



2024:DHC:8311



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

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Date of Decision: 25.10.2024+ **ARB.P. 1202/2024**

TECHCHEF CONSULTING INDIA PRIVATE LIMITEDPetitioner
Through: Mr. Roshan Santhalia, Ms. Ekta
Bharati, Mr. Prateek Charan and Mr.
Apurv Prasad, Advocates.

versus

HIMANSHU MISHRA & ANR.Respondents
Through: Mr. Nirmal Prasad, Mr. Shagun
Agarwal, Mr. K. Shakeel and Mr.
Tejasvi Mahajan, Advocates for R2.

CORAM:**HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') for appointment of a sole arbitrator to adjudicate the disputes between the parties.
2. The petitioner is a company engaged in providing data recovery services whereas respondent no.1, Mr. Himanshu Mishra, is a former employee of the petitioner. The respondent no.2, i.e. M/s. Techupay Consulting Services Private Limited (TCSPL), is a company set up by respondent no.1 after leaving employment under the petitioner. The disputes between the parties have arisen in context of a non-compete provision in the employment agreement dated 13.01.2017 between the parties. The said agreement also contains an arbitration clause in Clause 9.3 thereof.
3. Clause 9.3 of the employment agreement is as under:



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“9.3 Any dispute arising between the parties, shall be settled exclusively by arbitration in accordance with Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of sole arbitrator appointed by the consent of both the parties. The place of arbitration shall be New Delhi, and the language of arbitration shall be English.”

4. In the notice dated 11.06.2024 under Section 21 of the A&C Act, the petitioner while raising various claims, suggested the name of a person who could be appointed as a Sole Arbitrator. This notice was sent to both the respondents.
5. In the respondents' reply dated 08.07.2024 to the aforesaid notice under section 21, while the existence of the arbitration agreement has not been disputed, an alternate name was suggested for appointment as a Sole Arbitrator. As the parties could not mutually decide on the appointment of an arbitrator to adjudicate their disputes, the petitioner filed the present petition.
6. In the arbitral proceedings, the petitioner seeks to implead both the respondent no.1 & 2 despite the fact that the respondent no.2 is not a signatory to the arbitration agreement between the parties.
7. Learned counsel for the respondent while not disputing the existence of the arbitration agreement in the employment agreement dated 13.01.2017, submits, that the reference to arbitration must be confined to the petitioner and respondent no.1. It is submitted that it is not permissible to implead the respondent no.2 in the proposed arbitration since the respondent no.2 is not a party to the arbitration agreement.
8. The above contention of the respondent is untenable. It has now been conclusively held in ***Cox and Kings Ltd. v. SAP Ltd.(5J)*** (2024) 4 SCC 1 that the definition of parties under Section 2(1)(h) read with Section 7 of the



Arbitration and Conciliation Act, 1996 includes both signatory as well as, non-signatory parties.

9. The judgment of the Supreme Court in ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*** (2013) 1 SCC 641 recognises that impleadment of non-signatories can be based on non-consensual theories/ doctrines, particularly if the non-signatories or beneficiaries of the breach of obligations created under the principal contract (employment agreement).

10. In this regard, reference may be made to Paragraph 103.1 and 103.2 of ***Chloro Controls*** (supra), which read as under:-

“103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.”

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called “the alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of the applicable law.”

11. It is noticed that Para 103.2 of ***Chloro Controls*** (supra) clearly recognises that impleadment of a non-signatory can also be justified on the basis of “the alter ego” principle.

12. In the present case, the petitioner strenuously contends that respondent no.2 is nothing but an alter ego of the respondent no.1; it is merely a front created for the purpose of circumventing the non-compete provision in the employment agreement.

13. It is pointed out that the data on the website of the Ministry of Corporate Affairs regarding respondent no.2, appended with the present petition, indicates that respondent no.2 has two directors, namely – (1) Ms.



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Suneeta Mishra and (2) Mr. Mamraj. The petitioner submits that Ms. Suneeta Mishra is the mother of respondent no.1 and the other director is a director in one of the client companies of the petitioner. It is contended that the respondent no.2 is merely a front created by the petitioner, to circumvent the non-compete clause/s in the employment agreement dated 13.01.2017. The petitioner has claimed that it has suffered immense damages as a result of the dishonest conduct of the respondents.

14. In *Oil and Natural Gas Corporation Ltd. v. M/s. Discovery Enterprises Pvt. Ltd. & Anr.* (2022) 8 SCC 42, it has been observed as under:-

“36. Commentators have noted that a signed written agreement to submit a present or future dispute to arbitration does not exclude the possibility of an arbitration agreement binding a third party. A non-signatory may be bound by the operation of the group of companies doctrine as well as by the operation of the principles of assignment, agency and succession. 23 A party, which is not a signatory to a contract containing an arbitration clause, may be bound by the agreement to arbitrate if it is an alter ego of a party which executed the agreement. This constitutes a departure from the ordinary principle of contract law that every company in a group of companies is a distinct legal entity. A non-signatory may be bound by the arbitration agreement where:

- (i) There exists a group of companies; and*
- (ii) Parties have engaged in conduct or made statements indicating an intention to bind a non-signatory.”*

15. It has also been observed in *Oil and Natural Gas Corporation Ltd. v. M/s. Discovery Enterprises Pvt. Ltd. & Anr.* (supra) as under :-

“38. Explaining the application of the alter ego principle in arbitration, Born also notes:

“Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an ‘alter ego’ of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that



each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities [Id, p. 1432] .

