurances which were given at the time of commencement of the distributorship.

3. On 28.3.2016 it is stated that the plaintiff company was shocked to receive an email stating that they were exiting the plaintiff company from the State of Haryana. Various such allegations are made against the

defendants. Plaintiff further states that after assessing the entire records of dealing and business with defendants No.1, 2 and 3 and taking note of the entire facts and transactions, the plaintiff noted various losses and damages. These alleged acts of omission and commission are spelt out in paragraph 52 of the plaint. Hence, it is pleaded that the plaintiff is entitled to recover damages jointly and severally from the defendants totalling Rs.17,70,39,462/-.

4. It is admitted in paragraph 56 of the plaint that defendants No.1, 2 and 3 have executed respective Distribution Agreements/Agreement with the plaintiff company which contains respective Arbitration Clause. It is also stated in the said para that transaction of the plaintiff and the defendants in relation to the products of defendant No.1 are closely inter related and fully inter-dependent apart from the joint collusion and hatching of an ingenious plan on the part of the defendants. It is further pleaded that the acts of the defendants are part of the same cause of action and it is just necessary that legal proceedings be initiated against the defendants jointly. It is further stated that different dispute resolution mechanisms and jurisdictions in three different agreements cannot be separately resorted to by the plaintiff. Hence, it is stated that the present suit is being filed.

5. Section 8 of the Arbitration & Conciliation Act reads as follows:-

"8. Power to refer parties to arbitration where there is an arbitration agreement.—

"1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute,

then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.;
...."

6. It is an admitted fact that there exists an arbitration clause in the agreement between the plaintiff and defendant No.1. The arbitration clause being clause 26.9 reads as follows:-

"26.9 Governing Law, Jurisdiction and Venue. Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held within Bangalore, Karnataka in accordance with the Arbitration Rules of Arbitration and Conciliation Act of 1996 then in effect. The arbitration award shall be final and binding for the parties without appeal and shall be in writing and set forth the findings of fact and the conclusions of law. The number of arbitrators shall be three (3). with each side to the dispute being entitled to appoint one (1) arbitrator each. The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator shall be the sole arbitrator, provided that the arbitrator was validly and properly appointed. All proceedings shall be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version. In the event that any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect. This Agreement shall be governed by and interpreted in accordance with the laws of India, the jurisdiction and venue for any legal action between the parties hereto arising out of or connected with this Agreement, or the Services and Products furnished hereunder, shall be in a court located in Bangalore, Karnataka. The "United

Nations Convention on Contracts for the international Sale of Goods" does not apply to this Agreement.”

7. The arbitration clause in the agreement with defendant No.2 reads as follows:-

“13. “The transaction under this invoice shall be subject to laws of India and the Courts in Mumbai shall have exclusive jurisdiction. Any dispute pertaining to transaction under this invoice shall first be referred to sole Arbitrator appointed by IMPIL and the decision of the Arbitrator shall be final and binding on the parties. The arbitration shall be conducted as per the provisions of The Arbitration and Conciliation Act, 1996 and the place of arbitration shall be in Mumbai.”

8. The arbitration clause in the agreement with defendant No.3 reads as follows:-

“Disputes, differences, or claims arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Bangalore. India in accordance with the laws of India then in effect. The arbitration award shall be final and binding for the parties without appeal and shall be in writing and set forth the findings of fact and the conclusions of law.

The number of arbitrators shall be three, with each side to the dispute being entitled to appoint one arbitrator. The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the president of the Bar Council of India. Other vacancies shall be filled by the respective nominating party. Proceedings shall continue from the stage they were at when the vacancy occurred.

If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator shall be the sole arbitrator, provided that the arbitrator was validly and properly appointed.

All proceedings shall be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version.

Notwithstanding anything in this Section 16 to the contrary, the Parties may apply to any court of competent jurisdiction for injunctive, or preventive relief without breach of this Section 16 and this Section 16 shall be of no force and effect with respect to such application for injunctive or preventive relief only.

In the event that any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.

Customer irrevocably consents to the service of process by mail or any other manner permitted by the relevant law.

9. Learned counsel for the plaintiff has vehemently urged that Section 8 of the Arbitration Act has no application as the dispute raised in the present suit are not covered by the arbitration agreement. Reference is made to the judgment of the Supreme Court in ***Sukanya Holdings Pvt. Ltd. vs. Jayesh H.Pandya and Ors., AIR 2003 SC 2252.***

10. Learned counsel for the defendants have, however, relied upon judgments of the Supreme Court in the case of ***Ameet Lal Chand Shah, 2018 SCC Online SC 487 and Cheran Properties Limited vs. Kasturi, 2018 SCC Online SC 431.***

11. Learned counsel for defendant No.2 has in fact pointed out that certain arbitration proceedings are going on before the learned Arbitrator Justice S.Radhakrishnan in Mumbai between defendant No.2 and the plaintiff.

12. I may look at the legal position in this regard. In ***Sukanya Holdings***

Pvt. Ltd. vs. Jayesh H.Pandya and Ors., (supra) the Supreme Court held as follows:-

“15. The relevant language used in Section 8 is--"in a matter which is the subject matter of an arbitration agreement". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The word 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.”

