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

Reserved on: 10.10.2022

Decided on: 15.11.2022

+ **ARB.P. 324/2022**

SHRI SATINDER KUMAR GUPTA Petitioner

Through: Mr. Ravi Sikri, Sr. Adv. with
Ms. Akshita Raina, Mr. S.K.
Gupta, Advocates
(M:9999210199,email:
deppankadv@gmail.com).

versus

DIVINE INFRACON PRIVATE LIMITED
& ORS. Respondents

Through: Mr. Vijay Kasana, Advocate for
R-1
(M:9873416665,email:vijaydka
sana@gmail.com)
Mr. Shrey Chathly, Advocate
for R-3&4 (M:9910211045)

WITH

+ **ARB.P. 330/2022**

SHRI SATINDER KUMAR GUPTA Petitioner

Through: Mr. Ravi Sikri, Sr. Adv. with
Ms. Akshita Raina, Mr. S.K.
Gupta, Advocates

versus

DIVINE INFRACON PRIVATE LIMITED
& ORS. Respondents

Through: Mr. Vijay Kasana, Advocate
for R-1
Mr. Shrey Chathly, Advocate
for R-3&4

AND

+ **ARB.P. 332/2022**

SHRI SATINDER KUMAR GUPTA Petitioner

Through: Mr. Ravi Sikri, Sr. Adv. with
Ms. Akshita Raina, Mr. S.K.
Gupta, Advocates

versus

DIVINE INFRACON PRIVATE LIMITED
& ORS.

..... Respondents

Through: Mr. Vijay Kasana, Advocate for
R-1
Mr. Shrey Chathly, Advocate
for R-3&4.

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

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15.11.2022

MINI PUSHKARNA, J.

1. The present petitions have been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called the Act) seeking appointment of a sole arbitrator for adjudication of disputes that have arisen between the petitioner on the one hand and respondents on the other hand.

2. It is the case of the petitioner that in the year 2015, petitioner was approached by respondent No.3 and his wife respondent No.4, partners of respondent No.2, seeking financial assistance in the form of loans. Pursuant thereto, petitioner agreed to provide the financial assistance to the respondent No.3 and 4, partners of respondent No.2, in the form of interest bearing loans.

3. It is the case of the petitioner that in order to fraudulently induce the petitioner into parting with his hard earned money and

granting interest bearing loans, the respondent No. 3 and 4, partners of respondent No.2, had furnished a copy of board resolution of respondent No.2 dated 05.01.2015 to the petitioner, recording the factum of availing an interest bearing loan of Rs.3 crores from the petitioner, which was to be re-paid with interest at the commercial rate of 18% per annum compounded annually. Thus, petitioner transferred a sum of Rs. 3 crores (Rupees Three Crores) into the bank account of respondent No.2 through RTGS from IDBI Bank, Pitampura on 06.01.2015.

4. It is submitted that in order to secure the repayment of the aforementioned interest bearing loans of Rs. 3 crores granted by petitioner, respondent No.2 and its partners, i.e., respondent No.3 and 4 also executed an irrevocable promissory note in favour of the petitioner, jointly and severally promising to pay the petitioner, sum of Rs. 3 crores along with interest thereon at the commercial rate of 18% per annum compounded annually.

5. In support of the above transaction and to document its execution, a statement of confirmation of accounts dated 01.04.2015 was also prepared by the petitioner, which was duly confirmed and acknowledged by and for on behalf of respondent Nos. 2, 3 and 4.

6. It is the case of the petitioner that the respondents again approached the petitioner in the month of April, 2015 expressing their financial troubles and sought to offer three serviced apartments at Plot No.4, Sector 13, Dwarka, New Delhi-110075, purportedly valued at Rs. 1 crore each, against the interest bearing loans availed from the petitioner. The respondents had represented, assured and warranted to

the petitioner that they shall execute the registered conveyance and transfer the title to the three service apartments, in favour of the petitioner against the interest bearing loans availed from the petitioner. It is submitted on behalf of the petitioner that he was fraudulently induced into agreeing to the above referred proposal made by respondents and in pursuance thereof, three Hotelier – Buyer Agreements were executed between the respondent No.1 and the petitioner in respect of the three serviced apartments.