“the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories [Id, p. 1450] .”

39. *Recently, John Fellas elaborated on the principle of binding a non-signatory to an arbitration agreement from the lens of the doctrine of estoppel. He situated the rationale behind the application of the principle of direct estoppel against competing considerations of party autonomy and consent in interpreting arbitration agreements. Fellas observed that non-signatory parties can be bound by the principle of direct estoppel to prohibit such a party from deriving the benefits of a contract while disavowing the obligations to arbitrate under the same:*

*“There are at least two distinct types of estoppel doctrine that apply in the non-signatory context: “the direct benefits” estoppel theory and the “intertwined” estoppel theory. The direct benefits theory bears the hallmark of any estoppel doctrine-prohibiting a party from taking inconsistent positions or seeking to “have it both ways” by “rely[ing] on the contract when it works to its advantage and ignor[ing] it when it works to its disadvantage.” *Tepper Realty Co. v. Mosaic Tile Co.* [Tepper Realty Co. v. Mosaic Tile Co., 259 F Supp 688 (SDNY 1966)] . The direct benefits doctrine reflects that core principle by preventing a party from claiming rights under a contract but, at the same time, disavowing the obligation to arbitrate in the same contract.*

By contrast, the intertwined estoppel theory looks not to whether any benefit was received by the non-signatory, but rather at the nature of the dispute between the signatory and the non-signatory, and, in particular whether “the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estoppel [signatory party] has signed....the intertwined estoppel theory has as its central aim the perseverance of the efficacy of the arbitration process is clear when one looks at the typical fact pattern of an intertwined estoppel case.” [John Fellas, “Compelling



Signatories to Arbitrate with Non-Signatories”, New York Law Journal (28-3-2022)]

(emphasis supplied)

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.”*

16. In the present case, the contention of the petitioner is that the respondent no.2 while not being a signatory, is a veritable party to the arbitration agreement since it is an alter-ego of the respondent no.1; it is nothing but a front created for reaping the benefits of breach of the employment agreement. The contentions are required to be tested, based on consideration of the relevant material/ evidence in this regard. Considering that this would involve an extensive adjudicatory exercise, it would be apposite to leave this aspect for determination by a duly constituted arbitral tribunal.

17. In *Cox and Kings Ltd. v. SAP Ltd. (5J)*, it has been held as under:-

“G. The standard of determination at the referral stage — Sections 8 and 11

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164. In *Vidya Drolia* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , N.V. Ramana, J. (as the learned Chief Justice then was) held that the amendment to Section 8 rectified the shortcomings pointed out in *Chloro Controls* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] with respect to domestic arbitration. He further observed that the issue of determination of parties to an arbitration agreement is a complicated exercise, and should best be left to the Arbitral Tribunals : (*Vidya Drolia* case [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 161, para 239)

“**239.** ... Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good faith, etc. in a multi-party arbitration raises complicated factual questions, which are best left for the tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference.”

165. In *Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.* [*Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.*, (2021) 5 SCC 671 : (2021) 3 SCC (Civ) 307] , 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.

166. 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 Arbitral 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.* [*Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234] , 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 : (*Shin-Etsu Chemical Co. case* [*Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234] , SCC p. 267, para 74)



“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 and 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 proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration.”

167. In *Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689]*, this Court held that it is the legislative intent of Section 45 of the Arbitration Act to give a finding on whether an arbitration agreement is “null and void, inoperative and incapable of being performed” before referring the parties to arbitration. In 2019, the expression “unless it prima facie finds” was inserted in Section 45. In view of the legislative amendment, the basis of the above holding of *Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689]* has been expressly taken away. The present position of law is that the referral court only needs to give a prima facie finding on the validity or existence of an arbitration agreement.

168. In *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar [Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar, (2011) 11 SCC 375 : (2011) 3 SCC (Civ) 679]*, a two-Judge Bench of this Court held that when a third party is impleaded in a petition under Section 11(6) of the Arbitration Act, the referral court should delete or exclude such third party from the array of parties before referring the matter to the Tribunal. This observation was made prior to the decision of this Court in *Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689]* and is no longer relevant in light of the current position of law. Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement.

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.

H. Conclusions

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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; and”*

18. In the circumstances, since the existence of an arbitration agreement is not in doubt, this Court does not find any impediment to constituting an arbitral tribunal to adjudicate the disputes between the parties. Further, whether or not the respondent no.2 can be brought within the sweep of arbitration based on the aforesaid contentions of the petitioner is an aspect that will be duly considered by the arbitral tribunal.

19. At this stage, based on a *prima facie* conspectus, this Court is inclined to refer the parties, including respondent no.1 & 2, to arbitration.



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20. Accordingly, with the consent of the parties, Mr. Aditya Kumar Choudhary, Advocate (Mobile No.+91 9911401535) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

21. Needless to say, the respondent shall be entitled to raise appropriate jurisdictional objections as regards the learned Sole Arbitrator including objections as regards substantive “non-existence” of the arbitration agreement *qua* the respondent no.2. All such objection/s shall be duly considered by the arbitral tribunal in accordance with law.

22. At this stage, respective counsel for the parties request that the arbitration be conducted under the aegis of, and as per the rules of Delhi International Arbitration Centre (DIAC). It is directed accordingly.

23. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties, requisite disclosures as required under Section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

24. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

25. The present petition stands disposed of.

SACHIN DATTA, J

OCTOBER 25, 2024/uk