

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

COMMERCIAL ARBITRATION PETITION NO.212 OF 2024

Dharmadev Infrastructure Limited ... Petitioner
V/s.
Lok Holdings & Construction Limited & Anr. ... Respondents

**WITH
COMMERCIAL ARBITRATION APPLICATION NO.166 OF 2024**

Dharmadev Infrastructure Limited ... Applicant
V/s.
Lok Holdings & Construction Limited & Anr. ... Respondents

Mr. Pankaj Jain a/w Tejashree Kamble, Pradeep Purohit i/by P. D. Jain &
Company for the Applicant/Petitioner.
Mr. Ashish Pyasi a/w Anjali Shahi for Respondent No.1.
Ms. Bhoomi Upadhyay and Ms. Vinisha Bhavnani i/by Jayakar & Partners for
Respondent No.2.

CORAM : ARIF S. DOCTOR, J.
DATE : 17TH OCTOBER 2024

P.C. :

1. The captioned Commercial Arbitration is filed under Section 11 of
the Arbitration & Conciliation Act, 1996 for an appointment of an Arbitrator in

respect of disputes and differences which have arisen under a Supplementary Joint Venture Agreement (SJVA) dated November 2019 entered into between the Applicant and the Respondents.

2. Mr. Jain, Learned Counsel appearing on behalf of the Applicant at the outset pointed out that Respondent No.1 and 2 had entered into a Joint Venture Agreement (JVA) dated 12th May 2010, which contained an Arbitration Clause i.e. Clause 39. He then pointed out that the Applicant and the Respondents had thereafter entered into a Supplementary Joint Venture Agreement (SVJA) by and under which it was specifically agreed that all the terms of the JVA would be applicable *mutatis mutandis* to the parties (Clause 22¹) and that it was agreed and understood between the parties that the SJVA would always be read with the JVA (Clause 26²). It was thus he submitted that the Arbitration clause contained in the JVA stood specifically incorporated in the SJVA.

3. Mr. Jain then invited my attention to the notice invoking arbitration dated 12th January 2024 and pointed out that Respondent No. 1 had

1 22. All the other provisions of the JV Agreement will *mutatis mutandis* apply to the parties hereto as the case may be.

2 26. It is hereby agreed and understood by and between the parties hereto that foregoing Supplementary Agreement will always be read with the JV Agreement. The foregoing Supplementary Agreement will always be deemed to form part of JV Agreement, None of JV Agreement and Supplementary Agreement will be read in isolation.

in response thereto not disputed the existence of the arbitration clause but had merely stated that the notice of invocation was barred by limitation. He submitted that it was thus that the Applicant was constrained to file the present Application.

4. Mr. Pyasi, Learned Counsel appearing on behalf of Respondent No.1 opposed the Application. He submitted that the SJVA did not contain an arbitration clause and that the arbitration clause contained in the JVA did not form part of the SJVA. In support of his contention, he placed reliance upon clause 25³ of the SJVA which he submitted expressly stated that provisions SJVA shall override the provisions of JVA. It was thus submitted that since the SJVA did not contain an arbitration clause, the question of invoking arbitration under the same did not arise.

5. Mr. Pyasi then submitted that clauses 22 and 26 were only general references to the JVA and not a specific reference by which the parties had agreed to incorporate the arbitration clause contained in the JVA into the SJVA. He placed reliance upon the judgements of the Hon'ble Supreme Court in

3 25. *It is expressly agreed by and between the parties hereto that the provisions of this foregoing Supplementary Agreement will override the provisions of JV Agreement and all other deeds and documents executed by and between the parties hereto prior thereto and that in the event of any question dispute or issue as regards the interpretation of the provisions of the JV Agreement and those of this Supplementary Agreement then the provisions hereof will supersede and override the provisions of the JV Agreement and other prior writings and documents. Save and except as aforesaid all the provisions of the JV Agreement shall remain unchanged and the JV Agreement is valid subsisting and in full force and effect.*

