

**IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE**

The Hon'ble Justice Sabyasachi Bhattacharyya

A.P. No. 69 of 2024

**Basant Kumar Khemka and Anr.
Vs
City Shoppe Estates Limited**

With

A.P. No. 68 of 2024

**Nisha Khemka
Vs.
City Shoppe Estates Limited**

For the Petitioner : Mr. Pranit Bag, Adv.
Mr. Rahul Poddar, Adv.

For the respondent : Mr. Rajarshi Dutta, Adv.
Mr. Deepak Kr. Jain, Adv.
Mr. Abvishek Dutta, Adv.

Hearing concluded on : 07.08.2024

Judgment on : 12.08.2024

Sabyasachi Bhattacharyya, J:-

1. The present applications under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) has been filed by two owners of flats in a Housing Complex called “Diamond Towers”.
2. One M/s Jhansi Fuels & Chemicals Limited, the developer of the building complex, entered into an agreement for sale with one M/s Trot Shoe Company (P) Limited and pursuant thereto, executed a sale-deed in favour of the said M/s Tort Shoe on July 3, 1991 in

respect of the subject property. On November 9, 1994, M/s Trot Shoe Company Private Limited sold the said premises to one Amlan Singha.

3. Amlan Singha, in turn, sold the subject property to the present petitioners on September 1, 2020 by a registered sale deed.
4. Meanwhile, M/s Jhansi Fuels and Chemical Limited was renamed as City Shoppe Estates Limited, the present respondent.
5. The petitioners issued a notice under Section 21 of the 1996 Act to the respondent on October 18, 2023, invoking the arbitration clause contained in an agreement dated May 2, 1995 entered into between M/s Jhansi Fuels & Chemicals Limited and seven owners of Diamond Towers who, as per the said agreement, represented all the flat owners. The dispute raised therein pertains to alleged disconnection of electricity to the subject property by the respondent and failure of the respondent to honour its liability to provide amenities and facilities, primarily electricity, to the petitioners-flat owners.
6. There being no consensus between the parties regarding the appointment of Arbitrator, the present application has been filed by the petitioners.
7. Learned counsel for the respondent objects to the application under Section 11 on several grounds. First, it is pointed out that the petitioners were not parties to the agreement dated May 2, 1995. Also, the purchase-deed of the petitioners does not contain any arbitration clause. Moreover, the purchase-deed of the petitioners does not incorporate specifically the arbitration clause contained in the agreement dated May 2, 1995. Thus, it is argued that the petitioners

do not come within the purview of “party” as contemplated in Section 2 (1)(h) of the 1996 Act, which defines the term to mean a party to an arbitration agreement.

8. Further, learned counsel appearing for the respondent argues that the petitioners are hit by Section 7(5) of the 1996 Act. While Section 7 defines ‘arbitration agreement’, sub-section (5) thereof provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. Such element is entirely absent in the present case.
9. The respondents further argues that the dispute now raised by the petitioners relates to alleged disconnection of the electricity supply of the petitioners by the respondent, which falls outside the purview of the 1995 agreement in any case. The 1995 agreement was entered between the original developer and seven flat owners of Diamond Towers and was in the nature of a resolution of the then existing disputes between them.
10. By placing reliance on several clauses of the said agreement, learned counsel for the respondent argues that the liability of the developer was restricted to provide a generator, which has already been done long back.
11. In terms of the agreement, it is submitted, the developer was to hand over the maintenance of the residential complex to the association formed by the flat owners on signing the agreement, which is provided

in Clause 2(h) of the same. The reference to electric meters in Clause 2(l) in the agreement merely provided for the developer extending official, but not financial, assistance for separation of electric meters of the residential from the commercial/market complex. Mere provision in the agreement that future bills would be raised in the name of the association as well as the developer did not cast any liability on the developer to carry on giving electricity supply to the flat owners.

- 12.** It is argued that the agreement of 1995 contemplated the developer paying a lump-sum amount towards future maintenance of the entire residential complex in discharge of its liability in favour of the association. The agreement merely settled the dispute between the parties then existing. The liabilities of the developer were closed with the said agreement.
- 13.** The present dispute sought to be raised in the notice under Section 21 of the 1996 Act is distinct and different from those dealt with in the 1995 document, arising much subsequent to the said agreement of 1995 having exhausted its force.
- 14.** It is argued that the Supreme Court, in a string of judgments, has repeatedly observed that unless there is a specific reference to an arbitration clause in a different document in the agreement of the party, it cannot be said that the party concerned is entitled to invoke such arbitration clause.
- 15.** Learned counsel for the respondent further argues that although it was *prima facie* observed by the Court in a proceeding under Section 9

of the 1996 Act between the parties that the petitioner was a party to the arbitration agreement and was entitled to invoke arbitration clause, such finding was at a preliminary stage and merely *prima facie*, which cannot bind the parties at subsequent stages of litigation.

