

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Reserved on : 8th February, 2023**
Pronounced on: 26th April, 2023
+ **O.M.P.(COMM) No.456/2020 and I.A.No.7480/2020**

M /S TRADE INTERNATIONAL THROUGH PROPRIETOR
MR.P.K.HANDA Petitioner

Through: Mr. Varun Singh, Mr. Ytharth
Kumar, Ms. Alankriti Dwivedi,
Ms. Kajal S. Gupta, Mr. Himanshu
Yadav, Mr. Mohd. Atif Ahmad,
Mr. Pankaj K. Modi and Ms.
Smriti Wadhwa, Advocates

versus

M/S AVON HEALTHCARE PVT LTDRespondent

Through: Mr. Prashant Mehta and Ms. Divita
Vyas, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The petitioner vide the present petition under Section 34 of the Arbitration & Conciliation Act, 1996, (hereinafter referred to as 'the Act') has sought the following reliefs:

*“ a) allow the present petition and consequently set aside the Impugned Arbitral Award dated 31.05.2020 pronounced on 01.06.2020 passed by learned Sole Arbitrator Hon'ble Mr. Justice [Retd] V. K. Bali;
b) Pass such other order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”*

FACTUAL MATRIX

2. The brief facts of the case are that before the learned Arbitral Tribunal, two claim petitions bearing No. DAC/2085A/06-18 and DAC/20858/06-18 were filed. The counter claims have also been filed between the same parties. Both the claims have been decided by the learned Arbitral Tribunal by a common award. The learned counsel appearing on behalf of the parties had also consented that both the claim petitions could be decided by way of passing a common award.

3. M/s Avon Health Care Private Limited, the respondent herein and the claimant before the learned Arbitral Tribunal, is a company incorporated under the Companies Act, 1956 whereas the petitioner M/s Trade International is a Sole Proprietorship of one Mr.P.K.Handa.

4. The respondent herein, i.e., the claimant before the learned Arbitral Tribunal, is engaged in the business of promoting, providing, acquiring, buying, selling, converting developing and erecting health care systems including medical equipments for bio-medical waste management systems. The petitioner herein i.e., the respondent before the learned Arbitral Tribunal, is a sole proprietorship of Mr.P.K.Handa, represented previous constituents of claimant that it is sole authorized distributor and representative in India for all products of Medical Coaches Inc. [MCI] a company established and incorporated under the Laws of United States of America. The petitioner herein (the respondent before the learned Arbitral Tribunal) was also given to understand that Positive Impact Waste Solution Inc. located at New Jersey, U.S.A. (hereinafter referred to as 'PIWS') was engaged in manufacturing of bio-medical waste processing equipments and chemicals. The petitioner herein (the respondent before the learned Arbitral Tribunal) intended to appoint the

claimant, i.e., the respondent herein, as sub-representative for undertaking promotion and sales of the products of PIWS. During negotiations, the previous constituents of the claimant, i.e., the respondent herein, were assured that they would be able to make profit of Rs.50,00,000/- per machine which would be supplied vide the intended Sub Representative Agreement. In addition to aforesaid profit, the claimant, i.e., the respondent herein, would also be entitled to commission @ 8% on executed sales.

5. The petitioner herein (the respondent before the learned Arbitral Tribunal) also represented that though it was a distributor of MCI but it would be fully responsible for the products supplied to the claimant, i.e., the respondent herein, and the claimant, i.e., the respondent herein, would not have any privity of contract with actual manufacturers. Based on representations and assurances of the petitioner herein (the respondent before the learned Arbitral Tribunal) mentioned hereinbefore, the previous constituents of claimant, i.e., the respondent herein, entered into Sub Representative Agreement dated 1st November, 2012 with the petitioner herein (the respondent before the learned Arbitral Tribunal) by virtue of which the claimant, i.e., the respondent herein, was to undertake sale promotion activities of PIWS 3000 in the territories of Haryana, Punjab, Chandigarh, Himachal Pradesh, Uttarakhand and Jammu & Kashmir for a period of four years. In consideration of the said undertaking, previous constituents of claimant, i.e., the respondent herein, made initial payment of Rs.12,50,000/- immediately upon execution of the agreement. The balance payment of Rs.10,83,333/- pursuant to negotiations was made by the the respondent herein, to the petitioner

herein, i.e., the respondent before the learned Arbitral Tribunal, towards full and final payment with respect to Sub Representative Agreement mentioned above. The receipt of the payment towards full and final payment is evidenced by side Letter Agreement dated 7th May, 2013.

6. The previous constituents of claimant, i.e., the respondent herein and the petitioner (the respondent before the learned Arbitral Tribunal), similarly had also entered into Sub Distribution Agreement of even date, i.e., 7th May, 2013, which was for the purpose of after sale service and distribution and sale of Coldster in the territories mentioned above. Coldster is stated to be a vital requirement to ensure that PIWS 3000 machines fulfill their purpose towards efficient waste management. The payments made by the claimant, i.e., the respondent herein, were towards exclusive appointment as sub representative for undertaking sale and distribution of PIWS 3000 and for undertaking after sale and distribution for the same.

7. The agreements mentioned above were also entered into by the previous constituents of claimant, i.e., the respondent herein, Mr.Kuldeep Singh, Mr.Gurpreet Singh and Mr.Semjeet Singh Brar in their individual capacity. Later, the claimant, i.e., the respondent herein, was incorporated with an intent to promote and grow in the industry of bio-medical waste management systems for which respondent, i.e., the petitioner herein, issued 'No Objection Certificate' on 7th October, 2013. No payment was made towards assigning the scope of work mentioned in the agreement.

8. The respondent before the learned Arbitral Tribunal, i.e., the petitioner herein, had represented to the claimant, i.e., the respondent herein that M/s Snowcross Healthcare Pvt. Ltd. was a chosen agent which

was to handle the import in both the machines in question and, therefore, payment was to be made in favour of its agent mentioned above. Mr.P.K.Handa, the Sole proprietor of respondent M/s Trade International, i.e., the petitioner herein, was also the director of its chosen agent M/s Snowcross International.