7. The first Hotelier – Buyer Agreement was executed between respondent No.1 and petitioner on 21.04.2015 in respect of Serviced Apartment No. 1032, Plot No.4, Sector 13, Dwarka, New Delhi – 110075.

8. The second Hotelier – Buyer Agreement was executed between respondent No.1 and petitioner on 21.04.2015 in respect of Serviced Apartment No. 1005, Plot No.4, Sector 13, Dwarka, New Delhi – 110075.

9. The third Hotelier – Buyer Agreement was executed between respondent No.1 and petitioner on 14.05.2015 in respect of Serviced Apartment No. 1034, Plot No.4, Sector 13, Dwarka, New Delhi – 110075.

10. It is submitted that the three Hotelier – Buyer Agreements unequivocally record and register the express promise made to the petitioner that the respondents shall execute the sale deed in respect of the respective service apartments in favour of the petitioner. However, the respondents in breach of their contractual obligations, miserably defaulted in executing the sale deeds in respect of the three service

apartments in favour of the petitioner.

11. The respondents retained the physical possession of the three service apartments. However, they requested the petitioner to allow them to utilise the said apartments against payment of monthly rent. Since the petitioner was himself facing severe financial constraints, he agreed to the request of the respondents. It is the case of the petitioner that the respondents fraudulently and malafidely defaulted in the payment of the agreed monthly rent w.e.f. 01.04.2018. The petitioner made repeated requests to the respondents regarding execution of the registered conveyance deeds and payment of the agreed monthly rent. However, respondents continued to avoid their contractual obligations on one pretext or another.

12. The petitioner also received demand notices from the Municipal Corporation dated 01.08.2018, 28.02.2019 and 27.09.2019 seeking to levy penalties in respect of the three service apartments.

13. Since the respondents were not coming forward to execute the registered conveyance deeds for the three service apartments and persisted with their defaults, petitioner issued a legal notice dated 11.03.2019 to respondent No.1 and 3, partner in respondent No.2. Upon receipt of the legal notice, respondents approached the petitioner seeking to repay and discharge their legal liabilities owed to the petitioner in respect of the three service apartments and the interest bearing loans granted by the petitioner. Thus, respondents issued two cheques dated 18.08.2019 for a sum of Rs. 5,94,00,000/- and Rs. 50,00,000/- respectively, signed by respondent No.3 in favour of the petitioner. However, the said cheques were dishonoured and returned

upon presentation. Hence, petitioner issued legal notice dated 07.11.2019 to the respondents. Subsequently, petitioner filed criminal complaint under Section 138 of the Negotiable Instruments Act, 1881, which is pending adjudication before the District Court, Rohini.

14. The petitioner issued another legal notice dated 05.02.2021 to the respondents demanding payment of sum of Rs. 6,44,00,000/- along with interest thereon, @18% per annum. In reply thereto, respondent issued a notice dated 02.04.2021 to the petitioner seeking bilateral discussions in terms of the Dispute Resolution Clause as contained in the three Hotelier – Buyer Agreements. However, no amicable resolution was arrived at.

15. Thus, petitioner issued a legal demand cum invocation notice dated 15.06.2021 to the respondents thereby demanding payment of sum of Rs.6,44,00,000/- along with interest @ 18% per annum and also invoked arbitration clause as contained in clause 21 of each of the three Hotelier – Buyer Agreements.

16. Petitioner filed a petition under Section 9 of the Act seeking interim measures of protection in respect of claims of the petitioner against the respondents. The said petition being O.M.P. (I) (COMM) 291 of 2021 was disposed of by this Court vide order dated 10.12.2021. In the interregnum, respondent No.1 preferred arbitration petitions being 994, 995 and 996 of 2021 against the present petitioner seeking appointment of a sole arbitrator in terms of the arbitration clause as contained in the three Hotelier – Buyer Agreements between petitioner and respondent No.1. It may be noted that the aforesaid three petitions as filed by respondent No.1 have been disposed of by

this Court vide order dated 10.10.2022, by which this Court has appointed a sole arbitrator to adjudicate the disputes between the parties.

