ORDER OCD-21

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/457/2025
SREI EQUIPMENT FINANCE LIMITED
VS
GAYATRI GRANITE INDUSTRIES AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 19th June 2025.

Appearance:-
Mr. Swatarup Banerjee, Adv.
Mr. Sariful Haque, Adv.
Mr. Rajib Mullick, Adv.
Ms. Shambhavi Jha, Adv.
...ford petitioner.
Mr. Abhrajit Mitra, Sr. Adv.
Mr. Satadeep Bhattacharyya, Adv.
...for 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 Master Facility Agreement dated January 1, 2019. As per the dispute resolution clause, any dispute or difference arising out of or in connection the contract 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 settled by arbitration in accordance with 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, upon intimation to all the parties to the agreement. The proceeding was agreed to be held in Kolkata. The respondent No.1 is the borrower and the respondent Nos.2 to 6 are the

guarantors who had allegedly entered into two guarantee agreements and stood as personal guarantors in terms of those guarantee agreements.

2. The petitioner carries on business, inter alia, of providing financial assistance. The execution of the agreement was concluded within the jurisdiction of this Court, at the corporate office of the petitioner. The personal guarantee agreements incorporate the arbitration clause contained under clause 9.11 of the Master Facility Agreement, by reference. The agreement had four repayment schedules and under each repayment schedule, Rs.11,25,00,000/- was disbursed. Excavators and DG sets were secured against the said loan.

3. A deed of assignment was executed by the petitioner with the Bank of India. All receivables together with rights, benefits, powers, risks, guarantees and indemnities contained in the documents, including the corresponding securities, were assigned to the Bank of India. A servicer agreement was thereafter executed between Bank of India and the petitioner. The petitioner was, inter alia, given the duty to manage, collect, process and receive payment of the receivables on behalf of Bank of India.

4. Under such circumstances, as the respondent no.1 allegedly failed to repay the loan and as the servicer agreement allowed the petitioner to enforce the aforesaid facility agreement and terms and conditions thereof against the defaulter, a demand notice was issued.

5. The petitioner also terminated the agreement vide notice dated November 15, 2022 and corrigendum dated January 9, 2023. Allegedly, the

respondents did not respond to the notices. A notice invoking arbitration was sent on 16th March, 2023. The petitioner thereafter filed an application for appointment of an arbitrator vide AP No. 378 of 2023. The said application was permitted to be withdrawn with liberty to file afresh by order dated July 19, 2023. Thereafter, another notice invoking arbitration was issued on February 20, 2025. The respondents, however, replied to the said notice and denied the claims. Although the arbitration clause provides for appointment of a sole arbitrator by the petitioner company, in view of the provision of law under Section 12(5) of the said Act, this application has been filed before this Court.

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 certain factual aspects with regard to repayment by the respondent No. 1, errors in calculation, improper invocation of the clause etc. 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 contentions of Mr. Mitra of having paid back part of the loan and that, there were miscalculations, 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.

8. Mr. Mitra's further contends that, the petitioner could not have enforced the claim as a servicer. The servicer was only an agent of Bank of India.

Such action by the agent was barred under various laws, including the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDBI Act).

9. The next contention of Mr. Mitra is that the personal guarantee agreements were separate agreements and disputes against the guarantors ought to have been invoked under the said agreement and not by way of reference to the Master Facility Agreement. Further, Section 19 of the Limitation Act was referred to in respect of the contention that Mr. Banerjee has failed to refer to any document which would show that, between the time the debt became due and the notice invoking arbitration, payment had been made. The petitioner was not entitled to any extended period of limitation in claiming the amount.

10. This Court, as the referral court, is satisfied that there is an arbitration clause in the Master Facility Agreement duly signed by the petitioner and the borrower. Whether the petitioner was acting as an agent of Bank of India or has an independent right to invoke the clauses contained in the Master Facility Agreement, is a matter of evidence and to be decided by the learned Arbitrator. The said issue is kept open to be urged before the learned arbitrator. With regard to the issue of limitation, this Court finds that last month for repayment of the loan was January 2023 in respect of all four repayment schedules. It is contended that the last payment was received sometime in September 2022. The termination notice was in November 2022 and by a corrigendum on January 9, 2023. The first

notice invoking arbitration was dated March 16, 2023. Thereafter, the petitioner approached this Court and the first application was disposed of with liberty to proceed afresh. Accordingly, the second notice invoking arbitration was issued on February 20, 2025. The law is well settled that, the issue of limitation being a mixed question of law and fact should be decided by the learned arbitrator.

11. The other contention of improper invocation by reference to only Master Facility Agreement, does not impress the Court. It appears that both the personal guarantee agreements incorporate the arbitration and jurisdiction clause contained in the Master Facility Agreement under clauses 34, 35 and 36. Moreover, the guarantors have also replied to the notice invoking arbitration. The jurisdiction of the referral court is limited.

12. 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."

13. The issue of joinder or mis-joinder of parties etc. goes to the very root of the jurisdiction of the learned arbitrator and such issue can also be raised before the learned arbitrator. . In the decision of the Hon'ble Supreme Court in ***ASF Buildtech Pvt. Ltd. Vs. Shapoorji Paloonji*** 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 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."

14. Under such circumstances, the application is disposed of by appointing Hon'ble Justice Jyotirmay Bhattacharya, former Chief Justice of this Court, to arbitrate upon the dispute between the parties. The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the schedule of Arbitration and Conciliation Act, 1996. All questions raised by Mr. Mitra shall be available before the learned arbitrator.

(SHAMPA SARKAR, J.)

S. Kumar / R.D. Barua / sb /JM