9. Based on instructions and representations of respondent, i.e., the petitioner herein, the claimant, i.e., the respondent herein, placed a purchase order vide letter dated 1st January, 2014, with M/s Snowcross Healthcare Pvt. Ltd. for purchase of PIWS 3000 for the price of US \$2,00,000/-. The claimant, i.e., the respondent herein had already made a payment of Rs.50,00,000/- in November, 2013 by cheques for the purchase order. M/s Snowcross Healthcare Pvt. Ltd., on instructions of respondent, i.e., the petitioner herein, issued proforma invoice dated 22nd January, 2014 for US \$ 2,00,000/- on stipulated terms and conditions. The claimant, i.e., the respondent herein, stood by the terms of Proforma Invoice and made balance payment of Rs.72,00,000/- by cheques in the months of May and July, 2014 as per instructions from the respondent, i.e., the petitioner herein.

10. It was the case of the claimant, i.e., the respondent herein, before the learned Arbitrator that in light of the representations and assurances given by respondent, i.e., the petitioner herein, culminating into Sub Representative Agreement dated 1st November, 2012, it undertook vigorous steps towards marketing PIWS 3000 with various hospitals like PGIMER, Chandigarh; Mahant Indresh Hospital Dehradun; Himalayan Hospital Trust, Dehradun and Govt. Multi Speciality Hospital, Chandigarh and departments across the country with an intent to promote

and avail orders with respect to the same. Endeavours made by the claimant, i.e., the respondent herein, evoked positive response from several potential buyers who were keen to see and inspect machines personally prior to placing their orders. Marketing the product was undertaken on the assurance of timely delivery of functional machines by the petitioner as stipulated in the agreement. Claimant, i.e., the respondent herein, had undertaken presentations before various forums including Ministry of Health and Family Welfare [Panchkula] and National Green Tribunal [Principal Bench], New Delhi so as to assert utility and effectiveness of the product. Marketing exercise involved substantial finances, resources and time of the claimant was consumed which, however, turned abortive because of eventual failure of respondent, i.e., the petitioner herein, to deliver fully functional machines in a timely manner. Dedicated steps taken by the claimant, i.e., the respondent herein, for marketing the products were brought to the notice of the respondent, i.e., the petitioner herein.

11. It is further the case of the claimant, i.e., the respondent herein, before the learned Arbitrator that as per Proforma Invoice, machine was to be delivered within 90 days from the date of payment to the respondent, i.e., the petitioner herein, but there was delay of more than two years by respondent, i.e., the petitioner herein, on one pretext or the other resulting into serious financial loss and harassment to the claimant, i.e., the respondent herein.

12. Eventually, after a prolonged delay, towards aforesaid Proforma Invoice, on the instructions of the respondent, i.e., the petitioner herein, M/s Snowcross Healthcare Pvt. Ltd. issued invoice dated 17th December,

2015 for a price of Rs.1,45,24,800/- with respect to purchase order. The machine sent by respondent, i.e., the petitioner herein, was received by the claimant, i.e., the respondent herein, on 18th December, 2015. On opening the container, the claimant, i.e., the respondent herein, was shocked and surprised to see that the machine was old and in a very poor condition with several parts which were rusted and poorly assembled.

13. The claimant, i.e., the respondent herein, immediately informed the respondent before the Arbitral Tribunal, as regards the same on phone resulting into the visit of the respondent at the claimant's warehouse on 23rd December, 2015. The machine was personally inspected by Mr. P.K.Handa in the presence of the officials of the claimant, i.e., the respondent herein and on inspecting the machine the respondent, i.e., the petitioner herein, admitted that the machine was an old model manufactured in 2009 and was in a despicable condition with all essential parts completely damaged/rusted. The respondent, i.e., the petitioner herein, however assured the claimant, i.e., the respondent herein, that the matter would be taken up with PIWS.

14. The claimant before the on instructions of the respondent, i.e., the petitioner herein, contacted a chartered engineer who inspected the machine and concluded that the machine was not in working condition in addition to being an outdated machine manufactured in 2009. This observation was made in Inspection Report dated 5th January, 2016. The respondent, i.e., the petitioner herein, assured the claimant, i.e., the respondent herein that the claimant, i.e., the respondent herein would be refunded the amount along with interest and other losses/damages.

15. PIWS vide an e-mail dated 5th January, 2016 informed the respondent, i.e., the petitioner herein that the damage to machine was likely to have been caused during the course of its shipment and that a mistake had occurred when the machine was assembled because of which old parts had been used. It assured that the old parts would be replaced by new parts. The entreaties and demands made by the claimant, i.e., the petitioner herein, for replacement of machine or refund of money were initially agreed to but later denied.

16. As per the discussions in the foregoing paragraphs, the claimant, i.e., the respondent herein, issued to the respondent, i.e., the petitioner herein and its agent M/s Snowcross Healthcare Pvt. Ltd. legal notice dated 22nd November, 2017 highlighting several instances of breach on the part of the respondent, i.e., the petitioner herein, and its representatives and called upon to redress its grievances like refund of money paid to the respondent, i.e., the petitioner herein, refund of marketing expenses and the loss suffered by the claimant, i.e., the respondent herein.

17. No response was given by the respondent before the learned Arbitral Tribunal, i.e., the petitioner herein, within the stipulated time and left with no alternative, the claimant, i.e., the respondent herein, in terms of Clause 5.3 of the Sub Representative Agreement dated 1st November, 2012 invoked the arbitration in both the petitions vide notice dated 12th January, 2018. The respondent before the learned Arbitral Tribunal, i.e., the petitioner herein, gave reply to the said notice and denied each and every content of the said notice.

18. The claimant i.e., the respondent herein filed a petition under Section 11 (6) of the Act for appointment of the Sole Arbitrator for adjudicating the disputes between the parties arising out of the two agreements dated 1st November, 2012.

19. The Sole Arbitrator has been appointed for adjudicating the arbitral disputes between the parties. The claimant, i.e., the respondent herein, has filed two claims as stated above before the sole arbitrator.

20. The claimant, i.e., the respondent herein has raised the following claims before the learned Arbitrator in DAC/2085A/06-18 which are as under:

“Claim A: Refund the payment of Rs.1,45,33,333/- [Rs.23,33,333/- 8made towards Agreement dated 01.11.2012 and Rs.1,22,00,000/- made towards Purchase Order dated 01.01.2014]

Claim B: Refund the Marketing expenses to the tune of Rs.40,00,000/- [as quantified till date] incurred by the Claimant on the Respondents misleading assurances.