the case of *NBCC (India) Limited vs. Zillion Infraprojects Private Limited*⁴ and *M. R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited*,⁵ to submit when parties to a contract make a general reference to another contract which contains an arbitration clause, such a general reference would not mean that the arbitration clause in the other contract stood incorporated into their contract. He also then placed reliance upon the judgement of the Hon'ble Supreme Court in the case of *Magic Eye Developers Private Limited vs. Green Edge Infrastructure Private Limited & Ors.*⁶ to submit that when a dispute is raised qua the existence and validity of an arbitration agreement at a pre-referral stage the referral Court has to decide the said issue conclusively, finally and was not to leave the same to be determined by the Tribunal.

6. It was in the context of the above facts, Mr. Pyasi submitted that the question of appointing an Arbitrator does not arise in the facts of the present case, since there is no arbitration clause in the SJVA under which arbitration had been invoked.

7. Mr. Jain in dealing with the submissions of Mr. Pyasi *first* submitted that the objections raised by Respondent No. 1 were plainly untenable. He pointed out that clause 22 of the SJVA specifically incorporated

4 (2024) 7 SCC 174

5 (2009) 7 SCC 696

6 (2023) 8 SCC 50

all the clauses of the JVA which included the arbitration clause. He thus submitted that the same was not a general reference as was the case in the judgements of the Hon'ble Supreme Court in *Mr. Engineers Abd Contractors Private Limited* (supra) and *NBCC (India) Limited* (supra). Secondly, pointed out that the law as had evolved now did not require the referral Court to decide the issue of existence of arbitration agreement conclusively but only required the referral under Section 11(6) to *prima facie* rule on the existence of arbitration agreement. In support of his contention, he placed reliance upon a three-judge bench of the Hon'ble Supreme Court in the case of *SBI General Insurance Co. Ltd. vs. Krish Spinning*⁷.

8. He then also placed reliance upon a subsequent judgement of the Hon'ble Supreme Court in the case of *Ajay Madhusudan Patel & Ors. vs. Jyotrindra S. Patel & Ors.*⁸ which dealt with the issue of impleading a non-signatory as a party to an arbitration agreement and the scope of inquiry by the referral Court. to be conducted at the referral stage, stated as follows:-

"63. The recent Constitution Bench decision of this Court in Cox and Kings Limited v. SAP India Private Limited and Another reported in (2024) 4 SCC 1, specifically dealt with the question of impleading a non-signatory as a party in the arbitration proceedings and the corresponding scope of enquiry at the referral stage. It was held therein that Section 16 is an inclusive

⁷ 2024 SCC OnLine SC 1754

⁸ Judgement dated 20th September 2024 in Arbitration Petition No.19 of 2024

provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal and the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal. The relevant observations are reproduced hereinbelow:

163. *Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455; (2020) 1 SCC (Civ) 570] The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.*

XXX XXX XXX

169. *In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge : first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of*

competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16.

170. In view of the discussion above, we arrive at the following conclusions:

xxx xxx xxx

(170.12) At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement [...]"

(Emphasis supplied)

64. Therefore, on the pivotal issue whether the non-signatories can be referred to arbitration, this Court took the view that the referral court is required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement. However, recognizing the complexity of such a determination, the arbitral tribunal was considered the proper forum since it can decide whether the non-signatory is a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. In this process, the non-signatory must also be given an opportunity to raise objections regarding the jurisdiction of the arbitral tribunal in accordance with the principles of natural justice."

Basis the above, Mr. Jain submitted that a case for the appointment of an arbitrator had been made out.

9. Having heard Learned Counsel for the parties, I find that the contentions raised by Respondent No. 1 are thoroughly misconceived, for the following reasons, viz.