13. A perusal of the arbitration clauses in the agreements with the plaintiff above would show that the disputes which are raised by the plaintiff herein are squarely covered by the arbitration agreements. Hence, the aforesaid judgment would have no application to the case of the plaintiff.

14. The Supreme Court in *A. Ayyasamy vs. A. Paramasivam and Ors.*, (2016) 10 SCC 386 held that section 8 of the Arbitration Act contains a positive mandate that obligates the judicial authority to refer the parties to arbitration in terms of the arbitration agreement. The Supreme Court held as follows:-

"26. The Arbitration and Conciliation Act, 1996 does not in specific terms exclude any category of disputes--civil or commercial--from arbitrability. Intrinsic legislative material is in fact to the contrary. Section 8 contains a mandate that where an action is brought before a judicial authority in a matter which is the subject of an arbitration agreement, the parties shall be referred by it to arbitration, if a party to or a person claiming through a party to the arbitration agreement applies not later than the date of submitting the first statement on the substance of the dispute. The only exception is where the authority finds prima facie that there is no valid arbitration agreement. Section 8 contains a positive mandate and obligates the judicial authority to refer parties to arbitration in terms of the arbitration agreement. While dispensing with the element of judicial discretion, the statute imposes an affirmative obligation on every judicial authority to hold down parties to the terms of the agreement entered into between them to refer disputes to arbitration. Article 8 of the Uncitral Model Law enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 of the 1996 Act has made a departure which is indicative of the wide reach and ambit of the statutory mandate. Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find place in Section 8."

15. Over passage of time the law regarding reference to arbitration has evolved. Even non signatories have now been referred to arbitration. In

this context reference may be had to the recent judgment of the Supreme Court in *Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc.& Ors.*, (2013) 1 SCC 641 the Supreme Court held as follows:-

"70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (2nd Edn.) by Sir Michael J. Mustill:

- "1. The claimant was in reality always a party to the contract, although not named in it.
2. The claimant has succeeded by operation of law to the rights of the named party.
3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

.. .

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 the 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

.....

102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:

103.1 The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations,

succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law."

16. Similarly, in *Cheran Properties Limited vs. Kasturi & Sons Limited and Ors.*, 2018 SCC Online SC 431 the Supreme Court held as follows:-

"26. The Court held that it would examine the facts of the case on the touch-stone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a 'direct commonality' of the subject matter and on whether the agreement between the parties is a part of a composite transaction:

"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 the 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 no signatory parties would fall within the exception afore-discussed."

27. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus:

"The first theory is that of implied consent, third-party

beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

..

We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."

.....

31. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

"..The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of

the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession."

17. As held by the Supreme Court in *Cheran Properties Limited vs. Kasturi & Sons Limited and Ors.*(surpa), the existence of a relationship between the parties, commonality of the subject matter and whether the agreement between the parties is a part of a composite transaction have to be seen. A third party or a non-signatory could be subjected to arbitration without his prior consent, though this would only be in exceptional cases. This would happen only when there is a direct relationship to the party signatory to the arbitration agreement, commonality of the subject-matter and the agreement between the parties being a composite transaction.

18. In the present case though the parties have entered into three different agreements there is clearly a commonality of facts which as per the plaintiff bind the defendants together. It is the own case of the plaintiff in the plaint that defendants No.1, 2 and 3 are jointly and severally liable for the damages suffered by the plaintiff. The plaintiff further states that the transactions of the plaintiff with the defendants in relation to the products of defendant No.1 are closely inter-related, fully inter-dependent and the defendants have acted in joint collusion by hatching an ingenious plan. It is also stated by the plaintiff that the cause of action for the plaintiff qua the defendant arises out of mutual collusive acts and omissions of the said defendants.

19. Keeping in view the legal position and the fact that there is a commonality of facts which bind the defendants together as pleaded by the plaintiff, in my opinion, the present applications are liable to be allowed. The plaintiff cannot escape from the arbitration agreement as is sought to be

done. I may also note that a perusal of the above arbitration clause would show that regarding defendants No.1 and 3 the Agreement provides that the seat of arbitration would be Bangalore. The arbitration clause with defendant No.2 states that the seat of arbitration would be Mumbai. However, learned counsel appearing for defendant No.2 submits that they have no objection in case arbitration proceedings are held in Bangalore.

20. The applications are allowed. As noted above in the arbitration clause with defendants No.1 and 3 the seat of arbitration is Bangalore. Learned counsel for defendant No.2 has submitted that they have no objection in case the arbitration proceedings are held in Bangalore. Accordingly, it is left open to the parties to appoint a sole arbitrator to adjudicate the disputes between the parties. In case, the parties cannot arrive at a consensus, the parties are free to approach the appropriate High Court for appointment of an arbitrator. The applications stand disposed of.

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In view of the above, the present suit stands disposed of.

JAYANT NATH, J

JULY 25, 2019/n

corrected & released on 30.08.2019