Claim C: Loss of Profit to the tune of Rs.13,20,00,000/- [taking into consideration the assured commission of 8% as per the Agreement the Profits of Rs.50,00,000 /- per Machine which the Claimant was to generate over the 4 year period of the Contract where the Claimant intended to sell atleast 5 Machines in a year]

Claim D: Compound Interest at the rate of 1.5% pm compounded monthly from the date of accrual of each claim till its final repayment.”

and the following claim in claim petition bearing No.DAC/2085B/06-18 on the same averments and grounds as in claim petition bearing No. DAC/2085A/06-18 which is as follows:

“Claim A: Loss of Profit to the tune of Rs.1,05,00,000/- towards potential sale of Coldster which the Claimant

was unable to execute due to Respondents failure to fulfill their obligations under both the Agreements dated 01.11.2012.”

21. On 17th July, 2018, the statement of claim was filed by the respondent, i.e., the claimant before the learned Arbitral Tribunal. Statement of Defence was filed by the petitioner, i.e., (the respondent before the learned Arbitral Tribunal) on 27th December, 2018.

22. On 22nd January, 2019, an application under Section 16 of the Act was filed by the petitioner herein (the respondent before the learned Arbitral Tribunal). On 25th May, 2019, the petitioner herein (the respondent before the learned Arbitral Tribunal) has submitted that the application under Section 16 of the Act may be decided along with the main case and the learned counsel appearing on behalf of the claimant, i.e., the respondent herein stated that there would be no need to lead oral evidence and the learned counsel appearing for the petitioner herein (the respondent before the learned Arbitral Tribunal) sought permission to lead oral evidence which was denied by the learned Arbitrator.

23. After completion of the pleadings the learned Arbitrator passed the impugned award dated 31st May, 2020 and on 1st June, 2020, the impugned award was pronounced through email. Hence the instant petition has been filed, impugning the said arbitral award.

SUBMISSIONS

ON BEHALF OF THE PETITIONER

24. The learned counsel appearing on behalf of the petitioner submitted that the impugned award passed is in contravention of the fundamental policy of Indian law, is perverse, suffers from patent illegality and in

conflict with the basic notions of justice and morality thereby being liable to be set aside under Section 34 (2) of the Act. The learned sole arbitrator has not acted in judicious manner and instead passed an award which is *ex facie* arbitrary, capricious, inherently illegal and based on completely extraneous considerations and contrary to the terms of the agreement between the parties as well as in violation of principles of natural justice.

25. It is further submitted that the learned Arbitrator failed to consider and decide the application/objections filed by the petitioner under Section 16 of the Act. The learned Arbitrator also ignored, disregarded and acted contrary to the express statutory mandate of Section 16 (5) of the Act which made it incumbent upon the learned Arbitrator to decide on the plea raised by the petitioner under Section 16 of the Act. It is submitted that since the learned Arbitrator has failed to decide the application of the petitioner under Section 16 of the Act, therefore, the impugned award on this ground alone is amenable to interference under Section 34 read with Section 16(6) of the Act.

26. The learned counsel appearing on behalf of the petitioner submitted that the learned Arbitrator failed to consider that the purported claim raised by the respondent (the claimant before the learned Arbitrator) pertained to sale of an equipment called PIWS 3000 which was directly and substantially covered under a separate and independent agreement known as purchase order dated 1st January, 2014 read with proforma invoice dated 22nd January, 2014 and was not under the scope of Sub Distributionship Agreement and the Sub Representative Agreement which are very different.

27. It is also submitted that the instant dispute between the parties were beyond the scope of authority conferred to the learned Arbitrator under the Arbitration Clause of Sub Distribution Agreement dated 1st November, 2012 and the Sub Representative Agreement dated 1st November, 2012.

28. It is vehemently submitted that the learned Arbitrator failed to notice and evaluate express terms of Sub Representative Agreement dated 1st November, 2012, a bare perusal of which would have shown that the sale of PIWS 3000 equipment by M/s Snowcross Healthcare Pvt. Ltd. to the respondent, i.e., the claimant before the learned Arbitrator, was nowhere covered under the said agreement dated 1st November, 2012 and if anything was there, is a clear indication to the contrary. It is also submitted that the scope of services envisaged to be rendered under the Sub Representative Agreement dated 1st November, 2012 were related to sales, promotion activities of the product, *namely*, PIWS 3000 and it did not contemplate sale of equipment by M/s Snowcross Healthcare Pvt. Ltd. to the respondent, i.e., the claimant before the learned Arbitrator, in respect of which transaction, disputes have been raised by the respondent, i.e., the claimant before the learned Arbitrator.

29. It is submitted that the petitioner was not even a party to the said purchase order dated 1st January, 2014 and proforma invoice dated 22nd January, 2014, therefore, the arbitration proceedings before the learned Arbitrator were *ex facie* without jurisdiction.

30. The learned counsel appearing on behalf of the petitioner submitted that the purported claims were for refund of purchase price in respect of a PIWS 3000 equipment which was purchased by the respondent, i.e., the

claimant before the learned Arbitrator, from M/s Snowcross Healthcare Pvt. Ltd. through purchase order dated 1st January, 2014 and proforma invoice dated 22nd January, 2014 which is duly signed by the respondent, i.e., the claimant before the learned Arbitrator, and M/s Snowcross Healthcare Pvt. Ltd. and the relief, if any, was to be directed against M/s Snowcross Healthcare Pvt. Ltd. which had taken money from the respondent, i.e., the claimant before the learned Arbitrator. But, M/s Snowcross Healthcare Pvt. Ltd. inspite of being necessary party against whom the relief ought to have been sought was not made a party before the arbitration proceedings.

31. It is further submitted on behalf of the learned counsel appearing for the petitioner that the purported claims pertained to efficacy/ working condition of the equipment, however, the manufacturer of machine was not made a party and no action was initiated against the manufacturer, i.e. PIWS.

32. It is further submitted that therefore, the learned Arbitrator failed to appreciate that civil/arbitral action, if any, is maintainable only against the original manufacturer and the entity on whom the purchase order was placed, namely, M/s Snowcross Healthcare Pvt. Ltd. and none of whom were made party despite being necessary party in the sense that relief, if any, could be claimed only from them. Thus, the learned Arbitrator failed to appreciate that the arbitration claims/proceedings instituted were bad in law for non-joinder of necessary parties.