16. Learned counsel for the petitioners, on the other hand, argues that the present case is different from one where there has to be a reference to an arbitration clause in a different document in the deed/agreement between the parties. The present question, it is submitted, is whether the petitioners are entitled to invoke the arbitration clause of the 1995 agreement directly. It is reiterated that the petitioners do not seek to claim through the purchase deed of the petitioners from their vendor but directly rely on the arbitration clause in the 1995 agreement. The said agreement clearly includes the successors of the then flat owners as parties to the agreement, thus encompassing all subsequent successors-in-interest of the original owners. As such, the petitioners are entitled to invoke arbitration clause contained in the 1995 agreement.
17. Learned counsel for the petitioner places reliance on the judgment of *SBI General Insurance Co. Ltd. v. Krish Spinning* reported at (2024) SCC OnLine SC 1754 where the Supreme Court propounded the principle of negative competence-competence. Such aspect is aimed at restricting the interference of Courts at the referral stage by preventing courts from examining the issues pertaining to the jurisdiction of the Arbitral Tribunal as the tribunal itself has the

opportunity to entertain them. The Courts, it was held, are allowed to review the decision of the Arbitral Tribunal at a later stage.

18. It is argued that in terms of the said judgment, the limited jurisdiction of the Section 11 Court is only to enquire as to whether the application under Section 11 has been filed within the period of the limitation of three years or not and at best to see whether an arbitration agreement/clause exists or not. At this stage, the courts must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time-barred or on the jurisdiction of the Arbitral Tribunal.
19. Learned counsel for the petitioners also places reliance on an unreported Division Bench judgment of the Karnataka High Court in the matter of *M/s Devtree Cot. LLP. V. M/s Bhumika North Gardenia* where the Karnataka High Court, in a similar case, had held that “party” under Section 2(1)(h), read with Section 7, of the 1996 Act includes both signatories as well as non-signatory parties. Parties claiming through or under a party to the agreement can also apply to refer the matter to arbitration, it was observed. The Karnataka High Court also took into consideration the judgment in *Cox & Kings Ltd. v. SAP India pvt. Ltd and another* reported at (2024) 4 SCC 1 and *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc* reported at (2013) 1 SCC 641 and distinguished between the case before it and the proposition of law governing the “Group of Companies” doctrine.
20. It is next argued that the on a comprehensive reading of the 1995 agreement, it is evident that the developer also had the responsibility

to continue to provide facilities and amenities to the flat owners, including electricity connection. The rights of the flat owners emanate from the said original agreement of 1995. Since the petitioners have stepped into the shoes of the original flat owners via purchase, the petitioners can very well refer the dispute to arbitration by invoking the arbitration clause in the 1995 agreement itself.

- 21.** Learned counsel for the petitioner also relies on a letter executed by M/s Trot Shoe Company in favour of Amlan Singha, the vendor of the petitioners, and a similar letter by the said vendor to the petitioners, whereby the deposits for electricity charges were transferred in the name of the respective purchasers. The said documents, it is argued, go on to show that the petitioners have stepped into the shoes of the original flat owners and the respondent/developer has a continuing liability to provide electricity supply to the petitioners. Thus, the invocation of the arbitration clause of the 1995 agreement, it is submitted, is justified.
- 22.** It is further pointed out that the Learned Additional District and Sessions Judge, Fifth Court at Alipore, in Misc. Case (Arbitration) No. 47 of 2023, vide order no.25 dated March 2, 2024, decided an application challenging the maintainability of the petitioners' application under Section 9 of the 1996 Act. The said challenge was turned down and it was held categorically that the petition under Section 9 was very much maintainable, taking into consideration the letter dated September 1, 2000 issued by the petitioners' vendor whereby deposits relating to electricity connection were transferred,

including maintenance deposit and other deposit, in respect of the suit flat, in favour of the petitioners. Thus, it is argued that the issue has attained finality and cannot be reopened by the respondents.