17. The present petitions came to be filed on behalf of the petitioner in March, 2022 seeking appointment of a sole arbitrator for adjudication of disputes between the petitioner and the respondents herein.

18. All the six cases, viz. the three petitions filed on behalf of respondent No.1 herein and the present three petitions filed on behalf of petitioner came to be listed before this Court on 10.10.2022. Arguments were heard in all the six cases. Since there was no dispute with respect to appointment of arbitrator in the three petitions filed on behalf of respondent No.1, as noted herein above, the said three petitions were disposed of on 10.10.2022 thereby appointing a sole arbitrator. However, since serious disputes were raised in the present three petitions, they were heard at length and judgment in the present matters came to be reserved.

19. The present three petitions have been vehemently opposed by Ld. Counsel appearing for the respondents. It is submitted that the petitioner granted an interest bearing loan on 06.01.2015 of Rs. 3 crores to respondent No.2. Subsequently, petitioner agreed to novate all previous contracts and understandings between respondent No.2, 3 & 4, which resulted in execution of three Hotelier- Buyer Agreements with regards to the service apartments in question. The said Hotelier – Buyer Agreements were executed only between the petitioner and respondent No.1.

20. It is submitted that after execution of the aforesaid agreements, the earlier loan agreement came to an end. The respondent No.1 had adjusted the amount which was taken as loan by it from the respondent No.2. Thus, it is submitted that both the transactions were independent transactions and the same was duly recorded at para – 19 of the Hotelier – Buyer Agreement, which is reproduced as below:

“The this HBA constitute the entire agreement between the parties and revokes and supersedes all previous discussions, correspondence and deeds between the Parties, if any concerning the matters covered herein whether written, oral or implied. This Agreement shall not be changed or modified except by written amendment duly agreed by the Parties.”

21. It is the case of the respondents that the petitioner purchased the service apartments in question with motive to commercially exploit the same as prices of the commercial properties in those times were soaring. Therefore, the petitioner had specifically negotiated that till the time he sells it, he should not make payment for maintenance charges. Since the petitioner was utilising the property for commercial purposes, the petitioner is liable to pay the maintenance charges which he has not paid till date.

22. It is further the case of the respondents that respondent No.1 had never refused to register sale deed in favour of the petitioner. It is the petitioner who did not want to get the service apartments registered in his own name as he wanted to find a buyer and sell the property on premium directly to the new buyer, thereby avoiding to pay stamp duty for transferring the apartments in his own name. Since

the prices of commercial properties have fallen, and petitioner is not getting the expected returns, petitioner has created the entire story.

23. It is the contention on behalf of the respondents that after execution of the Hotelier – Buyer Agreements, the earlier contracts between respondent No.2 and the petitioner was novated, and new contract has come into existence. Ld. Counsel appearing for the respondents has referred to Section 62 of the Indian Contract Act, 1872 to contend that after novation, earlier contract has come to an end. Thus, it is submitted that respondent No.1 has taken permission from the bank, with whom the property was mortgaged, to transfer the three service apartments in favour of the petitioner, and has already executed the Hotelier – Buyer Agreement, as aforesaid. The possession of the property is already with the petitioner. The petitioner is deliberately not registering the apartments as the value of the apartments has not increased as per his expectations.

24. It is further contended on behalf of respondents that respondent No.1 has admittedly not issued the cheques for an amount of Rs. 6.44 crores. Therefore, the said agreement was not entered with respondent No.1 and therefore respondent No.1 cannot be dragged into the said controversy. The arbitration agreement does not cover the disputes arising between respondent No.2 and the petitioner. The arbitration clause is confined only to the disputes related to the said Hotelier-Buyer Agreements, which refers to disputes between the petitioner and respondent No.1 only.

25. It is further sought to be argued on behalf of respondents that the disputes between the parties have not arisen out of the Hotelier-

Buyer Agreements, as the respondent No.1 has always been ready to execute the sale deeds. The disputes have arisen as per the alleged understanding between the petitioner and respondent No.2, for which there is no arbitration clause. Thus, the arbitration agreement between the petitioner and the respondent No.1 cannot be extended to settle the disputes between the respondent No.2 and the petitioner. Respondent No.1 cannot be referred to arbitration, as the disputes raised by the petitioner do not pertain to the Hotelier - Buyer Agreement. It is submitted that the concept of group of companies, commonality of subject matter and composite transaction is not applicable in the present case as there was no assignment of the Hotelier-Buyer Agreements. The doctrine of Group of Companies would have applied if the Hotelier – Buyer Agreement had been assigned to somebody who was claiming through or on behalf of original party to the agreement.