33. It is submitted by the learned counsel appearing on behalf of the petitioner that the learned Arbitrator decided all the claims made by the respondent, i.e., the claimant before the learned Arbitrator, in relation to

the Sub Representative Agreement substantially in favour of the respondent. The learned Arbitrator also decided the claim made by the respondent in relation to the transaction between the respondent and M/s Snowcross Healthcare Pvt. Ltd. in favour of the respondent and against the petitioner despite the fact that M/s Snowcross Healthcare Pvt. Ltd. was not a party to the arbitration proceedings.

34. It is submitted that in the arbitration proceedings between the petitioner and the respondent, the learned Arbitrator had no jurisdiction to adjudicate upon a purchase order/proforma invoice dated 22nd January, 2014 executed between the respondent and M/s Snowcross Healthcare Pvt. Ltd. when M/s Snowcross Healthcare Pvt. Ltd. was not a party to the arbitration proceedings. The respondent had never invoked arbitration against M/s Snowcross Healthcare Pvt. Ltd. nor had it sought reference against M/s Snowcross Healthcare Pvt. Ltd. in its petition under Section 11 of the Act. It is further submitted that this Court vide its order dated 29th May, 2018 referred only the petitioner and the respondent to arbitration and only in relation to the Sub Representative Agreement and Sub Distribution Agreement dated 1st November, 2012 executed only between the petitioner and the respondent. There are no references made in relation to the separate transaction/arbitration agreement between the respondent M/s Snowcross Healthcare Pvt. Ltd. under the purchase order/proforma invoice. As such, the award passed by the learned Arbitrator in relation to the abovesaid purchase order/proforma invoice is *ex facie* beyond the reference and, therefore, beyond jurisdiction of the learned Arbitrator and requires to be set aside on this ground alone.

35. It is submitted by the learned counsel appearing on behalf of the petitioner that the impugned award is in fact complete negation of cardinal principles that a company is a separate juristic person. A person dealing with the company is deemed to have notice that it is dealing with a juristic entity, separate from its promoters/ directors/ members/ shareholders. It is further submitted that it is perfectly legal for proprietor or director of one concern to be a director in other concerned or for multiple companies having the same address or corresponding from a common address. This fact does not defeat the separate juristic personality of a company.

36. It is further submitted that being a sister concern does not mean that a separate and juristic identity of each of the companies ceases to exist, or that in a legal proceedings one sister concern can be held liable for the defaults of the other sister concern, which is not even a party to the proceedings.

37. There was no basis, in fact, or in law to hold that an order placed to M/s Snowcross Healthcare Pvt. Ltd. could be enforced against the petitioner that too in the absence of M/s Snowcross Healthcare Pvt. Ltd. solely on account of the proprietor of the petitioner company a director of M/s Snowcross Healthcare Pvt. Ltd. and having correspondence with the respondent from his common/person e mail ID. It is submitted that, in fact, since Mr.P.K.Handa was a director in M/s Snowcross Healthcare Pvt. Ltd. also which was perfectly in order and legal for him to have correspondence on behalf of M/s Snowcross Healthcare Pvt. Ltd. also, this finding militates against the fundamental law pertaining to a company being a separate juristic entity distinct from an individual,

however, without prejudice to the above said it is to be noted that most of the e mails were sent from info@tradeinternational.in which is official e mail ID of the petitioner and pkhanda@tradeinternational was put in CC in those e mails.

38. The learned counsel appearing for the petitioner submitted that the impugned award of the learned Arbitrator virtually amounts to lifting the corporate veil of M/s Snowcross Healthcare Pvt. Ltd., despite the fact that M/s Snowcross Healthcare Pvt. Ltd. was not a party to the arbitration and despite a settled law that an arbitrator does not have jurisdiction to lift the corporate veil, including by conferring liability on the basis that the party to the arbitration was the alter ego of another party which was not a party to the arbitration.

39. In view of the forgoing arguments, the learned counsel appearing on behalf of the petitioner submitted that the impugned award is liable to be set aside.

ON BEHALF OF THE RESPONDENT

40. *Per contra*, it is submitted that by consent order dated 25th May, 2019, the learned Arbitral Tribunal held that the applications filed u/s 16 of the Act and under Order XII Rule 6 of CPC, would be decided along with the main case. It is further submitted that, therefore, this no force in the arguments of the petitioner that the question of the learned Arbitral Tribunal failed to decide the petitioner's above said applications at an earlier stage. It is further submitted that the petitioner has *mala fidely* contended that majority of Claim A, B & D allegedly arise out of transactions between the Respondent & M/s Snowcross Healthcare Pvt. Ltd. being a separate entity are not maintainable. But, in fact, a bare

perusal of the facts and circumstances of the present case would show that the petitioner and M/s Snowcross healthcare Pvt Ltd would be bound squarely by the settled principles of ‘Group of Companies’ Doctrine as laid down by the Hon’ble Supreme Court in the Case of ***Cheran Properties Limited V. Kasturi and Sons Limited & Others*** (2018) 16 SCC 413.

41. Admittedly, the petitioner and M/s Snowcross Healthcare Pvt. Ltd. are sister concern companies of the same group which is evident from the fact that the sole proprietor of the respondent company is Mr. P.K. Handa was also a director of M/s Snowcross Healthcare Pvt. Ltd. It is further submitted that the petitioner was a ‘stranger’ to the purchase order dated 1st January, 2014 and the proforma invoice bearing No. 125/SH/2014 and not a party to the same. Thus, the same is beyond the scope of the present proceedings. It is further submitted that a bare persual of the petitioner’s own documents/ e mails filed along with the Statement of Defence would show that the petitioner and M/s Snowcross Healthcare Pvt. Ltd. are actually corresponding from the same e-mail ID pkhanda@tradeinternational.in.