23. Upon hearing learned counsel of the parties, it is clear that two issues are germane and are required to be decided for the present adjudication. Those are as follows:

- i) Whether the petitioners come within the purview of “party” as contemplated in the Arbitration and Conciliation Act, 1996;
- ii) Whether the disputes raised by the petitioners come within the ambit of the arbitration clause in the agreement dated May 2, 1995.

24. The said issues are answered as follows:

Whether the petitioners come within the purview of “party” as contemplated in the Arbitration and Conciliation Act, 1996

25. In order to decide this issue, the definition of “party” as provided in Section 2(1)(h) of the 1996 Act is to be considered. The said provision stipulates that “party” means a party to an arbitration agreement. Under the general scheme of the 1996 Act as evidenced by its Statement of Objects and Reasons, the thrust is on facilitating and encouraging Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate delays in disposal of cases. Hence, the

scheme of the Act is attuned to encourage arbitration and not to throw the spanner in the wheels of arbitration.

- 26.** Seen from such perspective, the endeavour of the courts would be to lend a wide interpretation to the provisions of the 1996 Act in favour of arbitration, rather than a restrictive view to prevent arbitration. Given a wide connotation to the expression “party”, the term should include not only parties to the agreement but any person claiming through or under the original parties to the agreement. This is for the simple reason that an agreement confers certain rights on the parties thereto, and if such rights are transferred to third parties, the latter also derive the same rights by stepping into the shoes of the original signatories.
- 27.** The scenario dealt with in *Cox and Kings Limited (supra)* and *Chloro Controls India Private Limited (supra)* is distinct and different from the present case. In the said judgments, the provisions of Section 8 of the 1996 Act, was primarily being considered. Moreover, the documents-in-question in the said matters comprised of distinct and different agreements. The question which arose was whether a non-signatory to an agreement can taken advantage of the arbitration clause to such agreement. There, the agreements-in-question did not specifically invoke the arbitration clause from another agreement as required under Section 7(5) of the 1996 Act. In such context, the Supreme Court propounded the theory of “Group of Companies”. By virtue of the said doctrine, even non-signatories were brought within the purview of an arbitration clause depending upon indicators of their

consent to be bound by the arbitration agreement. Also, in circumstances where the disputes arise from the self-same set of transactions or have a single document as their genesis, the arbitration clause in the original document or the primary documents can also be invoked in disputes arising in connection with the other documents.

- 28.** As opposed to the said scenario, in the present case, the question is whether a third party claiming through an original signatory to an arbitration agreement can also come within the purview of “party” within the contemplation of the 1996 Act. It is nobody’s case that the purchase deed of the petitioners contains any arbitration clause or refers to the arbitration clause of the 1995 agreement. Rather, the petitioners rely on the arbitration clause in the 1995 agreement directly, claiming to come within the ambit of the said agreement through their vendor and grand-vendor.
- 29.** There are two salient features in the agreement dated May 2, 1995, which acquire crucial importance in the present context.
- 30.** First, it was categorically mentioned in the preamble thereof that the seven signatory flat owners were signing the agreement for themselves and also on behalf of and representing the other owners of the total 106 flats of both buildings and five offices at the rear building of the ground floor of Diamond Towers.
- 31.** Secondly, it was clearly stipulated that the expression “flat owners” who were the party of the “Other Part” (second party) to the agreement, shall, unless excluded by or repugnant to the subject or

context, be deemed to mean and include their respective successors or successors-in-office.

32. Thus, not only were all the then flat owners brought within the fold of the contract, but their respective successors-in-interest were also included under the definition of flat owners, which was the second party to the agreement. The use of the expression “successors” is sufficiently expansive to include all subsequent successors-in-interest of the then flat owners, including the present petitioners.
33. With utmost humility, I fully agree with the ratio of the Division Bench judgment of the Karnataka High Court, which observed that parties claiming through or under the original parties to the documents also come within the purview of “party” as contemplated in the 1996 Act.
34. Another cue for coming to such finding is found in Section 8 of the 1996 Act. If an action is brought before a judicial authority, an application can be filed under the said provision by a party to the arbitration agreement “or any person claiming through or under him” for referring the matter to arbitration. Thus, even if a non-party to the agreement who claims under or through the original signatories makes such a prayer, the court shall refer the matter to arbitration.
35. This Court is not unaware of the fact that the Section 11 does not specifically use such an expansive expression to hedge the term ‘party’. However, by similar logic as incorporated in Section 8, if at the behest of a third party to the agreement claiming through a signatory to the arbitration agreement can have the matter referred by a judicial forum to an arbitrator, there cannot be any reason why the same

party cannot file an application under Section 11 seeking appointment of an arbitrator.

