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Appln.No.583 of 2022

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in

Arb.O.P.(Com. Div.) No.296 of 2021

SENTHILKUMAR RAMAMOORTHY J.

By application No.583 of 2022, Sakthi Sugars Ltd. (SSL) seeks to implead itself as a proposed second respondent in Arb.O.P.(Com.Div.) No.296 of 2021. Such impleadment is prayed for on the ground that SSL is the flagship company of the group. By drawing reference to the reliefs prayed for before the arbitral tribunal, learned counsel for SSL submitted that such reliefs are directed against SSL, which falls within the definition of affiliate in the Shareholders Agreement (SHA). With specific reference to paragraph 226 of the award, it is submitted that the arbitral tribunal had concluded that SSL is an affiliate of ABT Auto. Learned counsel also pointed out that clauses (e) and (j) of paragraph 393 of the award requires Sakthi Auto Component Limited to procure compliance by SSL. The impleading application is founded on the above bases.



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2. On the contrary, learned counsel for the award holders submits that proceedings for recognition/enforceability are only between parties to the arbitral agreement and the foreign award. In support of this contention, reference was made to Section 48 (1)(a) and Section 44 of the Arbitration and Conciliation Act 1996 (the Arbitration Act). Learned counsel also relied on the judgment of the Hon'ble Supreme Court in *Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited* (2022) 1 SCC 753, particularly paragraph 43 thereof, wherein the Hon'ble Supreme Court held, *inter alia*, as under:

“43. ... There can be no doubt that a non-party to the agreement, alleging that it cannot be bound by an award made under such agreement, is outside the literal construction of Section 48(1)(a). Also, it must not be forgotten that whereas Section 44 speaks of an arbitral award on differences between “persons”, Section 48(1)(a) refers only to the “parties” to the agreement referred to in Section 44(a). Thus, to include non-parties to the agreement by introducing the word “person” would run contrary to the express language of Section 48(1)(a), when read with Section 44. Also, it must not be forgotten that these grounds cannot be expansively interpreted



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as has been held above. The grounds are in themselves specific, and only speak of incapacity of parties and the agreement being invalid under the law to which the parties have subjected it. To attempt to bring non-parties within this ground is to try and fit a square peg in a round hole.”

3. By referring to paragraph 4 of the limited affidavit in reply of the award holders, learned counsel submitted that the award holders made it abundantly clear that enforcement is not being sought against SSL in the enforcement petition. The said paragraph 4 is set out below:

“4. SSL is not a party to the Arbitration Agreement, the Award as well as the present Enforcement Petition. Further, no direction has been passed against SSL in the Award nor is enforcement being sought against SSL in the Enforcement Petition. Further, SSL is also not a shareholder in SACL as on date, and is not impacted by the Award in any manner.”

4. This contention is countered by learned counsel for SSL. Learned counsel submits that SSL would be put to considerable hardship if the



foreign award is held to be enforceable without hearing SSL, especially if the award holders proceed to initiate action for enforcement/execution against the applicant. By referring to the judgment of the Hon'ble Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited* (2022) 1 SCC 209, particularly paragraphs 77 and 78 thereof, it is submitted that the question as to whether an affected third party should be heard in such proceedings was left open by the Hon'ble Supreme Court. The said paragraph 78 is set out below:

“78. Mr Salve then painted a lurid picture of third parties being affected in enforcement proceedings. No such third party is before us. As to a third party i.e. A party who is not a party to the arbitration agreement and to the subject-matter covered by the award and who is affected by an order made in enforcement, we say nothing, leaving the question open to be argued on the facts of a future case.”

5. The petition filed by the award holders is clearly a petition for recognition of the foreign award. In effect, the petitioner seeks a declaration that such foreign award is enforceable as a decree of this Court and for



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payment in terms thereof. It is therefore, not a composite petition for both recognition and enforcement/execution. The admitted position is that SSL is not a party to the arbitration agreement or the arbitral proceedings. In paragraph 4, which is extracted *supra*, the award holders adverted to the fact that SSL is not a party to the arbitration agreement, the award and Arb. O.P.(Com.Div.)No.296 of 2021. Besides, it is stated that no enforcement is being sought against SSL in the enforcement petition.

6. It should be noticed that there is some terminological confusion. Learned counsel for the award holders states, on instructions, that what is meant by paragraph 4 is that no relief is prayed for or claimed against SSL with regard to the recognition/enforceability of the award. As regards proceedings at the second stage, (i.e.) the enforcement/execution stage, he states that the award holders are not in a position to provide an undertaking at this juncture because they are unaware of future restructuring or other actions by the parties concerned.



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7. A third party to the arbitral proceedings and award has applied to this Court for impleading on the ground that the award may affect its interest particularly because certain directions are in relation to the third party applicant as affiliate. On examining the said directions, it is clear that the directions are against the party to the arbitral proceedings and such party has been directed to procure compliance by the affiliate. Consequently, even if the party to the award fails to procure compliance, the award would be enforceable against the party failing to procure compliance and not against the applicant/third party. Therefore, SSL has failed to demonstrate that the award imposes obligations or liabilities on it.

8. At the same time, it should be noticed and taken into account that the award holders are unwilling to categorically state that SSL would not be joined in enforcement/execution proceedings later. If such proceedings are instituted against SSL in future, the fact that SSL's impleading application was resisted on the ground that no enforcement is being sought against it would be a material consideration which should be borne in mind while deciding on such enforcement/execution petition.



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9. Subject to the above observations, the application to implead is

dismissed without any order as to costs.

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