26. Ld. Counsel for the respondents submits that there is no commonality of subject matter of the disputes between the petitioner and respondent No.1 on the one hand and the disputes between the petitioner and respondent No.2 on the other hand. The respondent No.1 has executed Hotelier – Buyer Agreement with the petitioner for giving service apartment. Whereas, the respondent No.2 has promised to pay Rs. 6.44 crores to the petitioner. The transaction is not a composite transaction, as the contract was novated and further the performance of one transaction is not dependent on the other.

27. In support of his submissions, ld. Counsel for the respondents has relied upon the following judgments:

I. DLF Home Developers Limited Vs. Rajapura Homes Private Limited and Ors., ARB. P. 16 & 17/2020

II. Oil and Natural Gas Corporation Limited Vs. Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42

28. I have heard the Id. Counsels for the parties and considered the submissions made by them.

29. The point for consideration for this Court is whether respondent Nos. 2, 3 & 4 can be referred to take part in arbitration despite execution of Hotelier – Buyer Agreement, which according to respondents, resulted in novation of all previous contracts, agreements between the parties. The second question which needs consideration of this Court is whether respondents 2, 3 and 4 can be referred to take part in arbitration despite the fact that the said respondents are non-signatories to the said agreements containing the arbitration clause.

30. There is no dispute as to the execution of the three Hotelier – Buyer Agreements executed between the petitioner and the respondent No.1 and the existence of the identical arbitration agreements therein. Clause 21 of the three Hotelier – Buyer Agreements, which is identical, is reproduced as under for ready reference:

“21. Any and all disputes or differences between THE HOTELIER and THE BUYER arising out of or in connection with this Agreement or its performance shall be settled amicably within 15 days through consultation between the Parties.

Thereafter, if the Parties have failed to reach an amicable settlement on any or all disputes or differences arising out of or in connection with this Agreement or its performance, such disputes or differences shall be submitted to Arbitration for final adjudication. Arbitration proceedings shall be conducted by a Sole Arbitrator who shall be appointed mutually by THE HOTELIER and the Buyer. Such arbitration shall be in accordance with the Indian (Arbitration and Conciliation) Act, 1996 ("Arbitration Act") and the rules made there under and/or any amendments thereof.

The arbitration proceedings shall be held in English and at New Delhi.

Decision of the Arbitrator shall be final and binding upon the Parties.

The Courts at Delhi alone shall have the exclusive jurisdiction for the purpose of this Agreement."

31. The three Hotelier – Buyer Agreements clearly and categorically record that the consideration for the serviced apartments had been received on behalf of respondent No.1 by respondent No.2 i.e. Jagat Overseas, the partnership concern of respondents 3 and 4. Respondent No.2 is expressly stated to be the associate firm of respondent No.1. Clause 1 of the three Hotelier – Buyer Agreements contains the recital to the aforesaid effect.
32. Clause 1 of First Hotelier – Buyer Agreement dated 21.04.2015 is reproduced as below for ready reference:-

"1. That in consideration of THE BUYER having agreed to pay a sum of Rs.1,00,00,000 (Rupees One Crore Only) paid vide RTGS No. IBKLR92015010600080609 dated 06.01.2015 for Rs.50,00,000/-, RTGS No. IBKLR92015010600080867 dated 06.01.2015 for

