



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM ARBITRATION PETITION (L) NO.2603 OF 2024

Cardinal Energy and Infra Structure Private Ltd. ...Petitioner

Versus

Subramanya Construction and Development Co. Ltd. ...Respondent

Shriraz Rustomjee i/b. Ms. Kinnari Mehta for the Petitioner.

Rahul Sarda with Punthi Shah i/b. Aarna Law LLP for Respondent Nos.1 and 2.

Siddhesh Bhole, Yakshay Chheda, Anushree Koparkar and Ms. Ashwin Pimple i/b. SSB Legal and Advisory for the Respondent No.3.

CORAM : R.I. CHAGLA J.
DATE : 27TH MARCH, 2024.

ORAL JUDGMENT :

1. The Petitioners have filed the present Commercial Arbitration Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“the said Act”). The Petitioners have challenged the validity and correctness of the Interim Award dated 2nd January, 2024 passed by the learned Sole Arbitrator allowing an application of Respondent Nos.1 and 2 to implead the Petitioners as party Respondents to the Arbitration proceedings despite not being

signatories to the Arbitration Agreement.

2. It would be pertinent to describe the Petitioners as the proposed Respondents joined by the impugned Award. The Respondent Nos.1 and 2 are the Claimants in the arbitral proceedings and Respondent No.3 is the original Respondent in the arbitral proceedings.

3. A brief background of facts is necessary and which is as under:-

(i) A Memorandum of Understanding (MoU) was executed between Respondent Nos.1 and 2, and Respondent No.3 on 10th February, 2012. The MoU contained the Arbitration Agreement in Clause 9 thereof.

(ii) Notice of invocation of arbitration sent by Respondent Nos.1 and 2 to Respondent No.3 on 25th November, 2021.

(iii) This Court by an order dated 23rd November, 2022 in Section 11 proceedings filed by Respondent Nos.1 and 2 against

Respondent No.3 being Arbitration Application No.86 of 2022 appointed the learned Sole Arbitrator to adjudicate upon the disputes between the Respondent Nos.1 and 2 on one hand and Respondent No.3 on the other arising out of said MoU.

(iv) On 20th June, 2023, Statement of Claim was filed by Respondent Nos.1 and 2.

(v) The Statement Defence was filed by Respondent No.3 on 7th August, 2023. In the Statement of Defence preliminary objections were taken to the maintainability of the claim statement on the grounds that the arbitration reference does not relate to properties transferred to the Petitioners in the absence of the Petitioners being made party Respondents and that the claim of the Claimants is not maintainable in the absence of the Petitioners.

(vi) The issues were framed by the Arbitral Tribunal on 25th September, 2023 and it is pertinent to refer to the issue Nos.(ii), (iii) and (v), which are as under:-

(ii) Whether the Claimants prove that the present arbitration reference relates to properties transferred in favour of Pegasus Ventures Private Ltd. i.e. properties at HMT land and Bondel land as described in Schedule M, N and O of Soc.?

(iii) Whether the Claimants prove that the present arbitration reference relates to properties transferred in favour of Cardinal Energy and Infrastructure Private Ltd. i.e. properties at BTM, Bangalore as described in Schedule L of SOC?

(v) Whether the Claimants prove that the present arbitration reference relates to properties which fall outside the scope of the said Memorandum of Understanding i.e., properties at Whitefield, Bangalore and Hyderabad ad described in Schedule A and F in SOC?

(vii) The Respondent Nos.1 and 2 filed an Application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 (CPC) on 27th October, 2023 to implead the Petitioners as party Respondents in the Arbitration Proceedings.

(viii) The Respondent No.3 filed its Reply on 8th November, 2023 opposing the Application, inter alia on the ground that the Arbitral Tribunal did not have the power to direct impleadment of the Petitioners and that this could only have been done by the Court referring the disputes arbitration.

(ix) The Arbitral Tribunal issued notice to the Petitioners on 16th December, 2023.

(x) The parties were heard on 2nd January, 2024. The Petitioners opposed the Application inter alia on the grounds that the Arbitral Tribunal did not have the power to direct their joinder and that the Application was barred on the principles of constructive res judicata.

