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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 864/2023

MONEYWISE FINANCIAL SERVICES PVT. LTD.

..... Petitioner

Through: Mr. Aditya Srinivasan, Mr. Mehvish
Khan, Mr. Rishabh Kanojiya, Advs.

versus

HITSAURABH B MOTIWALA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

26.02.2024

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1. This is a petition seeking appointment of an Arbitrator in terms of Clause 27 of the Master Loan Agreement dated 01.05.2019 (“*Loan Agreement*”).
2. The Loan Agreement is executed between the petitioner and the respondent No.1. The respondent No.2 has also signed the Loan Agreement dated 01.05.2019 as a guarantor.
3. The arbitration Clause is Clause 27 of the Loan Agreement which reads as under:-

“27) Any dispute or difference under or in connection with this Agreement, or any breach thereof, which cannot be settled by mutual negotiation between the Parties; shall be finally settled by arbitration conducted in accordance with the Arbitration and Conciliation Act, 1996 by a sole arbitrator. The arbitration shall be conducted in English language. The venue of the arbitration proceeding shall be NCT of Delhi.”



4. Mr. Srinivasan, learned counsel for the petitioner states that as the respondents failed to pay the outstanding dues of the petitioner, the petitioner issued loan recall notice invoking arbitration on 27.04.2023 to the respondents.
5. Learned counsel further states that the respondent Nos. 3 to 5 needs to be impleaded as parties to the arbitration proceedings as they are signatories with the Loan Agreement. He further submits that the present case is squarely covered by the judgement of ***Cox & Kings Ltd. v. SAP India (P) Ltd., 2023 SCC OnLine SC 1634.***
6. Mr. Jha, learned counsel for the respondents states that the respondent Nos. 3 to 5 are not signatory to the arbitration agreement and cannot be part of the arbitration proceedings.
7. He further states that the only parties who are signatory to the arbitration agreement can be involved in the arbitration proceedings and in case the respondent Nos. 3 to 5 are impleaded then M/s SMC Global Securities Limited who is the holding company of the petitioner should also be impleaded in the arbitration proceedings.
8. Mr Jha further submits that ***Cox and Kings (supra)*** is not applicable to the respondent Nos. 3 to 5 as the same is only applicable to the group companies.
9. I have learned counsel for the parties.
10. Admittedly, in the present case, the respondent Nos.1 and 2 are the parties to the Loan Agreement and there cannot be any doubt with regard to the Loan Agreement being valid and binding between the petitioner and the respondent Nos. 1 and 2.
11. As regards the respondent No. 3 is concerned, the letter dated



01.05.2019 addressed by the respondent No.3 is relevant. The letter dated 01.05.2019 reads as under:-

Moneywise Financial Services Private Limited
11/6, 2nd Floor, Shanti Chamber
PUSA Road, Delhi-110005

Date: 01/05/2019

Subject: Lien Letter

Dear Sir/Mam,

I/We are having a Demat Account ID with SPIC GLOBAL SEC LTD. I/We hereby lien the Securities (present or future) available in the above mentioned Demat Account as security in the following credit facilities sanctioned/granted by you:

• Name of the Borrower- Hitesaurabha B Motiwala S/o Brijbihari Gokulesh Motiwala
• Loan Account No.- MPM0191
• Name of the Borrower- Dilip Jain S/o Ashok Jain
• Loan Account No.- MPM0198
• Name of the Borrower- Dee Kartavya Finance Limited
• Loan Account No.- MPM0207

I/We agree to stand as Gaurantor for the above mentioned loan facilities. I/We hereby guarantee to Moneywise the due performance of all the obligations by the above mentioned Borrowers in accordance with their Facility Agreements.

I/We authorize Moneywise to adjust any Margin Deficiency/Margin Call in any of the above mentioned Loan Accounts with Securities available in above mentioned Demat Account.