Rs.50,00,000/- drawn on Indian Bank, as the Sale Price and all other costs, charges, deposits and applicable taxes etc. pertaining to the fully furnished Service Apartment No. 1032 in the said Building admeasuring Build up Area 70.97 Sq. Mtrs. (764 Sq. Ft.) and having Super Area 141.94 Sq. Mtrs (1528 Sq. Ft.) at Tenth Floor. The above said sale consideration has been received on behalf and request of The Hotelier by Jagat Overseas, a partnership concern and an associate firm of THE HOTELIER, the receipt of which, The Hotelier hereby admits and acknowledges in full and final settlement and thereby THE HOTELIER hereby agrees to sell and THE BUYER hereby agrees to purchase the said fully furnished Service Apartment on the following terms and conditions;

a. THE HOTELIER has provided in the fully furnished Service Apartment, along with the furniture, fittings and fixtures, all the necessary basic amenities/facilities such as electric, power, meter/sub-meter etc. to THE BUYER and is already included in the sale price. It is agreed between Hotelier and the Buyer that the maintenance of the service apartment shall be done by the Hotelier free of cost if there is no actual usage of the Apartment and only till the Buyer keeps the said service apartments with them and thereafter applicable maintenance on prorated basis will be charged from the new purchaser from the date of such sale irrespective of the fact that there is actual usage or not. Such maintenance charges shall be agreed by the new buyer. Any family members, friends are not to be considered as new purchasers/Buyer.

b. THE HOTELIER shall have the absolute right to assign the interest in the car parking areas in the 3rd (third) basement in the said Building, at its sole discretion to any person/s either in whole or in parts. However it is agreed that the Hotelier shall at all times reserve and provide Two car parking(s) space to the Buyer to its satisfaction at its own cost.

c. THE BUYER shall observe, perform and comply with the provisions of the Rules and Regulations as framed by THE HOTELIER/its nominated Maintenance Agency and provided to the Buyer in respect of said Service Apartment and the said Service Apartments Complex for the Maintenance and use of the common areas in the said Service Apartments Complex and the said Building, maintenance of which is totally under the scope of HOTELIER/its nominated Maintenance Agency in all respect. ”

33. Clause 1 of Second Hotelier – Buyer Agreement dated 21.04.2015 is reproduced as below for ready reference:

*“1. That in consideration of THE BUYER having agreed to pay a sum of **Rs.1,00,00,000 (Rupees One Crore Only)** paid vide RTGS No. **IBKLR92015010600080211** dated **06.01.2015** for **Rs.50,00,000/-**, RTGS No. **IBKLR92015010600080529** dated **06.01.2015** for **Rs.50,00,000/-** drawn on Indian Bank, Delhi as the Sale Price and all other costs, charges, deposits and applicable taxes etc. pertaining to the fully furnished **Service Apartment No. 1005** in the said Building admeasuring **Build up Area 68.56 Sq. Mtrs. (738 Sq. Ft.)** and having **Super Area 137.12 Sq. Mtrs (1476 Sq. Ft.)** at Tenth Floor. The above said sale consideration has been received on behalf and request of The Hotelier by Jagat Overseas, a partnership concern and an associate firm of THE HOTELIER, the receipt of which, The Hotelier hereby admits and acknowledges in full and final settlement and thereby THE HOTELIER hereby agrees to sell and THE BUYER hereby agrees to purchase the said fully furnished Service Apartment on the following terms and conditions;*

a. THE HOTELIER has provided in the fully furnished Service Apartment, along with the furniture, fittings and fixtures, all the necessary basic amenities/facilities such as electric, power, meter/sub-meter etc. to THE BUYER and

is already included in the sale price. It is agreed between Hotelier and the Buyer that the maintenance of the service apartment shall be done by the Hotelier free of cost if there is no actual usage of the Apartment and only till the Buyer keeps the said service apartments with them and thereafter applicable maintenance on prorata basis will be charged from the new purchaser from the date of such sale irrespective of the fact that there is actual usage or not. Such maintenance charges shall be agreed by the new buyer. Any family members, friends are not to be considered as new purchasers/Buyer.

*b. THE HOTELIER shall have the absolute right to assign the interest in the car parking areas in the 3rd (third) basement in the said Building, at its sole discretion to any person/s either in whole or in parts. **However it is agreed that the Hotelier shall at all times reserve and provide Two car parking(s) space to the Buyer to its satisfaction at its own cost.***

c. THE BUYER shall observe, perform and comply with the provisions of the Rules and Regulations as framed by THE HOTELIER/its nominated Maintenance Agency and provided to the Buyer in respect of said Service Apartment and the said Service Apartments Complex for the Maintenance and use of the common areas in the said Service Apartments Complex and the said Building, maintenance of which is totally under the scope of HOTELIER/its nominated Maintenance Agency in all respect.”

