OCD 8

ORDER SHEET
AP-COM/369/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

SREI EQUIPMENT FINANCE LIMITED
VS
MURTI HOUSING AND FINANCE PRIVATE LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 14th May, 2025.

Appearance:
Mr. Ranjan Bachawat, Sr. Adv.
Ms. Pubali Sinha Chowdhury, Adv.
Mr. Satyaki Mukherjee, Adv.
Ms. Rajeshwari Prasad, Adv.
…for the petitioner

Mr. Samrat Sen, Sr. Adv.
Ms. Manali Bose, Adv.
Mr. Subhransu Ganguly, Adv.
…for the respondent

1. This is an application for appointment of an Arbitrator, to arbitrate upon the disputes arising out of the agreement for sale dated September 29, 2017, which was entered into between the respondent and Srei Infrastructure Finance Limited (SIFL).

2. The clause with regard to settlement of dispute by arbitration is contained under Clause 7 of the said agreement. It provides that in the event of any dispute or difference arising out of and/or in connection with the agreement

during its subsistence and/or thereafter, between the parties including any dispute or difference relating to and/or touching the agreement or any covenants thereof, shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and rules framed thereunder.

3. Mr. Bachawat, learned senior advocate, submits that although the agreement was entered into between the respondent and SIFL, but by a business transfer agreement all rights, liabilities, business dealings etc. of SIFL stood transferred to Srei Equipment Finance Limited (SEFL). According to Mr. Bachawat, the agreement provided that the expression 'purchaser' would include successors-in-office, successors-in-interest, legal representatives, nominees and assigns. By the business transfer agreement, the commercial activities of SIFL stood transferred to SEFL and as such, SEFL was the successor in interest and the assignee of SIFL. Reference is made to the notice invoking arbitration dated November 5, 2024. The petitioner called upon the respondent to agree to the appointment of one of the two named arbitrators in the said notice, with a further proposal that the seat and the venue of arbitration will be Kolkata. Further reference is made to the response of the respondent dated December 3, 2024, wherein the respondent raised an objection with regard to the invocation on the ground that the subject agreement for sale was between SIFL and the respondent. SEFL being a non-signatory, could not invoke arbitration.

4. Mr. Sen, learned senior advocate for the respondent, submits that the claim was time barred. The petitioner sought specific performance of an agreement for sale of 2017. The time for performance expired on September 28, 2018. The notice of invocation was issued on November 5, 2024. Mr. Sen submits that the referral court is empowered to weed out non-arbitrable claims or time barred claims and decide the issue. Mr. Sen relied on the following decisions in support of his contention that this Court should refuse to refer the dispute upon holding that the same is barred by limitation:--

(i) ***B and T AG v. Ministry of Defence*** reported in ***(2024) 5 SCC 358*** *and*

(ii) ***Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*** reported in ***(2024) 4 SCC 341;***

5. The next contention of Mr. Sen is with regard to non-existence of the arbitration clause between the parties. Mr. Sen submits that the first duty of the referral court is to enquire as to whether an arbitration clause exists between the parties to the proceeding. In support of such contention, Mr. Sen relies on the decisions in ***SBP & Co. v. Patel Engineering Ltd. & Another*** reported in ***(2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*** reported in ***(2009)1 SCC 267***. Paragraph 26 of the decision in ***Lombardi Engineering (supra)*** is also referred to.

6. Mr. Sen denies the contention of Mr. Bachawat that, by virtue of a business transfer agreement, the petitioner had acquired a right to enforce the agreement for sale and approach this Court by invoking the arbitration

clause. His first contention is that the business transfer agreement has not been annexed and there has been suppression of such documents. The next question which has been raised is whether the business transfer agreement provides for assignment of the agreement for sale between SIFL and the petitioner, to SEFL. Such issue, requires consideration by this Court, to satisfy itself that the arbitration agreement stood assigned to the petitioner, upon execution of the business transfer agreement as a consequence of transfer of the agreement for sale as well.

7. Heard the parties. First, this Court considers the point of limitation. The Hon'ble Apex Court explained the scope of interference by a referral court by, inter alia, holding that the referral court should enquire whether the application for reference to arbitration was barred by limitation i.e. made within three years from invocation and whether the claim is ex facie barred and non-arbitrable. A mini trial is not required to be conducted by the referral court. Reference is made to the decision of ***SBI v. Krish Spinning...*** reported in *2024 SCC OnLine 1754.* The relevant paragraph is quoted below:-

> "**126.** Before, we close the matter, it is necessary for us to clarify the dictum as laid in Arif Azim Co. Ltd. v. Aptech Ltd. reported in 2024 INSC 155, so as to streamline the position of law and prevent the possibility of any conflict between the two decisions that may arise in future.
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> **127.** In Arif Azim (supra), while deciding an application for appointment of arbitrator under Section 11(6) of the Act, 1996, two issues had arisen for our consideration:

i. Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?

ii. Whether the court may decline to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly time-barred?

128. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that "the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice."