42. The learned counsel appearing on behalf of the respondent submitted that a bare perusal of the “ Sub-Representative Agreement” dated 1st November, 2012 and “Exclusive Sales Agreement” dated 3rd October, 2013 would reinforce the fact that the “Sub Representative Agreement” dated 1st November, 2012, the Purchase Order dated 1st October, 2014 and the Proforma Invoice bearing No. 125/SH/2014 are evidently interlinked with a similar underlying commercial purpose and are bound by the ‘Group of Companies’ Doctrine. The learned counsel

appearing on behalf of the respondent submitted that therefore the learned Arbitral Tribunal has rightly held that the petitioner and M/s Snowcross Healthcare Pvt. Ltd. are sister concerns attracting the Group of Companies doctrine and furthermore held that even if M/s Snowcross Healthcare Pvt. Ltd. is not arrayed as a party, the same would not make any difference in the said circumstances.

43. It is submitted that learned Arbitral Tribunal vide order dated 25th May, 2019 held that if the claimant, i.e., the respondent herein will not be leading oral evidence, it would not be permissible for the present petitioner, i.e., respondent before the learned Arbitral Tribunal, to lead oral evidence. Furthermore, the learned Sole Arbitrator vide order dated 6th June, 2019, on the request made by the counsel on behalf of the petitioner, i.e., respondent before learned Arbitral Tribunal, granted permission to file sur-rejoinder. It is submitted that the petitioner's application under section 24 of the Act sought relief of filing sur-rejoinder, in alternative to leading evidence. Therefore, the prayer of the said application was allowed which leaves no ground for the petitioner to claim that their application under section 24 of the Act was wrongly rejected.

44. It is vehemently submitted that the learned Arbitral Tribunal having appreciated all pleadings, documents and evidence produced before it gave the specific finding of facts and that this Court in the limited jurisdiction under section 34 of the Act should not interfere with any factual findings.

45. It is submitted that there are no error or any finding of the learned Arbitral Tribunal that the machines supplied by the petitioner to the

respondent herein were defective, stating that there was overwhelming evidence that the machines supplied were not in working order/conditions. The petitioner was obliged to supply the respondent with a new fully functional machine, admittedly the machine which was supplied to the respondent was in a very poor condition wherein several parts were rusted, and poorly assembled and was clearly not new and was admittedly an old machine not in working condition. While reaching the above said conclusion, the learned Arbitral Tribunal had relied on certain documents:

- a. The Email dated 23.12.2015 & Email dated 24.12.2015 issued by the Respondent to the petitioner reiterating the degenerate condition of the machine which was supplied.
- b. Photographs of the Machine dated 21.12.2015 depicting the severe damage caused to the machine.
- c. Engineer Report dated 05.01.2016 clarifying that machine supplied was manufactured in 2009 and was not in working condition
- d. PIWS Email to the petitioner dated 05.01.2016 admitting after perusing the photographs that the machine was damaged and old parts have been used during assembling.
- e. PIWS Email dated 23.01.2016 to the Respondent, offering to replace the defective machine with a new one which was never communicated to the claimant, i.e., the respondent herein.

46. The learned counsel appearing on behalf of the respondent submitted that the petitioner during the arbitral proceedings refused to bear/pay any part of the fees of the learned Arbitral Tribunal or the

administrative costs by stating that he was an indigent person, due to which the respondent herein was compelled to undertake the same in the interest of adjudication of the disputes. However, it is already submitted that the claim of the petitioner that he is an indigent person is factually incorrect.

47. It is submitted the petitioner's claim of the impugned award being in contravention of the fundamental policy of the Indian law and against the basic notions of justice and morality is considerably far-reaching and excessive.

48. It is also submitted that there is no breach of principles of natural justice since the learned Arbitral Tribunal has dealt with all the issues raised during the arbitral proceedings in a detailed manner and has given detailed findings in the impugned award itself and the learned Arbitral Tribunal gave full opportunity to the petitioner herein to lead evidence, and on the request made by the counsel on behalf of the Petitioner, also granted permission to file sur-rejoinder in the arbitral proceedings.

49. It is further submitted that the petitioner has neither been able to prove that there has been patent illegality in the impugned award nor that the said award is against the public policy of India and thus the respondent is entitled to the award amount along with interest. It is further submitted that in view of the foregoing paragraphs, the petitioner has failed to make out any case for interference in the impugned award by this Court and that the instant petition, being devoid of merit, is liable to be dismissed.

FINDINGS AND ANALYSIS

50. Heard the learned counsel appearing for the parties and perused the record.

51. Before proceeding further, this Court finds it necessary to briefly revisit the existing of position of law with respect to the scope of interference with an arbitral award in India.

52. As far as Section 34 of the Act is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground as provided under Section 34(2)(b)(ii) of the Act, i.e., if the award is against the Public Policy of India. As per the legal position clarified through decisions of this Court prior to the amendments in the 1996 Act in 2015, a violation of India Public Policy in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality and existence of patent illegality in the arbitral award. The concept of the fundamental policy of Indian Law would cover the compliance with the statutes under judicial precedents adopting a judicial approach, compliance with the principles of nature justice, and reasonableness.

53. It is only if one of the conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii) of the Act, but the said interference does not entail a review of the merits of the dispute as it is limited to the situations where the findings of the arbitration are arbitrary, capricious, or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the

root of the matter. An arbitral award may not be interfered with, if the view taken by the learned arbitrator is a possible view based on the facts.

ANALYSIS

54. Upon perusal of the pleadings and material on record, the following questions are framed for adjudication by this Court to decide the present case:

- I. Whether the Arbitrator has rightly invoked the Group of Companies Doctrine to the facts and circumstances of the instant case?*
- II. Whether the award was passed without complying with the due procedure as provided under Section 16 and Section 24 of the Act?*

ISSUE No.1

Whether the Arbitrator has rightly invoked the Group of Companies Doctrine to the facts and circumstances of the instant case?

55. The contentions raised herein by the petitioner fall within the ambit of Section 34 of the Act and draw the attention of this Court towards the discussion of Group of Companies Doctrine. The Group of Companies Doctrine provides that a non-signatory party may also be bound by the arbitration agreement if it is a member of same group of companies as the signatory and all the parties to the arbitration agreement mutually intend that the non-signatory be bound by it. This mutual intent of the parties is usually determined by their respective acts which include the engagement of a non-signatory in performance, negotiation, discharge or termination of the Contract/Agreement.

