

ORDER

OCD-31

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/1080/2024
SK PETRO SERVICES PRIVATE LIMITED
VS
NATIONAL THERMAL POWER CORPORATION AND ANR.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 19th May, 2025.

Appearance:

Mr. Rishad Medora, Adv.

Mr. Abhirup Chakraborty, Adv.

Ms. Priyanka Mitra, Adv.

... for the petitioner.

Mr. Debdutta Saha, Adv.

... for respondent No. 1

Mr. Kamal Kr. Chattopadhyay, Adv.

Ms. Rimi Chatterjee, Adv.

Mr. Tanjir Ali, Adv.

... for respondent No.2.

1. The matter was fixed today for final disposal. The matter was fixed in presence of all the parties.
2. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of a learned arbitrator to adjudicate the dispute between the parties. The dispute arose from an e-auction held by MSTC Ltd., allegedly acting as an agent of National Thermal Power Corporation [in short, 'NTPC']. NTPC is the respondent No.1 and MSTC is the respondent No.2.

3. According to the petitioner, the dispute arose when the earnest money deposit [EMD] made by the petitioner was forfeited by the respondent No.1. According to the petitioner, the forfeiture was illegal. The petitioner invoked arbitration. The respondent no. 1 replied to the said notice.
4. The respondent No.1 raises an objection with regard to maintainability of the application against the said respondent. Its contention is that, there is no privity of contract between the petitioner and the respondent No.1. All disputes arose out of the e-auction which was held by MSTC Ltd. The arbitration clause is contained in the terms and conditions of such e-auction. According to the respondent No.1, the terms and conditions of the e-auction were part of an understanding or agreement or contract between MSTC and the petitioner. The notice invoking arbitration is not tenable in law. It is submitted that the application filed before this Court should be dismissed on the ground that the respondent No.1 being a non- signatory to the arbitration agreement, cannot be proceeded against. The dispute should not be referred to arbitration in respect of the respondent no. 1.
5. To counter such submissions, the petitioner relies on a decision of this Court in the matter of **Jay Ispat Traders Vs. Kolkata Metropolitan Development Authority And Anr.** passed in **AP-COM/493/2024**, which was rendered under similar facts. Same contentions were raised by the respondent therein, i.e. Kolkata Metropolitan Development Authority that, as the e-auction had been conducted by MSTC Ltd. there was no privity of contract between the petitioner therein and KMDA, so the dispute could not be referred to arbitration.

6. This court held as follows :-

“This Court finds that Clause 3 of the BSTC contains the arbitration clause. BSTC is an integral part of the e-auction notice and the general terms and conditions of the contract arising out of the said e-auction. Clause 16 at page 21 categorically provides so. The existence of the arbitration clause is not in dispute.

The question which now arises is whether KMDA would be bound by such clause. Clause 1.1 of the BSTC describes KMDA as the principal and MSTC as the selling agent or the service provider. Further, it appears that KMDA has been described in all the documents, namely the BSTC and STC as the owner or the seller or the principal. The auction is with regard to the sale of structural steel, scrap and other materials upon dismantling Vivekananda Road Flyover. Such materials were lying at the KMDA’s stockyard at Baguiati and Salt Lake. The money was to be separately paid to KMDA and MSTC, by the buyer. The bids were to be accepted and approved by KMDA. The lifting of the materials, the period etc. were all fixed by KMDA. The buyers were required to take stock of the materials and satisfy themselves as to the quality, quantity thereof from the stockyard of KMDA, prior to the auction. Clause 17 of the BSTC provides that no claim against the principal or against MSTC would arise if the goods were sold in lots and not in numbers and were found deficient in any way. Clause 18 provided that in the event of non-removal of the sold materials after expiry of the time allowed in the relevant order and subsequent extension(s) thereof, if any, the principal/owner of the materials would have the right to order re-sale of the said material as also to forfeit relevant payments made by the defaulting buyer.”

