OCD-51

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
(COMMERCIAL DIVISION)
ORIGINAL SIDE

AP-COM/904/2024
IA NO: GA-COM/1/2025

DREAM PLAZA PVT. LTD. & ORS.
VS
INTER CONTINENTAL HOTELS GROUP (INDIA) PVT. LTD. & ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 17th January, 2025

Appearance :
Mr. Jishnu Chowdhury, Sr. Adv.
Mr. SuvasisSengupta, Adv.
Mr. DebrajSaha, Adv.
Mr. Snehasis Sen, Adv.
Mr. Roshan Sengupta, Adv.
... for the petitioner

Mr. Ratnanko Banerji, Sr. Adv.
Mr. Dhruba Ghosh, Sr. Adv.
Ms. Zia Kapoor, Adv.
Ms. Ananya Agarwal, Adv.
Mr. VeerendraRamkumar, Adv.
Mr. Siddhartha Dey, Adv.
Mr. AltamashAlim, Adv.
Mr. Sourodip Banerjee, Adv.
... for the respondent nos.1 to 3

The Court :GA-COM 1 of 2025 is an application to expunge the respondent no.3 from the array of the respondents in AP-COM 904 of 2024.

Mr. Ghosh, learned senior Advocate has supported such prayer on the following grounds:-

a) no relief had been claimed against the respondent in the application for injunction;

b) the respondent no.3 is not a signatory to the arbitration agreement;

c) the doctrine of group companies would not apply in respect of the respondent no.3;

d) the respondent no.3 was neither interlinked nor interconnected with the underlying contract;

e) respondent no.3 was not connected with the negotiations which were going on between the parties;

f) a letter was mistakenly issued in the letterhead of the respondent no.3, which could not be construed as an indication that the respondent no.3 wanted to be bound by the Hotel Management Agreement.

Mr. Jishnu Chowdhury, learned senior Advocate submits that the respondent no.3 had issued a notice threatening to restrict the hotel's access to the Guest Reservation System. The connection of the said respondent with the other respondents is well established. Moreover, if the said respondent No.3 withdraws the notice, there will be no further need for an order of injunction.

Having heard the rival contentions, this Court is of the view that the issue as to whether the respondent no.3 is a proper party or not, can be raised before the learned arbitral tribunal, in case the claimant chooses to implead the respondent no.3 as a party respondent in the said proceeding. At this stage, it will not be proper for the referral court to probe deeper and enquire into the involvement of the respondent No.3 in the business transaction between the signatories. The notice has been issued by the respondent No.3. Whether the same was a mistake or not, will be adjudicated by the arbitral tribunal.

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)
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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:
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> > (a) preliminary negotiations between the parties;
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> > (b) practices which the parties have established between themselves;
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> > (c) the conduct of the parties subsequent to the conclusion of the contract;
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> > (d) the nature and purpose of the contract;
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> > (e) the meaning commonly given to terms and expressions in the trade concerned; and
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> > (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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> > ***
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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."

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.
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> > 2. The claimant has succeeded by operation of law to the rights of the named party.
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> > 3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
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> > 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.**
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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."

Under such circumstances and with the above observations, this application is disposed of.

Contentions of Mr. Ghosh are not considered on merits. They may be urged before the learned arbitral tribunal if the occasion so arises.

The application GA-COM 1 of 2025 is disposed of.

AP-COM 904 of 2024 :

This is an application for injunction restraining the respondents from giving effect or further effect to the letter dated September 18, 2024, being Annexure I to the application. By the said letter, the petitioners were requested to pay all the outstanding dues to the Manager under the Hotel Management Agreement (in short HMA), including the unpaid fees. The letter contains a threat to suspend the hotel's access to the reservation system within a period of 48 days from receipt of the notice.

Article 15.2 and 15.4 of the HMA was referred to in the letter. According to the respondents, a sum of Rs.11,154,584/- was due as manager's fees. It was further stated that if the dispute was not settled within 45 days, that is, within 2nd November, 2024, the Manager would restrain the hotel's access to the Guest Reservation System, until the payment was received.