56. The roots of this doctrine have emerged out from the International Jurisprudence of Arbitration in a landmark pronouncement given by

International Chamber of Commerce Tribunal while deciding the case of ***Dow Chemicals v. Isover Saint Gobain, ICC Case No.4131***. The quintessence of applying this doctrine to the domestic as well as international arbitration is that it prevents fragmentation of dispute in the composite, this doctrine is a concept evolving majorly out of the judicial pronouncements but the legislative intent pertaining to this Doctrine can be traced out by drawing the relativity between Section 8 and 45 of the Act, 1996. The Section 8 of the Act creates a statutory mandate that wherever and whenever the parties are bound by a valid and enforceable Arbitration agreement/clause, the Court shall refer the parties to the Arbitration. Section 45 of the Act provides as under:

“ 45. Power of judicial authority to refer parties to arbitration.—

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed. ”

57. The above referred Section 45 of the Act pertains to part II of the Act and provides that the judicial authority shall refer ‘ any person’ to the arbitration if the request is made by either party to the agreement or any person claiming through or under him. The Hon’ble Supreme Court in the case of ***Chloro Controls India Ltd. V. Severn Trent Water Purification Inc. and Ors.; (2013) 1 SCC 641*** expounded this doctrine in the Indian Jurisprudence of Group of Companies Doctrine in an

arbitration proceeding with respect to Section 45 of the Act. It was held as under:

“ 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.

74. *In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the Arbitral Tribunal is one of the determinative factors.*

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145. *The expression “connection” means a link or relationship between people or things or the people with whom one has contact [Concise Oxford Dictionary (Indian Edition)]. “Connection” means act of uniting; state of being united; a relative; relation*

between things one of which is bound up with (Law Lexicon, 2nd Edn., 1997). Thus, even the dictionary meaning of this expression is liberally worded. It implies expansion in its operation and effect both. Connection can be direct or remote but it should not be fanciful or marginal. In other words, there should be relevant connection between the dispute and the agreement by specific words or by necessary implication like reference to all other agreements in one (principal) agreement. The expression appearing in Clause 30 has to be given a meaningful interpretation particularly when the principal agreement itself, by specific words or by necessary implication, refers to all other agreements. This would imply that the other agreements originate from the principal agreement and hence, its terms and conditions would be applicable to those agreements. There are three agreements, as already noticed, which do not contain any specific arbitration clause. Both the Managing Directors' agreement and the international distributor agreement directly relate to the principal agreement stating the manner in which the affairs would be managed and the Managing Directors be appointed. At the same time, the international distributor agreement is executed between Severn Trent Water Purification Inc., the erstwhile Capital Controls Co. Inc. and Capital Controls (India) (P) Ltd., the joint venture company. Firstly, the chances of dispute between the same group of companies were remote and secondly these were the companies which were held by the same management. The parties had also agreed to have relationship as that of seller and distributor to make the joint venture company a success. The interest of Capital Controls Co. Inc. and that of Capital Controls (India) (P) Ltd., to the extent of the former's share, were common. Furthermore, this being an integral part of the principal agreement would, in our opinion, be squarely covered by the

arbitration clause contained in the mother/shareholders' agreement. This agreement has been specifically referred in Clause 7 of the mother/shareholders' agreement. Not only that is there incorporation by reference of international distributor agreement in the mother/shareholders' agreement but, in fact, it is an integral part thereof.

146. *Another aspect of the case is that all these agreements were executed simultaneously on 16-11-1995 which fact fully supports the view that the parties intended to have all these agreements as a composite transaction. Furthermore, when the parties signed the supplementary collaboration agreement in August 1997, by that time all these agreements had not only been signed and understood by the parties but, in fact, had also been acted upon.*

147. *In the supplementary collaboration agreement, the parties reconfirmed the existence of the joint venture agreement dated 16-11-1995 and made a specific stipulation that both the parties confirmed to adhere by the terms and conditions stipulated by the Government of India in its Letters dated 11-10-1996, amended on 21-4-1997. This was signed by Madhusudan B. Kocha, member of the Kocha Group on behalf of the joint venture company and Capital Controls (Delaware) Inc. The necessity for executing this agreement was in face of the condition of the government approval as well as the subsequent amendment of Clauses (2), (3) and (4) of the approval Letter dated 11-10-1996 i.e. items of manufacture, proposed location and foreign equity.*

148. *The conduct of the parties and even the subsequent events leave no doubt in the mind of the Court that the parties had executed, intended and actually implemented the composite transaction contained in the principal agreement. The courts have also applied the Group of Companies Doctrine in such cases. As already noticed, this Court in Olympus*

Superstructures (P) Ltd. [(1999) 5 SCC 651] permitted reference to arbitration where there were multiple contracts between the parties, interpreting the words “in connection with” and “disputes relating to connected matters”. Besides making the reference, the Court also held that making of two awards which may be conflicting in relation to the items which are likely to overlap in two agreements could not be permitted.

149. The courts have also accepted and more so in group company cases that the fact that a party being non-signatory to one or other agreement may not be of much significance, the performance of one may be quite irrelevant with the performance and fulfilment of the principal or the mother agreement. That, in fact, is the situation in the present case.

150. One of the arguments advanced was that the international distributor agreement had specifically provided for construction, interpretation and performance of the agreement and for the transaction under that agreement to be governed by and interpreted by the laws of the State of Pennsylvania, USA and parties thereto agreed that any litigation thereunder shall be brought in any Federal or State Court in the Eastern District of the Commonwealth of Pennsylvania which fact would oust the possibility of reference to arbitration in terms of Clause 30 of the principal agreement, as the parties had chosen a specific forum of the court system. Discussion on this argument may not be greatly relevant in view of the above discussion in this judgment. This being a composite transaction, the parties could opt for any remedy.”

