

OCD 7

ORDER SHEET
AP-COM/760/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

TATA CAPITAL LIMIED
VS
M/S KUSARI ENTERPRISE AND ORS.

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

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

1. Despite paper publication, none appears on behalf of the respondent. The affidavit of service is taken on record.
2. Publications in two newspapers, one in Business Standard (English) and the other in Aaj Kaal (Bengali language) have been made and the same have been produced before the Court.
3. The matter proceeds in the absence of the respondent. 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 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 business loan 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 for final dues in respect of loan dated 29th July, 2019 disbursed to the respondent, was issued on 28th June, 2022.

4. In the recital of the agreement for business loan, the expression “lender” included its heirs, successors and assigns. Despite the issuance of the loan recall notice, no payment was made. The fact that the agreement was handed over to the borrower is also on record. The dispute resolution clause provided that the dispute would be resolved by arbitration and the place of the arbitration would be Kolkata. It appears that the petitioner had issued a notice commencing arbitration on 13th July, 2021, which was duly received by the respondent. Even if the petitioner was a non-signatory to the agreement, the petitioner had acquired all rights, liabilities, agreements, business assets etc. of Tata Capital Financial Services Ltd. with effect from January 1, 2024, by virtue of the order of appropriate forum.
5. The petitioner also submits that nomination of an arbitrator, from the panel supplied by the petitioner company, is no longer permissible under the law. Hence, the petitioner has approached this court. The borrower did not respond to the notice invoking arbitration. Upon merger of the two

companies, the petitioner has been vested with all rights, liabilities, assets etc of the erstwhile lender. Thus, the application in my, prima facie view, is maintainable at the instance of the petitioner. Even if, the petitioner is a non-signatory, but in view of the merger, the petitioner can invoke arbitration as the successor of the erstwhile lender.

6. 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)

“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."

7. 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* (2ndEdn.) 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.”

8. 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.”

9. 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. All objections that are available to the respondents, shall be raised before the learned Arbitrator.

10. Under such circumstances, this Court refers the matter to arbitration by appointing Mr. Abhidipto Tarafder, learned Advocate (Mob No.8697194588), as the sole arbitrator, to arbitrate upon the disputes 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/her remuneration as per the schedule of Arbitration and Conciliation Act, 1996.
11. AP-COM 760 of 2024 is disposed of accordingly.

(SHAMPA SARKAR, J.)