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

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Date of Decision: 26.11.2024

+ **ARB.P. 1434/2024**

(19) **MR. SUNEEL SARDANA, DECEASED THROUGH LEGAL REPRESENTATIVES**

.....Petitioner

Through: Mr. Aditya Malhotra, Ms. Tripti Kapoor and Ms. Eshita Gupta, Advs.

versus

M/S VIPUL LTD & ANR.

.....Respondents

Through: Mr. Sumesh Dhawan, Ms. Vatsala Kak, Mr. Shaurya Shyam, Mr. Sagar Thakkar, Advs. for R-1.

Mr. Kirti Uppal, Sr. Adv. along with Mr. J.K. Sharma, Mr. Abhishek Bhardwaj, Mr. Rajendra Singh, Mr. Aditya Raj, Mr. Sudesh Ranjan Singh and Mr. Chirag Nagpal, Advs. for R-2.

+ **O.M.P.(I) (COMM.) 331/2024**

(74) **MR. SUNEEL SARDANA (DECEASED) THROUGH LRS MR. SIDHARTH SARDANA AND ANR**

.....Petitioners

Through: Mr. Aditya Malhotra, Ms. Tripti Kapoor and Ms. Eshita Gupta, Advs.

versus

M/S VIPUL LTD & ANR.

.....Respondents

Through: Mr. Sumesh Dhawan, Ms. Vatsala Kak, Mr. Shaurya Shyam, Mr. Sagar Thakkar, Advs. for R-1.

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and Mr. Chirag Nagpal, Advs. for
R-2.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL)

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A&C Act') seeks constitution of an arbitral tribunal to adjudicate the disputes between the parties.
2. The disputes between the parties have arisen in the context of a collaboration agreement dated 02.09.2010, amended *vide* addendum dated 02.11.2016 (hereinafter referred to as 'CA-1') entered into between the petitioner and the respondent no.1 for an area admeasuring 7094 sq. yards.
3. Another collaboration agreement dated 02.11.2016 (hereinafter referred to as 'CA-2') was entered into between the petitioner and the respondent no.1 for an additional area admeasuring 1404.36 sq. yards.
4. In terms of CA-1 and CA-2, the petitioner was entitled to a portion of the built-up area out of the project to be developed.
5. It is the case of the petitioner that the share of the petitioner and the respondent no.1, as per Clause 4 of both CA-1 and CA-2, was to be divided proportionately on all floors and with proportionate share in the basements, ground floor, stilts, parking space, terrace, common areas, open common areas and all other constructed and non-constructed area and utilities of the Group Housing Complex to be developed on the said area for collaboration.
6. The petitioner contends that the respondent no.1 did not adhere to the terms of CA-1 and CA-2 and since the petitioner was not given his due



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share, disputes arose between the parties.

7. Further, the respondent no.1 and the respondent no.2 are stated to have entered into a joint development agreement for commercial buildings and a joint development agreement for residential buildings both dated 11.10.2021 whereby the respondent no.1 and the respondent no.2 have allegedly agreed to divide the built-up space on a 50:50 basis and 30:70 basis respectively.

8. It is submitted on behalf of the petitioner that the project is intended to be constructed on the petitioner's land, however, no allocation whatsoever has been made to the petitioner.

9. The arbitration clause under CA - 1 and CA – 2 is common and in the following terms: -

“34. That, in case of any dispute or differences, both the parties shall settle the same amicably, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments, modifications thereof for the time being in force. The arbitration shall be conducted by a Sole Arbitrator mutually appointed by both the Parties. The arbitration proceedings shall be conducted in English and the venue of arbitration shall be New Delhi regardless of the place of execution of this Agreement and / or any other papers, documents in respect of the Subject Matter. The reason decision of the arbitral tribunal constituted in accordance with the provisions of this clause shall be final and binding on the Parties and may be entered and enforced in any court of competent jurisdiction by either Party.”

10. The petitioner issued a notice dated 05.06.2024 under Section 21 of the Arbitration and Conciliation Act, 1996, invoking the arbitration clause in CA-1 and CA-2. The respondents replied on 26.06.2024, raising objections and disagreeing with the suggested arbitrators.

11. Resultantly, the petitioner has approached this Court through the



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present petition, seeking the appointment of a Sole Arbitrator to adjudicate the dispute.