Notwithstanding anything to the contrary contained in any written contract executed or to be executed between the above mentioned Borrowers and Moneywise or its group companies or with me/us, Moneywise or its group companies shall at any time and at all times have the power and authority to exercise the right of set-off or adjust against the payment of any money due by the above mentioned Borrower(s) or by me/us or any of my/our family members, relatives, associates or any other entity associated to the undersigned. Any outstanding from the above mentioned Borrowers or by me/us or any of my/our family members, relatives, associates or any other entity associated to the undersigned, may be recovered/adjusted from the Securities available in the Demat Account. In addition to the above, Moneywise or its group companies shall also have the right to sell or dispose or create any form of encumbrance over the Securities available in the above mentioned Demat Account for payment of any dues payable by the above mentioned Borrowers or by me/us or any of my/our family members, relatives, associates or any other entity associated to the undersigned to Moneywise or group companies.

I/We further declare that this authority to Moneywise or its group companies is irrevocable and shall continue to be in full force and valid until expressly revoked with the written consent of Moneywise or its group companies.

I/We hereby further undertake to hold Moneywise or group companies indemnified and saved harmless from and against all losses, damages, interest, charges, expenses and any detriment of whatsoever kind or nature consequent or attributed to Moneywise or group companies acting or purporting to act in the exercise of any right of set off or lien.

Vishal Hemraj Oswal S/o Hemraj Pukhray Oswal
PAN- AAEP02778D
22, Pratishtha Awas, Near Jain Derasar Mandir Road
Ghod Dod Road, Surat City,
Surat- 395001



12. Similarly, the respondent No. 4 has addressed an email to M/s SMC Global Securities Limited who is the holding company of the petitioner which reads as under:-

From: Arun Kumar [arun2706@smcfinance.com]
22 April 2020 23:48
arun@smcindiaonline.com; 'Sandeep'
kaushal.mahpal@smcfinance.com
Subject: FW: Jinaam limit

Regards,
Arun Kumar | Asst. Manager | Funding
Moneywise Financial Services Pvt Ltd
11/68, 2nd Floor, Shanti Chambers, Pusa Road, New Delhi - 110085 Mobile : 9658988192 |
Landline : 011-30111000-8658 Website - <http://smcfinance.com/>
SMC Values : Passion | Integrity | Relationship | Innovation | Trustworthy

-----Original Message-----
From: Sandeep [mailto:sandeepagg@smcfinance.com]
Sent: 13 May 2019 14:40
To: kamalgoel@smcindiaonline.com; "Arun Kumar"
Subject: FW: Jinaam limit

-----Original Message-----
From: rahul oswal [mailto:rahulfloral@yahoo.com]
Sent: 13/05/2019 14:34
To: Fund@smcfinance.com; Sandeepagg@smcfinance.com
Subject: Jinaam limit

Dear sir,

At present, we are availing combine funding facility of Rs.4.36 CR. in our three accounts, MPN0191 Mr. Hitesrabha B Motiwala, MPN0190 Mr. Dilip Jain & MPN0207 M/s Dee Kartavya Finance Ltd., against 16,74,000 shares valued at Rs.9.87 CR. approx @ Rs.59/share. You are requested to provide further funding of Rs.2.64 CR. After the requested funding total debit will be at Rs.7 CR. and we will provide the remaining shares of Rs. 1.5 CR. within 2-3 days.

Rahul Hemraj Oswal
Director
Jinaam's dress pvt ltd .
Road no 5, plot no 524,
Sachin GIDC 394230.
Surat .
Phone no +91-261-2399123
www.jinaam.com

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13. The respondent No. 5 has signed a promissory note issued in favour of the petitioner as a guarantor.
14. Recently, the Hon'ble Supreme in *Cox & Kings (supra)* has observed as under:-

6. We are not reproducing the factual matrix of the case, as we have been called upon to settle the broader legal issues raised in the reference. In the process, we will answer the above legal issues, as well as other ancillary issues that have been raised before us by counsel.