- 36.** Thus, the first issue is decided in favour of the petitioners, holding that the petitioners come within the broad connotation of the expression “party” as envisaged in the 1996 Act, being successors-in-interest of one of the original flat owners/parties to the 1995 agreement.

Whether the dispute raised by the petitioners comes within the ambit of the arbitration clause in the agreement dated May 2, 1995

- 37.** The judgment of the Supreme Court in *SBI General Insurance Company Limited (supra)* is on a slightly different footing than the present case. There the Supreme Court was primarily deciding issues pertaining to the scope and standard of judicial scrutiny under Section 11(6) of the 1996 Act when a plea of “accord and satisfaction” is taken by the defendant.
- 38.** The Supreme Court held that in such context, the court appointing an Arbitrator cannot delve into a full-fledged enquiry on whether there was an accord and satisfaction. The “accord and satisfaction” concept, however, is not applicable to the present case. However, the Apex Court, in the said judgment, also dealt with all the recent decisions in the field and streamlined the position of law to the extent that while deciding an application under Section 11, the court cannot enter into

a threadbare factual or evidentiary analysis of the issues involved in the arbitration, including the competence of the Arbitral Tribunal itself.

39. The negative *kompetenz-kompetenz* principle which was discussed therein is actually a mirror image of the *kompetenz-kompetenz* principle. The two complement each other but are mutually exclusive in the sense that the more the Arbitral Tribunal has the competence to decide its own competence (jurisdiction), the less a judicial forum or a court has the competence to decide the same.
40. Section 16 of the 1996 Act clearly empowers the Arbitral Tribunal itself to decide all issues as to jurisdiction, throwing it wide open for the Arbitrator to enter into all shades of such an enquiry. As pointed out by the Supreme Court in *SBI General Insurance (supra)*, the court has a second look only in an appeal under Section 37 or a challenge under Section 34 at subsequent stages to scrutinize the decision of the Arbitral Tribunal. However, within the limited window of consideration in a Section 11 application, the charter of the court is merely to ascertain whether there is an arbitration clause, the disputes are inherently arbitrable and as to whether the application under Section 11 is time-barred. If the underlying dispute sought to be referred is *ex facie* time-barred or palpably “deadwood”, then the court at best can nip such a reference at the bud, saving future trouble for the parties. Considered in such backdrop, in the present case, it cannot be said that the dispute sought to be raised by the petitioners is palpably non-arbitrable.

- 41.** A careful scrutiny of the agreement dated May 2, 1995 brings to light several aspects of the same. Whereas in several sub-clauses, such as (g), (i), (l), (r), (s) and (t) of Clause 2, it is contemplated that the developer hands over the maintenance of the residential complex and signing of the agreement to the Association and makes certain payments for such transfer, there are other conflicting reflections as well in the self-same document.
- 42.** For example, in sub-clause (l) of Clause 2, the developer is required to issue a letter to CESC Limited with a copy to the Association to the effect that electric meters and other electrical installations previously standing in the name of the developer should be transferred jointly in the name of the Association and the developer along with the security deposit and other deposits if any. Importantly, future bills would also be made in the joint name of the Association and the developer.
- 43.** Thus, it is seen that the developer does not wash its hand entirely off the liabilities regarding electricity supply, among other things.
- 44.** Again, Clause 3 of the 1995 agreement, *inter alia*, provides that in the event the developer fails to complete the work or provide the facilities and/amenities required to be provided by it within the stipulated time, the Association would be entitled to call upon the cheques to be handed over for encashment.
- 45.** Additionally, Clause 6 of the agreement contemplates that the parties would do all other and further acts, deeds and things as may be necessary for requirement “from time to time” to give effect to the

agreement. Thus, the liability of the parties (including the developer), as envisaged in the said agreement, was of a continuing nature.