34. Clause 1 of Third Hotelier – Buyer Agreement dated 14.05.2015 is reproduced below for ready reference-

*1. That in consideration of THE BUYER having agreed to pay a sum of **Rs.1,00,00,000 (Rupees One Crore Only)** paid vide RTGS No. **IBKLR92015010600080817** dated **06.01.2015** for **Rs.50,00,000/-**, RTGS No. **IBKLR92015010600080767** dated **06.01.2015** for*

Rs.50,00,000/- drawn on Indian Bank, as the Sale Price and all other costs, charges, deposits and applicable taxes etc. pertaining to the fully furnished Service Apartment No. 1034 in the said Building admeasuring Build up Area 70.97 Sq. Mtrs. (764 Sq. Ft.) and having Super Area 141.94 Sq. Mtrs (1528 Sq. Ft.) at Tenth Floor. The above said sale consideration has been received on, behalf and request of The Hotelier by Jagat Overseas, a partnership concern and an associate firm of THE HOTELIER, the receipt of which, The Hotelier hereby admits and acknowledges in full and final settlement and thereby THE HOTELIER hereby agrees to sell and THE BUYER hereby agrees to purchase the said fully furnished Service Apartment on the following terms and conditions;

a. THE HOTELIER has provided in the fully furnished Service Apartment, along with the furniture, fittings and fixtures, all the necessary basic amenities/facilities such as electric, power, meter/sub-meter etc. to THE BUYER and is already included in the sale price. It is agreed between Hotelier and the Buyer that the maintenance of the service apartment shall be done by the Hotelier free of cost if there is no actual usage of the Apartment and only till the Buyer keeps the said service apartments with them and thereafter applicable maintenance on prorata basis will be charged from the new purchaser from the date of such sale irrespective of the fact that there is actual usage or not. Such maintenance charges shall be agreed by the new buyer. Any family members, friends are not to be considered as new purchasers/ Buyer.

b. THE HOTELIER shall have the absolute right to assign the interest in the car parking areas in the 3rd (third) basement in the said Building, at its sole discretion to any person/s either in whole or in parts. However it is agreed that the Hotelier shall at all times reserve and provide Two car parking(s) space to the Buyer to its satisfaction at its own cost.

c. THE BUYER shall observe, perform and comply with the provisions of the Rules and Regulations as framed by THE HOTELIER/its nominated Maintenance Agency and provided to the Buyer in respect of said Service Apartment and the said Service Apartments Complex for the Maintenance and use of the common areas in the said Service Apartments Complex and the said Building, maintenance of which is totally under the scope of HOTELIER/its nominated Maintenance Agency in all respect.”

35. Reading of the aforesaid clause in the three Hotelier-Buyer Agreements discloses that respondent No.2 and its partners, i.e., respondent Nos. 3 & 4, who are also husband and wife, have received the entire consideration and are evidently the beneficiaries of the entire transaction. It is pertinent to note here, as pointed out by Id. Senior Counsel for the petitioner, that sons of respondent No.3 & 4 are the directors of respondent No.1.

36. From the facts as recorded hereinabove, it transpires that the transaction between the petitioner and respondent No.1, is intrinsically linked to the transaction between the petitioner and respondent No.2, 3 & 4. There is clearly commonality of subject matter of the two transactions.

37. Commenting on the aspect of referring non-signatory parties to arbitration, Supreme Court in the case of ***Chloro Controls India (P) Ltd. Vs. Severn Trent Water Purification Inc.***, reported as **(2013) 1 SCC 641**, held as follows:

“71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those

claiming under or through them, the courts under the English law have, in certain cases, also applied the “group of companies doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, “intention of the parties” is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

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.”

38. Similarly, this Court in the case of ***Shapoorji Pallonji and Co. Pvt. Ltd. Vs. Rattan India Power Ltd. and Another, reported as 2021 SCC OnLine Del 3688*** has dwelled on the circumstances when non-signatories can be compelled to arbitrate and has held as follows:

22. In Chloro Controls (supra), the Supreme Court had referred to two theories that could be applied to compel non-signatories to an arbitration agreement to arbitrate, as under:

“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.”