7. Mr. Chattopadhyay, learned Advocate for the respondent no.2 submits that the decision passed by this Court, which has been referred to hereinabove, settled the issue. It was held that a non-signatory can be a party to the arbitration agreement. How KMDA was found to be connected with the dispute had been recorded. A similar e-auction notice was involved. It is

further urged by Mr. Chattopadhyay that, after the e-auction was held, all commercial transactions continued between the petitioner and the respondent no.1. The role of the respondent no.2 ceased, upon completion of the e-auction. Mr. Chattopadhyay submits that the respondent no.2 should be expunged from this application as the petitioner does not have any cause of action against the respondent no.2.

8. Mr. Chattopadhyay relies on a decision of the Jharkhand High Court in the matter of **M/s. Absolute Vintrade Pvt. Ltd. Vs. M/s. MSTC Limited** passed in **Arbitration Application No.20 of 2024**.
9. The first question which is required to be addressed in this regard is whether this application should be dismissed on the ground that the respondent no.1 was a non-signatory to the arbitration agreement. The arbitration agreement being a part of the e-auction notice and terms and conditions therein, did not bind the respondent no. 1.
10. The documents annexed to this application indicate that MSTC was acting on behalf of a principal. Clause 3 of Buyer Specific Terms & Conditions (BSTC) of e-auction notice, provides for settlement of disputes by arbitration. The jurisdiction clause states that Courts at the place where the concerned office of MSTC Ltd., which is carrying out the event/auction is situated, alone, shall have exclusive jurisdiction. Page 31 of the petition indicates that the offices of MSTC are at New Town and AJC Bose Road. In the Letter of Acceptance, the petitioner has been depicted as the buyer and NTPC Kahalgaon has been depicted as the seller. Thus, in my *prima facie* view,

MSTC was acting on behalf of NTPC, Kahalgaon. Page 32 of the application provides that the money was to be paid to NTPC either by e-payment/DD or PO. The Remarks Column at Page 33 provides that the balance material value, except charges of MSTC should be deposited in favour of the seller bank account, which was the account of NTPC. By an e-mail, a copy of which has been annexed at page 55, which was a part of trail mail dated February 8, 2022, NTPC had forfeited the EMDs deposited by the petitioner and NTPC requested MSTC for re-auctioning.

11. In such view of the matter, this Court *prima facie* finds sufficient reason to hold that NTPC was the principal on whose behalf the auction was held. NTPC's involvement in the entire transaction is available from the records. Issue of joinder, misjoinder and non-joinder are matters within the domain of the learned arbitrator.
12. 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.”

13. 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.”

14. 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.”

15. Reference is made to the decision of “**ASF Buildtech Private Limited vs. Shapoorji Pallonji and Company Private Limited** reported in **2025 SCC OnLine SC 1016**.

“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."

16. Under such circumstances, as a referral Court, it is sufficient to hold, *prima facie*, that the respondent no.1 is intrinsically related to / or connected with the e-auction notice, the terms and conditions thereof and the business transaction between the parties. The arbitration clause binds it. The issue of joinder, non-joinder and mis-joinder of parties, is left to be adjudicated by the learned Arbitrator and the respondents can always raise such points before the learned Arbitrator at the appropriate stage. The contention that NTPC is not the principal, can also be raised before the learned Arbitrator.

17. The decision of Jharkhand High Court which has been cited by Mr. Chattopadhyay records the limited role of the respondent no.2.
18. This Court is of the view that the issue as to whether the respondent no.2 can be proceeded against or is a necessary or a proper party, can be raised before the learned Arbitrator. The BSTC provides that the contract between MSTC and the buyer shall be deemed to be concluded after sale order/letter of acceptance and parties will affix their digital signatures. Emails of MSTC are also on record. Thus, this court cannot conclusively hold that, the respondent No.2 is not a necessary or a proper party.
19. Under such circumstances, the application is allowed. This Court appoints Mr. Mainak Bose, Senior Advocate (Mobile No.9830467707) 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 own remuneration as per the Schedule of the Act.
20. Accordingly, AP-COM/1080/2024 stands disposed of.
21. All points available to either party, shall be raised before the learned Arbitrator. The observations are, *prima facie*, and restricted to the disposal of the application for reference to arbitration.

(SHAMPA SARKAR, J.)