12. Although the collaboration agreement between the petitioner and the respondent no.1 is a bilateral one, the petitioner has sought to implead the respondent no.2 in the proposed arbitration in view of the aforesaid joint development agreement/s.

13. The respondent no.2 has been sought to be brought within the fold of the arbitration despite being a non-signatory on the basis that it is the beneficiary of the rights and obligations created under CA-1 and CA-2.

14. In support of the legal basis for impleadment of the respondent no.2, reliance has been placed on paragraph 103.1 and 103.2 of the judgment of the Supreme Court in ***Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.***, (2013) 1 SCC 641.

15. Reliance has also been placed on the judgment of ***Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd.***, (2021) 281 DLT 246, to contend that when the rights created in favour of the non-signatory (the respondent no.2) is pursuant to the benefits derived under the main agreement containing the arbitration clause (CA-1 and CA-2), the non-signatory would come within the sweep of the arbitration agreement.

16. It is further contended that the subject matter of the joint development agreements between the respondent no.1 and the respondent no.2 is the very same land parcel which is the subject matter of the CA-1 and CA-2 between the petitioner and the respondent no.1. Both CA-1 and CA-2 and the joint development agreement/s are stated to be inextricably connected with each other.

17. Reliance is placed on ***ONGC Ltd. v. Discovery Enterprises (P) Ltd.***,



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(2022) 8 SCC 42, to contend that “*the doctrine of arbitral estoppels suggests that a party is stopped from denying its obligation to arbitrate when it received a “direct benefit” form a contract containing an arbitration agreement*”. (Paragraph 59)

18. In context of a situation where non-signatories are sought to be impleaded in arbitration, the standard of determination at the reference stage, has been set out by the Supreme Court in ***Cox & Kings Ltd. v. SAP India (P) Ltd.***, 2024 INSC 670, wherein it has been held as under :-

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

[...]

164. In *Vidya Drolia, 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 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, 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.*, 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.



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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. AkshOptifibre 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 : (Shin-Etsu Chemical Co. case 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, 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 Controls¹ 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, 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 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

170 [...]

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 [...]

After the aforesaid decision of the Constitution Bench, the matter was placed before the regular bench of the Supreme Court for adjudication, and in *Cox & Kings Ltd. v. SAP India (P) Ltd.*,¹ on the issue of impleadment of non-signatory, it has held as under:

“34. Further, on the issue of impleadment of respondent no. 2, which is not a signatory to the arbitration agreement, elaborate submissions have been made on both the sides, placing reliance on terms of the agreements, email exchanges, etc. In view of the complexity involved in the determination of the question as to whether the respondent no. 2 is a party to the arbitration agreement or not, we are of the view that it would be appropriate for the arbitral tribunal to take a call on the question

¹2024 INSC 670



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after taking into consideration the evidence adduced before it by the parties and the application of the legal doctrine as elaborated in the decision in Cox and Kings (supra).”

19. After some hearing, respective counsel for the parties are in agreement and jointly request this Court to appoint an independent sole Arbitrator to adjudicate the disputes between the parties.

20. Accordingly, Mr. Justice (Retd.) Rajiv Shakdher, Former Chief Justice, Himachal Pradesh High Court (Mob. No.: +91 9717495004) is appointed as the sole Arbitrator to adjudicate the disputes between the parties.

21. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

22. The respondents would be entitled to raise appropriate objections as regards jurisdiction/arbitrability including objection/s on account of impleadment of a non-signatory to the arbitration agreement. All such objections shall be duly considered and decided by the learned Sole Arbitrator on its own merits and in accordance with law. It is made clear that this Court has not expressed any opinion with regard to the merits thereof.

23. The learned sole Arbitrator shall fix his fees in consultation with the parties.

24. All rights and contentions are left open, to be considered by the learned sole Arbitrator on merits.

25. It shall be open to the respondents to raise counter-claims, if any, in the arbitration proceedings.

26. The present petition is disposed of.



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27. Since an arbitral tribunal has already been constituted, it would be apposite if the present petition is treated as an application under Section 17 of the A&C Act and dealt with by the learned sole Arbitrator, in accordance with law. It is directed accordingly.

28. The petition is disposed of in the above terms.

SACHIN DATTA, J

NOVEMBER 26, 2024/r, sv