(xi) An Order / Award dated 2nd January, 2024 was communicated to the parties on 5th January, 2024.

4. Mr. Shiraz Rustomjee, the learned Senior Counsel appearing for the Petitioners has at the outset dealt with the preliminary objection which has been raised by the Respondent No.3 that the Petitioners could not be impleaded by the Claimants / Respondent Nos.1 and 2 herein and that the impugned Award is an interlocutory order and not an Interim Award which can be challenged under Section 34 of the Arbitration Act. He has submitted that on this specific preliminary objection of impleadment raised by Respondent Nos.2 and 3, the Arbitral Tribunal framed the

aforementioned issues (ii), (iii) and (v) as points for determination. The learned Arbitrator has decided the said points for determination in the impugned Award. Thus, the impugned Award has finally decided matters which form a part of the claims before it. He has placed reliance upon the decision of the Supreme Court in *Indian Farmers Fertilizer Cooperative Limited Vs. Bhadra Products*¹ in support of his contention that the impugned Award satisfies the requirements of an interim Award as opposed to an interlocutory order. This is in view of the impugned Award apart from finally deciding the aforementioned points for determination, has finally decided the question of joinder of the Petitioners to the arbitration proceedings. This has serious consequences and severely prejudices the Petitioners. Thus, this cannot be considered as an interlocutory order.

5. Mr. Rustomjee has submitted that, at any rate, the impugned Award purports to expand the scope of the reference originally made by the Section 11 Court and the decision is therefore, an award on this ground also.

1 (2018) 2 SCC 534.

6. Mr. Rustomjee has submitted that the Petitioners were not parties to the proceedings before the Arbitral Tribunal. By adding the Petitioners as party Respondents, the preliminary objections raised by the Respondent No.3 has been decided conclusively. The Petitioners are constrained to participate in the arbitration proceedings. Such a decision cannot be considered a mere interlocutory order, and is clearly in the nature of an Award.

7. Mr. Rustomjee has submitted that the Arbitral Tribunal has allowed the application for impleadment by placing heavy reliance on the decision of *Cox and Kings Ltd. Vs. SPA India Pvt. Ltd.*² The Arbitral Tribunal has held that the decision supports the view that the Arbitral Tribunal has the power to direct joinder of non-signatories to the Arbitration Agreement. He has submitted that it is not disputed that Section 8 or 11 Court may in an appropriate case, decide to leave it to the Arbitral Tribunal to decide whether a non-signatory to the Arbitration Agreement should be joined as a party to the proceedings. However, this does not mean that the Arbitral Tribunal has the power, of its own accord and de hors any Court proceeding, to direct such joinder. Indeed, *Cox and Kings(Supra)*

2 2023 SCC OnLine SC 1634.

does not hold that this is the position in law. He has particularly placed reliance on paragraphs 171 and 172 of the decision in this respect.

8. Mr. Rustomjee has submitted that the Supreme Court in *Cox and Kings(Supra)* has only held that in case of joinder of the non-signatory to the arbitration proceedings, 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 case the referral Courts considers the determination to be complex, the Court should leave it to the Arbitral Tribunal to decide whether the non-signatory can be impleaded to the arbitration proceedings based on factors outlined in the decision.

9. Mr. Rustomjee has submitted that the decision of *Cox and Kings (Supra)* does not hold or even suggest that the Arbitral Tribunal has powers akin to those exercised by a Court under Order 1 Rule 10 of the CPC as contended by the contesting Respondents.

10. Mr. Rustomjee has submitted that the Arbitral Tribunal does not have any inherent power to implead a non-signatory to the

arbitration proceedings, including powers under Order 1 Rule 10 of the CPC. He has placed reliance upon the decision of the Delhi High Court in *Arupri Logistics Pvt. Ltd. Vs. Vilas Gupta and Ors.*³ wherein the Court had held that the Arbitral Tribunal owes its existence to operation of law under Section 8 or 11 of the Arbitration Act and does not have power of joinder akin to those of a Court under Order 1 Rule 10.