23. In addition to the above, the Supreme Court had also referred to the Group of Companies doctrine and applied the same for compelling certain parties to arbitrate in that case.

24. According to Gary B. Born, the principal legal basis for holding that a non-signatory be bound by an arbitration agreement is to “include both purely consensual theories (Eg. agency, assumption, assignment) and non-consensual theories (Eg. estoppel, alter ego)”. (see *International Commercial Arbitration*, Volume I, (Third Edition), p. 1531).

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28. There exists another set of cases where the Courts have compelled non-signatories to arbitrate by disregarding their corporate facade or where the Courts have found the signatory to be an alter ego of the non-signatory or vice versa. In *Barcelona Traction, Light and Power Company Ltd.* : (1970) ICJ Rep. 3, the International Courts of Justice had explained the doctrine of piercing the corporate veil in the following words:

“the process of lifting the corporate veil’ or ‘disregarding the legal entity’ has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.”

39. Considering the law as aforesaid, there is no doubt that in the present case the two transactions pertaining to interest bearing loan of Rs. 3 crores granted by petitioner to respondent No.2 to 4 is intrinsically linked with the subsequent transaction of execution of the

three Hotelier-Buyer Agreements between petitioner and respondent No.1. The obligations and liabilities under the aforesaid transactions as well as the claims and counter-claims of the parties arise from the same set of facts. Thus, perusal of the facts in the present case clearly establish that there is direct relationship between the parties. There is direct commonality of the subject matter and the transaction between the parties is also of composite nature.

40. Supreme Court in the case of ***Mahanagar Telephone Nigam Limited v. Canara Bank, (2020) 12 SCC 767*** has discussed the incidents as to when a third party to an arbitration agreement can be included for reference to arbitration proceedings, and has held as follows:

“10.6. The circumstances in which the “group of companies” doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A “composite transaction” refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.”

41. As noted above, in the present case respondent No.2 and its partners, ie. Respondent Nos. 3 & 4, received the entire consideration of the interest bearing loan as extended by the petitioner. Thus, respondent Nos. 2 to 4 are beneficiaries of the entire transaction

wherein they received loan from the petitioner. Subsequently, three Hotelier – Buyer Agreements were executed between petitioner and respondent No.1, against the repayment of the loan to the petitioner. The directors of respondent No.1 Company are the sons of respondent No.3 & 4. Thus, it is clear that the respondents are mere alter egos, associates and group concerns of each other. Even otherwise, the disputes which have arisen are linked to each other in substance and essence as they arise from the same set of facts. Therefore, the contention raised on behalf of respondents that the disputes relating to repayment of loan is only between petitioner and respondent Nos. 2 to 4 and that the said disputes cannot be referred to arbitration on the basis of Hotelier – Buyer Agreements between petitioner and respondent No.1, which contains the arbitration clause, is found to be untenable.

42. The contention on behalf of the respondents that after execution of the Hotelier – Buyer Agreements, the earlier contracts between respondent No.2 and petitioner were novated in view of Section 62 of the Indian Contract Act, also does not hold any water. The principle of novation of contract has no applicability to the facts and circumstances of the present case, since it is the contention on behalf of respondents themselves that the petitioner is entitled to the amounts for which cheques had been issued by respondent No.2, which were subsequently dishonoured, for which proceedings under Section 138 of the Negotiable Instruments Act are also pending. The issue with respect to execution of the Hotelier – Buyer Agreements between petitioner and respondent No.1, is closely connected to the issue of

interest bearing loan given by petitioner to respondent No. 2, for which the beneficiaries were the partners, i.e., respondent Nos. 3 & 4. Thus, it cannot be said that the two transactions are disconnected with each other. Thus, the plea that respondent Nos. 2 to 4 ought not to be referred for arbitration, has no merit.