The petitioner moved this Court under Section 9 of the Arbitration and Conciliation Act, 1996 and a learned Judge passed an ad-interim order staying the said notice on the ground that, ends of justice demanded that the respondents and the manager should berestrained from suspending or discontinuing the Guest Reservation System, to the detriment of the hotel. Her Lordship took note of the arbitration clause which provided that all controversies disputes and claims arising out of or in connection with the agreement, would be first discussed by the owner and the manager, with the objective to resolve such dispute in a friendly manner. If such efforts failed within ten business days from receipt of the notice, such controversies would be finally determined by arbitration under the Indian Arbitration and Conciliation Act, 1996. The dispute resolution clause further provided that in the event the dispute arising out of or in connection with the agreement wasnot resolved, either party would be entitled to issue a notice in writing to the other party, by referring the dispute for final resolution by appointing arbitrator in accordance with the Arbitration and Conciliation Act, 1996. There would be a panel of three arbitrators one to be appointed by the owner, other to be appointed by the manager and the two arbitrators, thereafter, shall appoint an umpire. The place of arbitration was selectedas Kolkata. At this juncture, the arbitrators have been appointed by the parties. The tribunal has been constituted. Under such circumstances, it is prayed by the petitioners that the interim order passed on October 30, 2024, should be continued until prayers can be made before learned arbitral tribunal for further interim orders. It is submitted that the question of payment of the Manager's fees or any percentage to the respondents, did not arise.

Mr. Jishnu Chowdhury, learned senior advocate appearing on behalf of the petitioners submits that the entire dispute arose out of the failure of the respondent to reconcile the accounts. The respondents were entitled only to the manager's fees and some service charges. The respondents deducted more than their share/percentage, thereby, committing breach of the terms of the agreement. The money deposited in the hotel's accounts,were much less than the entitlement of the petitioners. According to Mr. Chowdhury, there was a discrepancy of more than Rs.7.5 crores in the amount billed by the respondents and/or their manager and the amount which was actually received by the hotel. Until such reconciliation of accounts was achieved,the question of making further payments to the respondents would not arise. The learned Court took into account the discrepancies, and passed the interim order. Under such circumstances, the order already passed should neither be modified nor varied.

Mr. Ratnanko Banerji and Mr. Dhruba Ghosh, learned Senior Advocates appear for the respective respondents and submit that under the terms and conditions of the HMA, various charges were payable to the respondents. The accounts were reconciled. Reference is made to pages 64 to 74 of the application. It is further submitted that if the petitioners were not satisfied with the accounts and the reconciliation done by the respondents, the petitioners should have submitted their accounts and their calculations, which had not been done. Under such circumstances, asking the respondents to further reconcile and the act of withholding the payments due to the respondents, were a contrary to the HMA. The contract permitted the respondent to discontinue the Guest Reservation System and also prevent the petitioner from using their logo. The petitioners were in breach of the HMA, Article 15.2 and Article 15.4 are relevant in this regard. They are quoted below:-

> "15.2. Material breach
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> If either party commits a material breach of this Agreement, the other party may terminate the Agreement at the expiration of thirty (30) days after giving written notice to the party which committed the breach PROVIDED the breach has not been remedied or the defaulting party has not demonstrated to the satisfaction of the non-defaulting party within such thirty (30) day period that it has taken appropriate steps to cure the default and is working diligently to complete such cure within a period satisfactory to the non-defaulting party, acting reasonably.
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> However, if the default is not capable of being cured, the non-defaulting party may serve a notice on the defaulting party providing details of the alleged default and specifying an amount of compensation, to be paid to the non-defaulting party within sixty (60) days after the non-defaulting party's serving the notice on the defaulting party, for which the non-defaulting party is willing to settle the default. If such sixty (60) day period expires without the non-defaulting party receiving the compensation required in its notice or adequate compensation to the reasonable satisfaction of the non-defaulting party, then at any time within six (5) months of the date of expiration of such sixty(60) day period, (or within one (1) month if such sixty (60) day period expires at a time less than six (6) months prior to the Expected Completion Date as provided in Item 6 of the

Details) the non-defaulting party has the right to terminate this Contract by notice to the defaulting party.

For the purpose of this Agreement, "Material Breach shall be defined to mean a failure on the part of either the Owner or Manager to perform a substantial obligation under this Agreement or otherwise commit a breach that goes to the essence of the Agreement and which results in the deprivation of one of the significant benefits of the Agreement to the non-defaulting party."

"15.4 Suspension of System.