11. Mr. Rustomjee has submitted that in case of impleadment of a non-signatory by the Arbitration Tribunal, the original reference Court can either add a third party to the arbitration reference or permit the Arbitral Tribunal so constituted to decide the issue. However, the Arbitral Tribunal cannot arrogate to itself powers which are neither conferred by the statute or the rules which govern the arbitration, nor can it take recourse to inherent powers, which are only available with Courts.

12. Mr Rustomjee has also placed reliance upon decision of the Madras High Court in *Abhibus Services India Private Ltd. and Ors. Vs. Pallavan Transport Consultancies Services Ltd.*⁴ which is

3 2023 SCC OnLine Del 4297.

4 2022 SCC OnLine Mad 796.

followed in *Arupri Logistics (Supra)*. In the said decision, the Madras High Court held that the power of the Arbitral Tribunal to rule on its own jurisdiction is a post factor contingency or eventuality. In cases of impleadment of non-signatory / third party by the Arbitral Tribunal, the original reference by the Court in terms of Sections 8, 9 and 11 of the Arbitration Act gets enlarged by adding more parties which were not party / parties to the reference. If such power were to be read anywhere in the whole scheme of the Arbitration Act, the very concept of reference to arbitration loses its sanctity.

13. Mr. Rustomjee has submitted that in the present case, the order of reference by the Section 11 Court dated 23rd November, 2022 did not cover the Petitioners. In fact, the Petitioners were not even made parties to the Section 11 proceedings. The impugned award has the effect of expanding the scope of the reference made by the Section 11 Court, which is impermissible in law.

14. Mr. Rustomjee has relied upon the decision of *National Insurance Company Ltd. Vs. Boghara Polyfab Private Ltd.*⁵ wherein in paragraph 22 the Supreme Court identified and segregated the

5 (2009) 1 SCC 267

preliminary issues that may arise for consideration, in an application under Section 11 of the Arbitration Act into the following three categories as under: (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

15. In paragraph 22.1 of the said decision, first category, which the Chief Justice / his designate will have to decide, includes, whether there is an Arbitration Agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement. He has submitted that thus, it is for the referral Court under Section 11 of the Act to determine the Arbitration Agreement and parties to such an agreement. Accordingly, it would be appropriate for the contesting Respondents to have joined the Petitioners in the Section 11 and sought a referral of disputes between them for arbitration.

16. Mr. Rustomjee has further relied upon the decisions of the Supreme Court viz. *Ispat Industries Ltd. Vs. Commissioner of*

*Customs, Mumbai*⁶ at paragraphs 46 to 50 and *Bank of India & Anr. Vs. K. Mohandas and Ors.*⁷ at paragraphs 54 to 63, in support of his contention that a case is only an authority for what it actually decides and not what logically flows from it. He has submitted that several decisions have been relied upon by the Respondent Nos.1 and 2 and which have not addressed the issue which has been raised herein viz., whether the Arbitrator has inherent power to implead a non-signatory, third party to the Arbitration Agreement proceedings without power being expressly endowed upon it by the referral Court at the time of reference.

17. Mr. Rustomjee has submitted that the contesting Respondents have sought to contend that the reference to Order 1 Rule 10 in the impugned Award could be disregarded. They have submitted that reference to a wrong provision would not negate an order if the power otherwise existed in law. However, the contesting Respondents have never pointed out that they were not accepting that their reliance upon Order 1 Rule 10 was erroneous. They have continued to urge that the Arbitral Tribunal has powers under this provision. Hence, the submission is of no significance and ought to be

6 (2006) 12 Supreme Court Cases 583.

7 (2009) 5 Supreme Court Cases 313.

disregarded.

18. Mr. Rustomjee submitted that the present Petition should be allowed by setting aside the impugned Interim Award. He has submitted that given the limited ambit of Section 34, if this Court is inclined to set aside the Award, no further directions should be passed or liberty granted permitting the contesting Respondents to adopt any particular course of action.