43. This Court in the case of ***Vijay Kumar Munjal and Ors. Vs. Pawan Munjal and Ors., 2022 SCC OnLine Del 499*** has held as follows:

“113. In addition, there are various principles on the basis of which a non-signatory may be compelled to arbitrate. These include cases where a non-signatory is an alter ego signatory {Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 [hereafter ‘Chloro Control’]; Barcelona Traction, Light and Power Company Ltd. : (1970) ICJ Rep. 3 [hereafter ‘Barcelona Traction’]}; the non-signatory is found to be a party by lifting the corporate veil {Ibid [Barcelona Traction]; Builders Federal (Hong Kong) v. Turner Const. : 655 F. Supp. 1400 (S.D.N.Y. 1987); Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc. : 933 F.2d 131, 32, 32 Fed. R. Evid. Serv. 1218 (2d Cir. 1991); Thomson-CSF, S.A. v. American Arbitration Association : 64 F.3d 773 (2d Cir. 1995)}; the non-signatory is a part of the same group of companies {Ibid [Chloro Controls]; Mahanagr Telephone Nigam Ltd. v. Canara Bank, (2020) 12 SCC 767 [hereafter ‘Canara Bank’]; Dow Chemical v. Isover-Saint-Gobain (1984) Rev Arb 137; GE Energy Powe Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC : 140 S.Ct. 1637, 1640 (2020)}; the non-signatory is a party to a composite transaction {Ibid [Canara Bank]}; the non-signatory's consent is implied {Gvozdenovic v. United Air Lines, Inc., : 933 F.2d 1100 (2d. Cir. 1991)}; the non-signatory is estopped from avoiding arbitration where it knowingly received benefits under the agreement {Life Techs Corp. v. AB Sciex Prop. Ltd. : 803 F. Supp. 2d 270; Deloitte Noraudit v. Deloitte Haskins Sells : 9 F.3d 1060 (2d Cir.

1993); *Avila Group Inc. v. Norma J. of California* : 426 F. Supp. 537 (S.D.N.Y. 1977) (S.D.N.Y. 1977)}.”

44. Considering the facts of the present case, it is seen that crux of the dispute which forms subject matter of the present proceedings, pertains to repayment of the interest bearing loans advanced by petitioner to respondent No. 2 through its partners viz. respondent Nos. 3 and 4. The three Hotelier and Buyer Agreements were executed between the petitioner and respondent No. 1 for three Service Apartments in a Five Star Hotel against the repayment of loans. Since respondent No. 1 failed to execute conveyance of the three Service Apartments in favour of the petitioner, respondents approached the petitioner and sought to settle the disputes. Thus, two cheques were issued by respondent No. 3 in favour of the petitioner. The said cheques were dishonoured on presentation to the Bank. Fact remains that respondents have neither paid the interest bearing loans advanced by the petitioner nor executed the registered conveyance of the three Service Apartments in favour of the petitioner. The aforesaid disputes are intricately intertwined and linked with each other.

45. Thus, this Court is of the *prima facie* view that respondent Nos. 2 to 4 are required to be joined in the arbitral proceedings as parties, even though they may not be signatories to the Hotelier – Buyer Agreements, which contain the arbitration clause. The said course is imperative in order to adjudicate upon the disputes pending between the parties which are fundamentally and essentially not only arising from the same set of facts but also innately connected and associated with each other. However, it is clarified that the view given by this

Court is a *prima facie* view and the parties are not precluded from raising the said issue before the arbitral tribunal.

46. In view of the aforesaid, the present matters are also referred to the arbitration of Hon'ble Mr. Justice S.P. Garg, former Judge of Delhi High Court, Mobile No.: 9910384627, who was appointed as sole arbitrator to adjudicate the disputes between the parties in the connected petitions viz. ARB.P. 994/2021, ARB.P. 995/2021 & ARB.P. 996/2021 by order dated 10.10.2022.

47. Parties are directed to seek requisite disclosures under Section 12 of the Arbitration and Conciliation Act, 1996 from the learned sole arbitrator before commencement of the arbitration proceedings.

48. The learned sole arbitrator shall be entitled to fees as stipulated in the fourth schedule of the Arbitration and Conciliation Act, 1996.

49. All rights and contentions of the parties are left open for consideration by the learned sole Arbitrator.

50. The aforesaid petitions are disposed of in the aforesaid terms.

(MINI PUSHKARNA)
JUDGE

NOVEMBER 15, 2022

c/PB