

ORDER

OCD-4

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/394/2025
SREI EQUIPMENT FINANCE LIMITED
VS
KRISHNA ARJUN ENTERPRISE AND ORS.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 16th June 2025.

Appearance:-

Mr. Swatarup Banerjee, Advocate
Mr. Sariful Haque, Advocate
Mr. Rajib Mullick, Advocate
Mr. Biswaroop Ghosh, Advocate
... for the petitioner.

Mr. Abhrajit Mitra, Senior Advocate
Mr. Nikunj Berlia, Advocate
Mr. Rachit Lakhmani, Advocate
Ms. Srija Chakraborty, advocate
... for the respondents.

1. This is the second application for appointment of a learned arbitrator filed before this court, in terms of clause 9.11 of the facility agreement dated September 5, 2018. The agreement was entered into between the petitioner and the respondent No.1. The respondent No. 1 is an unregistered partnership firm. The managing partner signed the agreement on behalf of the firm. The clause provides that any dispute or difference arising out of or in connection with the agreement during its subsistence or thereafter between the parties, including any dispute or difference relating to the interpretation of the agreement or any clause thereof, shall be adjudicated by arbitration in accordance with the

provisions of the Arbitration and Conciliation Act, 1996 and the rules framed thereunder. The dispute shall be referred to the arbitration of a sole arbitrator, to be appointed by the petitioner company.

2. The application was filed before this Court after the respondents did not agree to invocation of the said clause. The procedure for unilateral appointment mentioned in the agreement for appointment of a learned arbitrator by the company was no longer valid, upon interpretation of Section 12(5) of the Arbitration and Conciliation Act, 1996 (hereinafter refer to as 'the said Act'). Thus, the petitioner approached this Court. The first application was allowed to be withdrawn with liberty to file afresh.
3. Mr. Banerjee, learned advocate for the petitioner, submits that Rs.56 crore was extended as a loan facility to the respondent No.1. The last month for repayment of the monthly instalment as per Annexure-II to Schedule-VII of the repayment schedule of the agreement of 2018, was August 2023. It is submitted by the petitioner that a revised schedule of repayment of the said loan was provided to the respondents. Reliance has been placed on Annexure—C at pages 63-65 of the petition. The last date for repayment under the revised schedule was January 5, 2024. It is contended that the parties executed a deed of guarantee simultaneously with the facility agreement, also on September 5, 2018. The respondent Nos.2 and 3 stood as guarantors. The arbitration clause under the main agreement was incorporated by reference in the deed of personal guarantee. Thus, according to Mr. Banerjee, all the respondents were liable jointly and

severally. According to the petitioner, payment was made up to the 21st monthly instalment and part payment was made of the 22nd monthly instalment. Paragraph 9 of the application states that last of the payment was received on 31st March 2020. The petitioner issued a demand notice and claimed a sum of Rs.71,20,28,045.83, vide letter dated January 1, 2023. The letter was addressed to the borrower as also the guarantors. A letter of termination of the agreement was issued on January 17, 2023. The respondents did not reply to the said letter and a notice invoking arbitration was issued on 22nd March 2023. The notice was issued to the borrower as also to the guarantors. The respondents did not reply to the said notice and the petitioner moved this Court for appointment of an arbitrator. In view of the formal defects in the said application, the petitioner was allowed to withdraw the same with liberty to file afresh, in accordance with law.

4. Another notice was issued on September 10, 2024, calling upon the respondents to pay up the alleged dues. The respondent No.1 through its learned advocate replied to the said notice and denied the claim. The principal and interest components and other charges mentioned in the said notice were stated to be untrue and incorrect. It was categorically stated that unless the disbursements and month-wise repayment were furnished in detail, the respondents would not be in a position to understand the claim and the number of instalments that were pending. Paragraph 6 of the said letter indicates that the respondent No.1, through

its learned advocate, called upon the petitioner to furnish details of other charges, debited expenses, overdue charges item-wise and month-wise payment etc. The claim was also alleged to be barred by limitation. Accordingly, the respondent No.1 contended that the petitioner did not have an enforceable debt against the respondent No.1, as the notice was issued after five years from the date of the agreement. A second notice dated February 15, 2025 invoking the arbitration clause was sent by the petitioner to the respondents. The respondent No.1 and the respondent Nos.2 and 3 replied to the said notice. Those documents are available at pages 103, 104, 107, 108, 111 and 112 of the petition.