129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

130. On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to "prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process."

131. Our findings on both the aforesaid issues have been summarised in paragraph 89 of the said decision thus:—

"89. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test - first, whether the petition under

> Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal."

8. The subject agreement for sale was to be executed by and between SIFL and the petitioner, within the 12th month from the date of execution i.e. within September 28, 2018. The period between March 15, 2020 and February 28, 2022 had been excluded by the Hon'ble Apex Court for the purpose of computation of limitation in respect of all proceedings or applications to be filed under the Arbitration and Conciliation Act, 1996, which included the time for issuance of a notice invoking arbitration. Moreover, proceedings were going on in the NCLT and the parties were undergoing CIRP. Thus, in the instant case as well, the above period, in my prima facie view, should be excluded while computing the period of limitation to invoke arbitration. In the decision of *Krish Spinning (supra)*, the Hon'ble Apex Court held that the referral court was required to see whether the reference to arbitration was within the period of limitation or the claims were dead wood, leaving it for the learned arbitrator to decide on the point of limitation, which is often mixed question of law and facts. In the decision of *B and T AG (supra)* which has been relied upon by Mr. Sen, the eye of needle test has been discussed. It provides that the standard of scrutiny to examine the non-arbitrability of the claim would only be, prima facie. The referral court must not undertake a full review of the contested facts. It must only be confined to a primary first review and let facts speak for themselves. The Hon'ble Court made a distinction between the plea that the claims were

barred by limitation and that the application for appointment of an arbitrator was barred by limitation. Cause of action was explained to be a bundle of material facts, which were essential for determining the period of limitation for bringing an action. Thus, the said decision does not help Mr. Sen at this stage, in view of the aforementioned facts narrated hereinabove and also because this application has been filed within a few months from invocation of the arbitration clause. *Lombardi Engineering (supra)* also deals with the limited scope of judicial scrutiny at the pre-referral stage. It lays down the law that a restricted and limited review is available to the referral court to check and protect parties from being forced to arbitrate when the matter was demonstrably non-arbitrable and deadwood. In the facts of this case, it would not be proper for this Court to go into a deeper probe.

9. The other contention of Mr. Sen that, the arbitration clause was not in existence as the petitioner was not a signatory to the agreement for sale, is prima facie, not acceptable to the Court for the following reasons:-

(a) The petitioner relies upon a business transfer agreement entered into between SIFL and SEFL and contends that SEFL was the assignee or the successor in interest of SIFL. The recital of the agreement has been relied upon.

(b) SEFL is intrinsically connected with the business of SIFL and the conduct of SEFL indicates that it chose to be bound by the said agreement.

(c) The business transfer agreement was made a part of the resolution plan. The resolution plan was approved by the NCLT.

10. The contention of Mr. Sen that NCLT had expressed doubts with regard to the validity of the business transfer agreement and the applicant before the NCLT had decided to maintain status quo in respect of the said agreement, would indicate that SEFL had not actually derived any right on the basis of the said agreement, is also an issue which is required to be adjudicated upon appreciation of evidence. Such adjudication is also within the domain of the learned arbitrator.

11. In the decision of ***ASF Buildtech Private Ltd. v. Shapoorji Pallonji and Company Pvt. Ltd.*** reported in ***2025 INSC 1016***, the Hon'ble Court once again reiterated that all issues with regard to arbitrability, non-arbitrability, who should be parties to an arbitration agreement etc. should be left to be decided by the learned arbitrator under the doctrine of kompetenz-kompetenz. The relevant paragraphs are quoted below:-

> "113. It is well within the jurisdiction of the Arbitral Tribunal to decide the issue of joinder and non-joinder of parties and to assess the applicability of the Group of Companies Doctrine. Neither in Cox and Kings (I) (supra) nor in Ajay Madhusudhan (supra), this Court has said that it is only the reference courts that are empowered to determine whether a non-signatory should be referred to arbitration. The law which has developed over a period of time is that both 'courts and tribunals' are fully empowered to decide the issues of impleadment of a non-signatory and Arbitral Tribunals have been held to be preferred forum for the adjudication of the same.
> 114. In the case of Ajay Madhusudhan (supra), this Court, placing reliance on Cox and Kings (I) (supra), has expressly held that Section 16 is an inclusive 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.

115. The case of Ajay Madhusudhan (supra) also recognizes that the legal relationship between the signatory and non-signatory assumes significance in determining whether the non-signatory can be taken to be bound by the Arbitration Agreement. This Court also issued a caveat that the 'courts and tribunals should not adopt a conservative approach to exclude all persons or entities who are otherwise bound by the underlying contract containing the arbitration agreement through their conduct and their relationship with the signatory parties. The mutual intent of the parties, relationship of a non- signatory with a signatory, commonality of the subject matter, the composite nature of the transactions and performance of the contract are all factors that signify the intention of the non-signatory to be bound by the arbitration agreement'.