58. The Hon’ble Supreme Court in the foregoing paragraph 73 of ***Chloro Controls*** (Supra) laid down the conditions wherein a party which is a non-signatory to the arbitration may be referred to arbitration proceedings within the signatory bodies. The conditions precedent to such

reference includes that there exists a common or relative nexus of the non-signatory with the subject matter of the dispute between the signatory entities to the arbitration agreement. Emphasizing on this doctrine, the Hon'ble Supreme Court in the case of **ONGC Ltd. V. Discovery Enterprises (P) Ltd.** (2022) 8 SCC 42 has further held as hereunder:

“27. Noting that this would only be in exceptional cases, the Court in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] held that these exceptions would be examined on the touchstone of:

- i. A direct relationship to the party signatory to the arbitration agreement;*
- ii. Direct commonality of the subject-matter; and*
- iii. Whether the agreement is of a composite transaction where the performance of a mother agreement may not be feasible without the execution or performance of a subsidiary or ancillary agreement.*

28. The principle for binding non-signatories as laid down in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] was applied in the context of a domestic arbitration in Ameet Lalchand Shah v. Rishabh Enterprises [Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 : (2019) 1 SCC (Civ) 308] . A two-Judge Bench of this Court, in the context of the application of the then amended [Arbitration and Conciliation (Amendment) Act, 2015] (“the 2015 Amendment”) provisions of Section 8 of the 1996 Act, observed that the 2015 Amendment to Section 8 had brought it in line with Section 45 of the 1996 Act. Prior to the amendment, Section 8(1) of the 1996 Act provided that a party to an

arbitration agreement can make an application to seek a reference to arbitration. The amended Section 8(1) clarified that a person claiming through or under a party to the arbitration can also seek reference to arbitration notwithstanding any judicial precedent. In Ameet Lalchand [Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 : (2019) 1 SCC (Civ) 308] , the Court did not explicitly invoke the group of companies doctrine to bind a non-signatory, rather it relied on Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] to hold that a non-signatory would be bound by the arbitration clause in the mother agreement, since it is a party to an inter-connected agreement, executed to achieve a common commercial goal.

29. *In Cheran Properties [Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413 : (2019) 1 SCC (Civ) 486] , a three-Judge Bench of this Court interpreted and applied the group of companies doctrine in the context of the enforcement of a domestic arbitration award against a non-signatory to the arbitration agreement. The Court observed that the decision by a two-Judge Bench in Indowind [Indowind Energy Ltd. v. Wescare (I) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] was rendered before the evolution and application of the group of companies doctrine by a three-Judge Bench in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] : (Cheran Properties case [Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413 : (2019) 1 SCC (Civ) 486] , SCC p. 433, para 23)*

“23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may

be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.”

30. *This Court in Cheran Properties [Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413 : (2019) 1 SCC (Civ) 486] also analysed academic literature that scrutinised adjudicatory trends across the world. It noted that the written intention to arbitrate between parties can extend to bind non-signatories with the aim to target the creditworthy member of the group of companies. However, the principle of separate legal personalities of companies also has to be balanced. The corporate veil can be pierced to bind non-signatories upon a construction of*

the arbitration agreement, the intention at the time of entering the contract and the performance of the underlying contract : (SCC pp. 433-34, para 25)

“25. 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.... [Redfern and Hunter on International Arbitration, 5th Edn., p. 99.] ’

The group of companies doctrine has been applied to pierce the corporate veil to locate the “true” party in interest, and more significantly, to target the creditworthy member of a group of companies [Id, 2.40, p. 100] . Though the extension of this doctrine is met with resistance on

the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract. [Id, 2.41, p. 100] ”

31. *This Court in Cheran Properties [Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413 : (2019) 1 SCC (Civ) 486] also distinguished the principle laid down in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] from its application in the context of Section 11(6) in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] [“Duro Felguera”]. In Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , a two-Judge Bench of this Court refused to direct a joint arbitration in five different contracts between sister concerns of one of the parties of the original arbitration agreement, by respecting the conscious intention of the parties to subject themselves to separate arbitration agreements under their individual contracts. This Court in Cheran Properties [Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413 : (2019) 1 SCC (Civ) 486] distinguished the factual situation in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] by discerning the mutual intention of the parties and performance of the contract : (Cheran Properties case [Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413 : (2019) 1 SCC (Civ) 486] , SCC p. 437, para 34)*

“34. ... The principle which underlies Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.,

(2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] is that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. In applying the doctrine, the law seeks to enforce the common intention of the parties, where circumstances indicate that both signatories and non-signatories were intended to be bound. In Duro [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , the case was held to stand on a different footing since all the five different packages as well as the corporate guarantee did not depend on the terms and conditions of the original package nor on the memorandum of understanding executed between the parties. The judgment in Duro [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] does not detract from the principle which was enunciated in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689].”

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34. While elucidating the circumstances in which the group of companies doctrine could be invoked to bind the non-signatory, the Court held : (MTNL case [MTNL v. Canara Bank, (2020) 12 SCC 767] , SCC pp. 779-80, para 10)

“10.5. The group of companies doctrine has been invoked by courts and Tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the

arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts. [Interim award in ICC Case No. 4131 of 1982, IX YB Comm Arb 131 (1984); Award in ICC Case No. 5103 of 1988, 115 JDI (Clunet) 1206 (1988). See also Gary B. Born, International Commercial Arbitration, Vol. I, 2009, pp. 1170-1171.]

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.

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group. [ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.] ”

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40. *In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*

- (i) The mutual intent of the parties;*
- (ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
- (iii) The commonality of the subject-matter;*
- (iv) The composite nature of the transaction; and*
- (v) The performance of the contract.*

41. *Consent and party autonomy are undergirded in Section 7 of the 1996 Act. However, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego [Gary Born, International Commercial Arbitration, 2nd Edn., Vol. 1, at p. 1418.] . These principles would have to be understood in the context of the present case, where ONGC's attempt at the joinder of JDIL to the proceedings was rejected without adjudication of ONGC's application for discovery and inspection of documents to prove the necessity for such a joinder. ”*

59. The doctrine being first expounded in *Chloro Controls (supra)* found its ambit by traversing through catena of cases. In *ONGC Ltd.*(Supra), a three judge bench of the Supreme Court has upheld the applicability of Group of Companies Doctrine in the case where non-signatory body is an alter ego of the signatory party. The Court laid down the points relevant to determine whether the doctrine is to be invoked or not. The test pertains to the following points:

- i. Mutual intent of parties;
- ii. Relationship of a non-signatory to a signatory;
- iii. Commonality of the subject matter;
- iv. Composite nature of the transaction; and
- v. Performance of the contract.

60. The Judgments cited above stood in conformity with the principles laid down with respect to the Group of Companies Doctrine until a three-Judge bench in the case of *Cox and Kings Limited v. SAP India Private Limited And Anr.* (2022) 8 SCC 1 doubted the bearing of the doctrine of the ground that the ratio in *Chloro Controls (supra)* is based on economic convenience rather than correct application of law. The Court referred the aspect of interpretation of ‘claiming through or under’ as occurring in amended Section 8 of the Act *qua* the doctrine of Group of Companies to a larger Bench.