In addition to any other rights and entitlements of Manger under this agreement, where Owner has been given notice by Manager pursuant to clause 15.2 that it is in material breach of its obligations under the Agreement and such material breach continues to subsist forty five (45) days after the date of Manager's notice, then Manager may also have the option to suspend without further notice to Owner the Hotel's access to the Reservation System and any other of the services of the System until such time as Owner's breach has been rectified Owner shall continue paying the System Fund Contributions in accordance with this Agreement during such suspension period. Suspension of the System pursuant to this clause 154 shall not impede any of the other rights of Manager under and arising out of this Agreement."

Clause 4.3 of the HMA talks about priority of payments which, is stated hereunder:

"All gross revenues shall be deposited in the bank account. Each month manager shall disburse or accrue, on behalf of owner, funds from the bank account in the following order of priority:

a) The Licence Fee.
b) All operating costs.
c) Manager's incentive management fee.
d) Capital Replacement Fund Contributions.
e) The available cash surplus to the owner."

Thus, according to Mr. Ghosh and Mr. Banerji, the petitioners were entitled to the owners' share under Clause (e) of Clause 4.2 upon the other payments as per clauses (a), (b), (c) and (d) having been satisfied. Clause 9.2 provides that any over payment towards management fee and other fees to the respondent can always be adjusted annually. The time prescribed for payment of licence fee etc. have been clearly delineated in the contract. The payment of such fee, apart from the other charges as per Clause 4.2 and in terms of the HMA were the obligation of the petitioners, which the petitioners failed to discharge. Records reveal that some payment had also been made by the petitioners during the course of negotiation between the parties. The series of communications which have been annexed to the application, clearly indicate that the parties were having certain disputes with regard to the amount deposited in the bank accounts and the percentage of money deducted by the respondents towards their fees and other receivables under the terms and conditions of HMA. According to the petitioners, the figures do not tally.

It appears from the terms of the HMA that the respondents were entitled to certain fees, remuneration and charges for operating the hotel and the booking system. It is also true that their logo is being used by the petitioners. Neither the pleadings nor the prayer in the application for injunction contemplate that the respondents should be injuncted from restricting the hotel's access to the Guest Reservation System, and the respondents must continueto discharge the functions without payment of charges. The entire application is based on an apprehension that if the respondents shut the Guest Reservation System, the hotel will stop functioning and this would result not only in closure of business, but will cause irreparable loss of injury to the petitioners. On this ground and upon taking into account the submissions of Mr. Chowdhury, the learned Judge had passed an order, inter alia, holding that suspension of the Guest Reservation system will be detrimental to the hotel's interest.

Even if, Mr. Chowdhury has made out an arguable case for an injunction restraining the respondents from suspending the hotel's access to the guest reservation system, this Court finds that, at best, the controversy raised by Mr. Chowdhury is with regard to what was payable to the petitioners prior to the issuance of the notice impugned before this Court. It cannot be accepted that the respondents will continue to run the business and discharge their obligation under the contract, without any payment. While granting an injunction, apart from prima facie case, balance of convenience and inconvenience as also irreparable loss and injury should be weighed. This Court does not find any reason to hold at this stage that, the respondents are not entitled to any payment and are bound to continue to discharge their obligations under the contract, free of cost. However, prima facie, as there is a controversy with regard to the accounts and the discrepancies in the amount billed and deposited in the bank, this court does not deem it fit to pass orders directing the payments, as claimed by the respondents. These aspects will be decided by the learned Arbitral Tribunal upon consideration of evidence. The learned Arbitral Tribunal has already been constituted. Under such circumstances, the interim order, which has been passed on October 30, 2024 shall continue unconditionally for a period of two weeks from date. Ad hoc payment of Rs.1 crore shall be made to the respondents towards their entitlement under the HMA within two weeks from date. Payment and acceptance shall be without prejudice to the rights and contentions of the parties. Upon compliance of the above, the interim order which was passed on October 30, 2024, shall continue for a further period of 10 weeks from the date of such payment to the respondents. In case of default, the interim order shall stand vacate.

The observations made hereinabove are tentative. The petitioners shall be at liberty to renew their prayer for injunction before the learned Arbitral Tribunal.

The issue with regard to current payment shall be decided by the learned Arbitral Tribunal, upon the prayer of the respondents.

This order will also not prevent the respondents from approaching the learned Arbitral Tribunal for necessary interim orders.

AP-COM/904/2024 is accordingly disposed of.

(SHAMPA SARKAR, J.)

SN/JM/TR/SP/B.Pal
AR(CR)