5. It is contended by Mr. Banerjee that the respondents did not deny either the existence of the arbitration clause or the signing of the documents. Their only contention was that the claim was time barred and the calculation was false, fabricated and incorrect. The issues raised by the respondents in their reply to the notice invoking arbitration were factual issues which were to be decided by the learned arbitrator. Prayer is made for reference of the dispute to arbitration.
6. Mr. Mitra, learned senior advocate appearing on behalf of the respondents prays for an opportunity to file an affidavit in opposition to bring on record a factual aspect that, the entire money was repaid soon after the loan facility was extended. The agreement had failed. The invocation was improper. There were no arbitrable disputes. The other aspect sought to be brought on record was the mistake in the calculation made by the

petitioner. It is submitted that the affidavit will disclose the frivolity of the claim of the petitioner.

7. This Court is of the view that the contention of Mr. Mitra of having paid back the entire amount immediately after the disbursal thereof and there are miscalculations of the debt due, are factual aspects and must be raised before the learned arbitrator. The issue of limitation and the claim being time barred must also be decided by the learned Arbitrator. These issues will have to be decided on evidence to be put forward before the learned arbitrator and as such, this application can be disposed of without an affidavit. Mr. Mitra further submits that the advantage of Section 19 of the Limitation Act cannot be taken by the petitioner, inasmuch as, there is nothing on record to show that within the period of limitation of three years from the date of execution of the loan agreement, any payment had been made by the respondents. The petitioner is not entitled to a fresh period of limitation. The claim is time barred as more than 5 years had already lapsed when the first invocation was made. According to Mr. Mitra, payment within a period of three years ought to have been reflected from the documents. Mr. Mitra further submits that the invocation was improper, inasmuch as, the personal guarantee deed was a separate agreement and the arbitration clause ought to have been invoked separately, in respect of the disputes arising out of the same, insofar as, the claims against the respondent Nos. 2 and 3 are concerned.

8. Mr. Mitra relied on the following decisions :-

- 1) *Sant Lal Mahton Vs. Kamla Prasad And Others* reported in 1951 SCC 1008.
 - 2) *West Bengal Power Development Corporation Limited Vs. Sical Mining Limited* reported in (2015) SCC OnLine Del 1430.
 - 3) *Chandra Chur Mukherjee Vs. Indian Oil Corporation Ltd.* reported in 2012 SCC OnLine Cal 1423.
9. Having considered the rival contentions of the parties, this Court finds that the parties entered into an agreement which contains an arbitration clause. As a referral court, I am satisfied that the parties had entered into a binding arbitration agreement. The respondent nos. 2 and 3 executed a personal guarantee deed with the petitioner on the same day as the execution of the facility agreement. Clause 34 of the personal guarantee agreement provides that the parties shall be bound by the terms and conditions of the agreement including the arbitration and jurisdiction clause detailed in the agreement No.171007 dated September 5, 2018 i.e. clauses 9.11 and 9.10 of the facility agreement dated September 5, 2018. Clause 35 provides that the Guarantor, Customer and SEFL confirmed the covenants mentioned in the Deed of Guarantee by execution thereof and further unconditionally and irrevocably agreed and confirmed that the instrument of Guarantee formed an integral part of the Agreement mentioned therein which was the Facility Agreement No.171007 dated September 5, 2018. Clause 36 provides that any dispute or difference arising out of or in connection with Guarantee Agreement shall be subject

to the Arbitration and Jurisdiction Clause as mentioned in the Facility Agreement. Thus, this Court is also of the, prima facie, view that the Personal Guarantee Agreement was a part and parcel of the Facility Agreement, which was intrinsically connected with the said agreement and arose out of the said agreement. The arbitration clause as stated in the agreement No.171007 dated September 5, 2018 was made applicable in its entirety to the Personal Guarantee Agreement. Thus, the invocation of the arbitration clause by reference to agreement No.171007 dated September 5, 2018 was adequate and extended to the guarantee agreement by reference. The deed of guarantee indicates, prima facie, the mutual intent of the signatories to be bound by the arbitration clause contained in the facility agreement.