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17. The arguments advanced by advocates on both sides of the aisle indicate that this Constitution Bench has been primarily called upon to determine the validity of the group of companies doctrine in Indian arbitration jurisprudence. However, there are other broad ancillary issues which have been raised by the learned counsel. These include : (i) whether the Arbitration Act allows joinder of a non-signatory as a party to an arbitration agreement; and, (ii) whether Section 7 of the Arbitration Act allows for determination of an intention to arbitrate on the basis of the conduct of the parties. This Bench will address the issues arising out of the order of reference as well as the abovementioned ancillary issues in due course.

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157. When deciding the referral issue, the scope of reference under both Sections 8 and 11 is limited. Where Section 8 requires the referral court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the existence of the



examination of an arbitration agreement.

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160. *In Pravin Electricals Pvt Ltd. v. Galaxy Infra and Engineering Pvt Ltd., a Bench of three Judges of this Court was called upon to decide an appeal arising out of a petition filed under Section 11(6) of the Arbitration Act for appointment of sole arbitrator. The issue before the Court was the determination of existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. This Court prima facie opined that there was no conclusive evidence to infer the existence of a valid arbitration agreement between the parties. Therefore, the issue of existence of a valid arbitration agreement was referred to be decided by the arbitral tribunal after conducting a detailed examination of documentary evidence and cross-examination of witnesses.*

161. *The above position of law leads us to the inevitable conclusion that at the referral stage, the court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal. The referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction. In Shin-Etsu Chemical Co Ltd. v. Aksh Optifibre Ltd., this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the tribunal:*

74. [...] Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the



arbitrator from trying the issue fully rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceedings to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration.”

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164. *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 nonsignatory 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 arbitral tribunal under Section 16.

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

a. The definition of “parties” under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;

b. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;

c. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;

d. Under the Arbitration Act, the concept of a “party” is distinct and different from the concept of “persons claiming through or under” a party to the arbitration agreement;

e. The underlying basis for the application of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the nonsignatory party to the arbitration agreement;

f. The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine;

g. The group of companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act;



h. To apply the group of companies doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises (supra). Resultantly, the principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine;

i. The persons “claiming through or under” can only assert a right in a derivative capacity;

j. The approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies doctrine to the phrase “claiming through or under” is erroneous and against the well-established principles of contract law and corporate law;

k. The group of companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements;

l. 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; and

m. In the course of this judgment, any authoritative determination given by this Court pertaining to the group of companies doctrine should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.”

(emphasis added)

15. A perusal of the above judgment reflects that the Court in Section 11 jurisdiction is only required to see the existence of the arbitration



clause and the issue of non signatory party shall be left open for the arbitral tribunal to decide.

16. Learned counsel for the parties are not disputing the existence of the arbitration clause but the only objection taken by the learned counsel for the respondents is that the respondent no. 3 to 5 are not signatories of the Loan Agreement.
17. *Prima facie*, I am of the view that the respondent Nos. 3 to 5 are a veritable party to the Loan Agreement as they are connected with the loan documents and form part of the loan transaction as in one way or the other, they have assured the petitioner regarding the execution of the loan documents and provided a security to the petitioner towards the loan transaction.
18. Further, the fact that whether the respondent Nos. 3 to 5 can be bound by the Loan Agreement and can be impleaded as parties to the arbitral proceedings is left open for the to Arbitral Tribunal decide. Also, the Arbitral Tribunal will also decide whether M/s SMC Global Securities Limited is a proper and necessary party to the arbitral proceedings.
19. With these observations, the parties are referred to the arbitration for adjudication of their dispute arising from the Loan Agreement. The following directions are issued:-
 - i) Justice Ali Mohammad Magray (Retd.) (Chief Justice of J&K) (Mob. No. 6005509928) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
 - ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher



Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- v) The parties shall approach the learned Arbitrator within two weeks from today.

20. The present petition is allowed and disposed of in the aforesaid terms.

JASMEET SINGH, J

FEBRUARY 26, 2024 / (MS)

Click here to check corrigendum, if any