

OCD 9

ORDER SHEET
AP-COM/542/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

TATA CAPITAL LIMITED
VS
M/S APAP TRADING PRIVATE LIMITED AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 29th July, 2025.

Appearance:
Mr. Jit Ray, Adv.
Mr. Aharnish Ghosh, Adv.
...for the petitioner

Ms. Setu Das Roy, Adv.
...for the respondent

The Court: This is an application for appointment of an arbitrator on the strength of clause 9 of the agreement for business loan. The petitioner submits that it is a non-banking finance company. In terms of the order of the National Company Law Tribunal, Mumbai, Tata Capital Financial Services Limited and Tata Cleantech Capital Limited merged with Tata Capital Limited. Thus, all the properties, assets, rights, benefits, interest, duties, obligations, liabilities, contracts, agreements, securities etc. of those two companies were transferred to the petitioner with effect from January 1, 2024. Tata Capital Finance Services Limited sanctioned a loan in favour of the respondent. The agreement stood

transferred by virtue of the order of the National Company Law Tribunal, Mumbai. The respondent defaulted in payment of the loan. A loan recall notice was issued on March 18, 2025. Despite the issuance of the loan recall notice, no payment was made.

In the recital of the agreement for business loan, the expression “lender” includes its heir, successors and assigns. The dispute resolution clause provided that disputes arising out of the said agreement, would be resolved by arbitration and the place of arbitration would be Kolkata. The petitioner had issued a notice invoking arbitration on April 30, 2025, which was duly received by the respondent. Even if the petitioner is a non-signatory to the agreement, the petitioner acquired all rights, liabilities, agreement, business assets etc. of Tata Capital Financial Services Ltd. with effect from January 1, 2024, by virtue of the order of an appropriate forum.

The petitioner also submits that nomination of an Arbitrator from the panel supplied by the petitioner company, is no longer permissible under law and the petitioner has thus, approached this court.

Ms. Setu Das Roy appears for the respondent. Ms. Das Roy submits that the merger was never informed to the respondent. That the calculation of the dues was faulty. The petitioner is a non-signatory.

I find that the notice invoking arbitration clearly indicated the mode and manner in which the petitioner has acquired right under the agreement and had stepped into the shoes of Tata Capital Financial Services Ltd. The said notice was received by the respondent. The respondent did not object to the said notice. The same was not responded to.

The other issues raised by Ms. Das Roy with regard to the computation and consequences thereof on the claim of the petitioner etc. shall be raised before the learned Arbitrator. In my prima facie view, even if the petitioner is a non-signatory, in view of the merger, the petitioner can invoke arbitration as the successor of the erstwhile lender.

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 Cas 680] as follows : (SCC pp. 75-77, paras 123 & 126-27)

“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.

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.

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.”

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:

- ‘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.”

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.

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.”

Merger is a transaction that combines companies or assets. All assets and liabilities of the merging companies are transferred to the surviving entity, meaning that, the new combined company assumes all the rights and legal obligations of both the original companies. Further adjudication is left to the learned Arbitrator.

Under such circumstances, this Court refers the matter to arbitration by appointing Ms. Sohini Chakraborty, Advocate [Mob. No. 9231661008] as the sole arbitrator, to arbitrate upon the disputes. 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 her remuneration as per the schedule of Arbitration and Conciliation Act, 1996.

AP-COM 542 of 2025 is disposed of accordingly.

(SHAMPA SARKAR, J.)