10. The decisions cited by Mr. Mitra on this score i.e. *Chandra Chur Mukherjee Vs. Indian Oil Corporation Limited*(supra) and *AP 555 of 2022 (West Bengal Power Development Corporation Limited Vs. Sical Mining Limited)*, are not applicable to this case. In those two matters, the parties moved the Court for appointment of an Arbitrator without any invocation as contemplated under the law. The proposition of law laid down in those two decisions were that before approaching the Chief Justice or his designate for appointment of a learned Arbitrator, a party was required to issue a notice invoking arbitration by expressing the intention to settle the dispute by the arbitrator. Upon expiry of 30 days from delivery of notice, if no

response was received, the party invoking arbitration could approach the Court for appointment under Section 11(6) of the Said Act.

11. The decision cited by Mr. Mitra reported in *Sant Lal Mahton* (Supra) is not applicable in the facts of the case, inasmuch as, it is not the petitioner's case that the period of limitation was extended upon the respondent making payment within a period of three years from the date the debt became due.
12. All issues raised by Mr. Mitra are matters of trial. The referral court is to satisfy itself, prima facie as to the existence of the arbitration clause. Whether the respondent nos. 2 and 3 were rightly impleaded in this proceedings as personal guarantors is also a matter which has to be decided by the learned Arbitrator. In the decision of the Hon'ble Supreme Court in ***ASF Buildtech Pvt. Ltd. Vs. Shapoorji Paloondi*** reported in **2025 SCC OnLine SC 1016** it was decided that the issues of joinder, non-joinder, mis-joinder etc. are also within the domain of the learned Arbitrator. The relevant portions 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 referable 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."

13. The referral court can, prima facie, examine the existence of an arbitration clause and can weed out absolutely dead and non-arbitrable claims. If there is any doubt, the dispute should be referred. Even if Mr. Mitra's contention that, the first invocation was made after five years from execution of the agreement and beyond the period of limitation is accepted, the decision of the Hon'ble Apex Court in the order dated January 10, 2022 by which the Hon'ble Apex Court in a suo moto writ petition had excluded the period between March 15, 2020 to February 28, 2022 in computation of the period of limitation in all such cases, may be taken advantage of by the petitioner. Secondly, the petitioner's debt fell due sometime in October 2020 as per the demand notice i.e. upon failure of payment from the 23rd instalment or part of the 22nd instalment. The

agreement was terminated on January 17, 2023. The demand notice was issued and the agreement was terminated before expiry of term for repayment. The notice invoking arbitration was issued on March 22, 2023. Moreover, this application has been filed upon liberty being granted by the Court to file afresh, in accordance with law.

14. In such a situation, the issue of limitation becomes a triable issue and a mixed question of law and fact. The same can be raised before the learned Arbitrator. This Court can make only a limited enquiry to weed out deed wood claims.
15. Reference is made to the decision of the Hon'ble Apex Court in ***Aslam Ismail Khan Deshmukh vs ASAP Fluids Private Limited and Another*** reported in **(2025) 1 SCC 502**. The relevant part is quoted below:-

“50. As evident from the aforesaid discussion and especially in light of the observations made in *Krish Spg. [SBI General Insurance Co. Ltd. v. Krish Spg., (2024) 12 SCC 1 : 2024 SCC OnLine SC 1754]*, this Court cannot conduct an intricate evidentiary enquiry into the question of when the cause of action can be said to have arisen between the parties and whether the claim raised by the petitioner is time-barred. This has to be strictly left for the determination by the Arbitral Tribunal. All other submissions made by the parties regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in Respondent 1 company are concerned with the merits of the dispute which squarely falls within the domain of the Arbitral Tribunal.

51. It is now well-settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists — nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue

advantage of such a limited scope of judicial interference of the referral Courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process. This is especially possible in instances, including but not limited to, where the claimant canvasses either ex facie time-barred claims or claims which have been discharged through “accord and satisfaction”, or cases where the impleadment of a non-signatory to the arbitration agreement is sought, etc.

52. In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration.”

16. Under such circumstances, this Court allows the application and refers the dispute to a sole Arbitrator. This Court appoints Justice Dilip Kumar Seth, former Judge of this Court 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/her remuneration as per the Schedule of the Act. All questions and objections available to the parties, including the arbitrability of the claim shall be decided by the learned arbitrator.
17. The application is disposed of.

(SHAMPA SARKAR, J.)