116. Recently, a coordinate bench of this Court in Adavya Projects Pvt. Ltd. v. Vishal Strcturals Pvt. Ltd., 2025 INSC 507, also held that an arbitral tribunal under Section 16 of the Act, 1996 has the power to implead the parties to an arbitration agreement, irrespective of whether they are signatories or non-signatories, to the arbitration proceedings. This Court speaking through. P.S. Narasimha J. observed that since an arbitral tribunal's jurisdiction is derived from the consent of the parties to refer their disputes to arbitration, any person or entity who is found to be a party to the arbitration agreement can be made a part of the arbitral proceedings, and the tribunal can exercise jurisdiction over him. Section 16 of the Act, 1996 which empowers the arbitral tribunal to determine its own jurisdiction, is an inclusive provision that covers all jurisdiction question including the determination of who is a party to the arbitration agreement, and thus, such a question would be one which falls within the domain of the arbitral tribunal. It further observed that, although most national legislations do not expressly provide for joinder of parties by the arbitral tribunal, yet an arbitral tribunal can direct the joinder of a person or entity, even if no such provision exists in the statute, as long as such person or entity is a party to the arbitration agreement. Accordingly, this Court held that since the respondents therein were parties to the underlying contract and the arbitration agreement, the arbitral tribunal would have the power to implead them as parties to the arbitration proceedings in exercise of its jurisdiction under Section 16 of the Act, 1996. The relevant observations read as under: -

"24. As briefly stated above, the determination of who is a party to the arbitration agreement falls within the domain of the arbitral tribunal as per Section 16 of the ACA. Section 16 embodies the doctrine of kompetenz-kompetenz, i.e., that the arbitral tribunal can determine its own jurisdiction. The provision is inclusive and covers all jurisdictional questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement. and the scope of disputes referrable to arbitration under the agreement. Considering that the arbitral tribunal's power to make an award that binds the parties is derived from the arbitration agreement, these jurisdictional issues must necessarily be decided through an interpretation of the arbitration agreement itself. Therefore, the arbitral tribunal's jurisdiction must be determined against the touchstone of the arbitration agreement.”

12. The arbitrator can decide on his own jurisdiction and also as to the validity and existence of the arbitration clause. The referral Courts duty is to just satisfy itself, prima-facie, that there exists an arbitration clause between the parties.

13. Whether the business transfer agreement was a product of fraud or a document which did not incorporate the subject agreement for sale etc. are matters of evidence and such issue raised by Mr. Sen must be left to be adjudicated by the learned arbitrator. The decisions of *Boghara Polyfab (supra)* and *Patel Engineering (supra)* do not help Mr. Sen in the above context.

14. In the matter of ***Ajay Madhusudan Patel v. Jyotrindra S. Patel,*** reported in ***(2025) 2 SCC 147,*** the Hon'ble Apex Court held as follows:-

> **“82.** An important factor to be considered by the courts and tribunals is the participation of the non-signatory in the performance of the underlying contract. In this regard, it was observed in Cox & Kings [Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Case 680] as follows : (SCC pp. 75-77, paras 123 & 126-27)
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> > “123. … The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The Unidroit Principle of International Commercial Contract, 2016 [Unidroit Principles of International Commercial Contracts, 2016, Article 4.3.] provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned; and

(f) usages.

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126. Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a number of reasons. First, by being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement; second, the conduct of the non-signatory may be in harmony with the conduct of the other members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other party has legitimate reasons to rely on the appearance created by the non-signatory party so as to bind it to the arbitration agreement.

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127. ... The nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence."

15. In the matter of ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.,*** reported in***(2013) 1 SCC 641,*** the Hon'ble Apex Court held as follows:-

> **"70.** Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (*sic* underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England* (2nd Edn.) by Sir Michael J. Mustill:
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> > '1. The claimant was in reality always a party to the contract, although not named in it.
> >
> > 2. The claimant has succeeded by operation of law to the rights of the named party.
> >
> > 3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
> >
> > 4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

16. In the matter of ***Cox & Kings Ltd. v. SAP (India) (P) Ltd.,*** reported in ***(2025) 1 SCC 611,*** the Hon'ble Apex Court held as follows:-

> **"31.**
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> ****
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> 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."

17. The petitioner claims to be intrinsically connected with the agreement for sale, pursuant to the business transfer agreement. The existence of the business transfer agreement is, prima facie, available from the order of the NCLT. Rest of the issues with regard to the validity, legality, effect and implementation of the said agreement, are left to be decided by the learned arbitrator, upon such points being raised.

18. Under such circumstances, this Court is of the view that further probe in this regard is not necessary. The referral Court is not required to decide the validity of the arbitration clause, but only satisfy itself, prima facie, as to its existence.

19. Under such circumstances, the application is allowed. This Court appoints Mr. Swarnendu Ghosh, Advocate (Mobile No.9831264232) as the learned arbitrator, to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned arbitrator shall fix his own remuneration as per the Schedule of the Act.

(SHAMPA SARKAR, J.)

B.Pal / S Kumar / R. D Barua