61. In the instant case, the two entities, ie., the petitioner and the M/s Snowcross Healthcare Pvt. Ltd are identified as sister companies which are carrying on similar trade pertaining to the instant case. The proprietor Mr.Handa is also the director of the M/s Snowcross Healthcare Pvt. Ltd. and both the entities entered into a transaction with the respondent for a

similar purpose, i.e., the sale of medical equipments. It is the contention of the petitioner that the invoice dated 22nd January, 2014 has a separate arbitration clause and the party to this invoice was M/s Snowcross Healthcare Pvt. Ltd. while the agreement dated 1st November, 2012 signed by the petitioner entity had a separate arbitration clause and the Group of Companies doctrine was invoked by the arbitrator while decided the claims is not appropriate.

62. Upon a perusal of material on record, it is evident that both entities, the petitioner and the M/s Snowcross Healthcare Pvt. Ltd. were operating from the same address and even the contact details and identification of representatives were overlapping for both the entities. The transaction was in direct nexus with the purpose of the agreement dated 1st November, 2012. The subject matter was the sale and purchase of same medical equipments and thus the nature of the transactions arising out of both the agreement dated 1st November 2012 and 22nd January, 2014 was composite in nature sharing a direct nexus. It is also pertinent to mention that in both the documents mentioned above, the arbitration was the agreed mechanism of the dispute resolution between the parties. Since the Hon'ble Supreme Court has referred the doctrine to a larger Bench to determine its legality, the doctrine till the time is not over-ruled by the Larger Bench, shall be applicable in the relevant circumstances. The subject matter of the dispute at hand was wholly arbitrable in nature as well as the transactions arising out of the agreement dated 1st November, 2012 between the respondent and the petitioner as well as the invoice dated 22nd January 2014 shared a common nexus pertaining to the sale of medical equipments. Therefore, this Court is of the view that the doctrine

not being over-ruled has been rightly put to use by the learned arbitrator. The issue no.1 is decided accordingly.

ISSUE No.II

Whether the award was passed without complying with the due procedure as provided under Section 16 and Section 24 of the Act?

63. The petitioner has alleged that the procedure under Section 16 has not been complied with by the Arbitrator. It is submitted that the petitioner has challenged the jurisdiction of Arbitrator with respect to adjudication of the claims against M/s Snowcross Healthcare Pvt. Ltd. as there was no joinder of the said M/s Snowcross Healthcare Pvt. Ltd. The Arbitrator without deciding the said application decided the main case which in submission of the petitioner is contrary to the principles of justice.

64. By a bare perusal of the orders and the Award passed by the learned Arbitrator, it is evident that the order was passed on consent of both the parties that the application under Section 16 of the Act shall be heard along with the main case. The said recording has also reflected by perusing the impugned award wherein the arbitrator has held as below:

“ Before the Tribunal may proceed any further, it may be mentioned that during the course of arbitration proceedings various applications came to be filed by both the parties. The Tribunal decided all the applications except the one filed by the claimant under Order 12 Rule 6 of the Code of Civil Procedure and the other filed by the Respondent under Section 16 of the Arbitration and Conciliation Act, 1996 as the learned counsel for the parties after arguing for some time, in both the applications

sought adjournment to seek instructions from their clients.

On instructions, it was stated by the learned counsel for both sides that the same be decided along with the main case.

Learned counsel for the parties are ad-idem that subject matter of both the applications shall be covered in the main case and, thus, there is no need to pass separate orders in the said applications.”

65. It is also observed that petitioner in its own submissions has conceded to the fact that the application filed by it under Section 16 of the Act challenging the jurisdiction and competence of the Arbitral Tribunal can be decided later along with the main case. It is trite that the intent of enacting the Act is to limit the juridical interventions and this Court cannot sit in appeal over the order that has been passed by the Arbitrator after appreciating the evidence, admissions, and findings throughout the arbitration proceedings. The legislation has itself authorized the arbitral tribunal to check for its own competence and jurisdiction and the principle laid down in the judgments cited above authorize the arbitrator itself to apply the group of companies doctrine whenever found necessary and imperative to do so. Since, the petitioner has himself conceded to the fact that his application can be decided along with the main case, it would not be open to him to agitate the same along with the grounds to plead the setting aside of the Award.

66. Further, the petitioner has alleged that the learned Arbitrator has exercised his jurisdiction arbitrarily without allowing him to lead oral evidence as provided under Section 24 of the Act. Section 24 of the Act has been reiterated as below:

“ 24 Hearings and written proceedings.—

(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials: Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicate to the parties.”

67. By perusal of the above-referred Section 24 of the Act, it is evident that the Section relates to procedural aspects pertaining to leading evidence by the parties. The section provides for the discretion of the Arbitrator to decide whether the proceedings shall be conducted orally or documentarily on the basis of the nature and requirement of the case in hand of the Arbitrator. The Arbitrator while deciding the application has not allowed the leading of oral evidence on the ground that the respondent has not made any representation for the same subject. However, the relief prayed in alternative of leading oral evidence, i.e., filing of sur-rejoinder was granted by the Arbitrator. The discretion to decide the procedure for leading evidence vests with the arbitrator and as

decided by the Hon'ble Supreme Court in the case of *Ssangyong Engineering & Construction Co. Ltd. V. National Highways Authority of India (NHAI)*, 2019 SCC OnLine SC 677, when the award is passed on the basis of the findings and analysis by the Arbitrator with sufficient reasoning for the same, the Court cannot sit in review or appeal to re-appreciate the factual findings by way of the evidence while exercising its jurisdiction under Section 34 of the Act. This issue is decided accordingly.

CONCLUSION

68. Hence, in the light of arguments and contentions made by the parties and foregoing analysis, this Court finds no cogent reasons to entertain the instant petition. The petitioner has failed to make out his case under Section 34 of the Act as his contentions are based more on procedural irregularities rather than illegality. As discussed above, this Court does not find sufficient cause to enter into the findings given by the learned Arbitrator and accordingly, the instant petition, being devoid of merits, is dismissed.

69. Pending applications, if any, also stand disposed of.

70. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 26, 2023
SV/AK