46. Also, it is reflected in the agreement itself that it was entered into in order to resolve the disputes and differences between the developer and the flat owners, then existing, with regard to the Housing Complex. Thus, the agreement gave a quietus to conflicts and disputes on several aspects which are to be explored by assessing evidence, to see whether electricity supply also came within the fold of such disputes.
47. That apart, similar letters were issued by the predecessor-in-interest of the petitioners' vendor and the petitioners' vendor to the petitioners. In the said letters, the respective vendors have clearly enumerated that the deposits given to the promoters/developers went on being transferred first by M/s. Trot Shoe Company (P) Limited to Amlan Singha and then from Amlan Singha to the petitioners.
48. The language employed in the letter dated September 1, 2000 issued by the petitioners' vendor to the petitioners was that since the vendor had sold to the petitioners the flat/unit-in-question, he was also transferring the said deposit presently held by the vendor in his name to and in favour of the petitioners. The said deposit included, *inter alia*, maintenance deposit, transformer and HT Line deposit as well as CESC deposit.
49. In a contemporaneous letter dated September 30, 2000, the petitioners had written to the respondent/developer that they had been consuming electricity from the sub meter supplied by the

developer and sought extension of electric power from the present capacity to three phases 40 AMPs capacity.

- 50.** Receipts were also purportedly issued by the present respondent in favour of the petitioners for electricity charges, which are also annexed to the present application.
- 51.** Again, in an e-mail dated July 23, 2023, the respondent/developer had replied to the petitioners' previous letter dated July 13, 2023, thereby alleging that the petitioners had admittedly stopped consuming electricity since March, 2020 and electricity was surrendered, meaning thereby that at least till March, 2020 the petitioners had been consuming electricity from the developer and that the developer/respondent had a continuing liability in that regard at least till 2020, much after the execution of the 1995 agreement.
- 52.** It is arguable, to say the least, whether the genesis of the present dispute regarding electricity supply can be traced back to the agreement dated May 2, 1995, which was the parent document conferring the respective rights on the developers and the flat owners with regard to the Diamond Towers Housing Complex. Hence, since the issue is clearly arguable, it is not for the Section 11 Court to enter into the evidentiary appreciation of the same.
- 53.** Section 16 of the 1996 Act embodies the *kompetenz-kompetenz* principle, which has been recognized across the board and has to be honoured, keeping in view the scheme of the 1996 Act, leaving it for the Arbitral Tribunal to decide as to whether it has jurisdiction. Such

jurisdictional issue encompasses within its fold all the sub-issues raised in that regard by the respondent in the present application.

- 54.** The very fact that such detailed discussion is necessary on the effect of the provisions of the 1995 agreement and the other documents produced before this Court is a sufficient indicator that the issue of arbitrability of the dispute is clearly arguable, requiring a threadbare and elaborate evidentiary appreciation as well as adjudication on questions of fact and law. Thus, it is beyond the limited jurisdiction conferred by Section 11 of the 1996 Act to enter into such an expansive enquiry at this stage. Such enquiry is best left to the Arbitral Tribunal.
- 55.** Hence, the second issue is also decided in favour of the petitioners, holding that the dispute is *prima facie* arbitrable and that the dispute raised by the petitioners comes within the ambit of the arbitration clause in the agreement dated May 2, 1995.
- 56.** All said and done, however, it is made clear that the above discussions do not comprise of a final or conclusive adjudication on any of the issues dealt with here but all questions are kept open for being decided finally by the learned Arbitrator. The above findings have been arrived at only for the limited purpose of deciding the application under Section 11 of the 1996 Act and are tentative insofar as the final adjudication before the Arbitrator is concerned. It will also be open to the parties to thrash out the issue of the jurisdiction of the Arbitral Tribunal before the Tribunal itself when the time comes.

- 57.** Since the two applications arise out of similar and common disputes in respect of two different units and all the documents to be looked into for adjudication of the dispute are virtually the same, the two matters have been taken up together and are being disposed of together.
- 58.** In such view of the matter, A.P. No. 69 of 2024 and A.P. No. 68 of 2024 are allowed on contest, thereby appointing Mr. Siddhartha Banerjee (Mobile No: 9830298922), an Advocate of this Court, as the sole Arbitrator to resolve the disputes between the parties arising in connection with both the matters, subject to a declaration being obtained under Section 12 of the Arbitration and Conciliation Act, 1996 from the said learned Arbitrator. The learned Arbitrator shall fix his own remuneration in consultation with the parties and within the framework of the 1996 Act, along with its Schedules. It will be open to the learned Arbitrator to club the two disputes together for the purpose of convenience.

(Sabyasachi Bhattacharyya, J.)