- A. Clause 22 of the SJVA specifically incorporates all the clauses of the JVA into the SJVA. This by no means can be said to be a general reference to the terms and conditions of the JVA. In my view, the incorporation of all the terms of the JVA into the SJVA could not be more specific. Hence, I find that the judgements of the Hon'ble Supreme Court in the case of *NBCC (India) Limited* (supra) and *M. R. Engineers and Contractors Private Limited* (supra) would have no application whatsoever to the facts of the present case, since in both the said judgements parties had made a general reference to the terms and conditions of another contract which contained an arbitration clause and not a specific reference as has been done in the present case.
- B. Additionally, I find the Respondents' reliance upon Clause 25 of the SJVA to be entirely misplaced. Firstly, Clause 25 of the SJVA has to be read in conjunction with clause 22 and 26 and not in isolation. A plain reading of clause 25 makes it clear that the same is limited in its applicability only to any question, dispute or issue as regards the interpretation of the provision of the JVA and the SJVA that's all. Thus, clause 25 could never be read to suggest that the other

clauses of the JVA were not incorporated by specific reference into the SJVA.

- C. Also I find the Respondents' reliance upon the judgement of the Hon'ble Supreme Court in the case of *Magic Eye Developers Private Limited* (supra) to be misplaced. In any case, as already noted above, I am of the *prima facie* view that there exists an arbitration agreement between the Parties for the reasons indicated above. I find that the judgement of the Hon'ble Supreme Court in the case of *SBI General Insurance Co. Ltd.* (supra) which is both subsequent to the judgement in the case of *Magic Eye Developers* (supra) as also delivered by a three Judge Bench of the Hon'ble Supreme Court has in the context of the scope of enquiry by referral Court under Section 11(6) held as follows, viz.

"110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16 implies that the scope of enquiry under section 11(6-A) is limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral

tribunal to 'rule' under Section 16. The prima facie view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

112. The aforesaid approach serves a two-fold purpose – firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.”

Therefore in my view, given the law as enunciated by the Hon’ble Supreme Court having come to the *prima facie* view that there exists an arbitration agreement between the parties, it is best left for the Tribunal to now determine the issue in an Application filed under Section 16, if and when filed by Respondent No. 1. Additionally, I must note that Respondent No. 1 in its reply to the notice invoking arbitration did not deny the agreement but had taken the stand that invocation notice was barred by limitation Respondent No. 2 also has not opposed the present Petition nor denied the fact that the JVA stood incorporated into the SJVA, nor had pressed for the ground of limitation.

10. Hence, for the aforesaid reasons, I find that a case for the appointment of an arbitrator has been made out. I thus allow the Application in terms of prayer clause (a) and appoint Ms. Dipti Bhuta, Advocate to act as sole arbitrator, keeping open all the rights and contentions of the parties to be urged

before the Tribunal, including on the existence of the Agreement between the Applicant and Respondent No. 1.

TERMS OF APPOINTMENT

- (a) **Appointment of Arbitrator:** Ms. Dipti Bhuta, Advocate, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties.
- (b) **Communication to Arbitrator of this order:**
- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.
- (ii) The Advocates for the Applicant will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator	Ms. Dipti Bhuta, Advocate
<i>Address</i>	202A, Savla Chambers, 40, Cawasji Patel Street, Fort, Mumbai – 400 001.
<i>Mobile</i>	9820766867
<i>Email</i>	diptinaz@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward, in hard copy or soft copy (or both), the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to Advocates for the parties as soon as possible. The Advocates for the Petitioners will arrange to file the original statement in the Registry. If the statement is forwarded in soft copy, a print out of the covering email is also to be filed in the registry.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. The information is to include functional email addresses and mobile numbers.
- (f) **Interim Application/s:**
 - (i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.
 - (ii) The present Petition under Section 9 of the Arbitration Act will be treated, heard, and disposed of as an

application under Section 17 of the Act. All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application. Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits.

(iii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.

- (g) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (h) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.
- (i) **Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (j) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.

11. The Petition and the Application are both disposed of in these terms. No orders as to costs.

12. This Court by an order dated 28th August 2024 had directed the Respondents to give notice to the Petitioner. The said order shall continue till disposal of arbitration proceedings.

13. All rights and contentions of the parties are expressly kept open.

(ARIF S. DOCTOR, J.)