19. Mr. Rahul Sarda, the learned Counsel appearing for the contesting Respondents viz. Respondent Nos.1 and 2 has submitted that the question that arises before this Court (in addition to challenge to the maintainability of the present Petition) is regarding the power of the Arbitral Tribunal to implead the non-signatories by applying 'Group of Companies' Doctrine. He has submitted that whether the appointment of the Arbitral Tribunal is through the Referral Court or the same is without intervention of the Referral Court i.e. by consent to the parties, the same makes no reference to the legal position viz.-a-viz. the power / remit of an Arbitral Tribunal. He has submitted that the purpose of approaching the Referral Court is not to get an adjudication on merits but only kick-start the process

of arbitration by appointment of an Arbitral Tribunal. The application to the Referral Court is made only in a situation where the procedure for appointing an Arbitral Tribunal by mutual consent fails. The order of appointment of an Arbitral Tribunal cannot be read to mean as circumscribing or even delineating the boundaries of an Arbitral Tribunal's remit. The Referral Court only facilitates the commencement of arbitration by appointing an Arbitral Tribunal and the Referral order cannot be regarded as the repository from which the appointed Arbitral Tribunal must draw powers / authority for the purpose of effective discharge of its functions. Thus, the distinction drawn by the Petitioners between the appointment of an Arbitrator by Referral Court and a case where such appointment is without the intervention of the Referral Court, is untenable.

20. Mr. Sarda has submitted that the Petitioners have only argued the present Petition as a pure question of law. The conclusions of fact arrived at by the Sole Arbitrator in the impugned order dated 20th January, 2024 have not been assailed by the Petitioners at all either in the present Petition or during the course of the hearing of the present Petition.

21. These facts include that the MoU permitted Respondent No.3 (signatory to the MoU) to invest in the projects either directly or through its subsidiaries. The Respondent No.3 invested in the properties / projects through the Petitioners and the Petitioners went on to perform the contract by executing the sale deeds.

22. The submission on behalf of the Petitioners that the Arbitral Tribunal can implead the non-signatories only if the Arbitral Tribunal has been empowered by the Referral Court to do so amounts to contending that the Arbitral Tribunal can apply the 'law of the land' only if empowered by the Referral Court in that behalf. He has submitted that this submission on behalf of the Petitioners ought to be rejected as the Arbitral Tribunal has drawn its power from the agreement between the parties, the provisions of the Arbitration Act which has been enacted as an alternate dispute resolution forum for resolving all contractual disputes (with an Arbitration Agreement) and the extant legal position as expounded by judgments of higher Courts.

23. Mr. Sarma has submitted that the power of an Arbitral Tribunal to decide on the existence of an Arbitration Agreement is

specifically drawn from Section 16 of the Act. The question as to whether the Petitioners can be impleaded as parties to the present arbitration before the Sole Arbitrator essentially involved 'ruling on any objections with respect to the existence and validity of the Arbitration Agreement' between the Respondent Nos.1 and 2 and the Petitioners. Hence, the same is expressly covered in the language of Section 16 of the Act. Even otherwise and without prejudice to the above, the said power is specifically vested in an Arbitral Tribunal as enunciated by the Supreme Court in the case of *Cox and Kings (Supra)*. Furthermore, there is no requirement in the statutory provisions in the Act which mandates that the Referral Court ought to specifically grant power / authority / permission to the Arbitral Tribunal to decide impleadment of non-signatories. He has submitted that even the Supreme Court has not in *Cox and Kings Ltd. (Supra)* and prior judgments ever held that the Referral Court must specifically empower an Arbitral Tribunal to consider the question whether non-signatories can be impleaded or not.

24. Mr. Sarda has submitted that the non-impleadment of non-signatories in a Section 11 Application could not have excluded the applicability of the doctrine of 'Group of Companies' by the Sole

Arbitrator which is now the law of the land if the conditions in this regard as laid down in the *Cox and Kings Ltd. (Supra)* and other applicable judicial precedents, are fulfilled. Thus, in the event a non-signatory is not impleaded to a Section 11 Application, the Sole Arbitrator does not lose his power / authority to implead the non-signatory if otherwise liable to be impleaded on the basis of the 'group of companies' doctrine. He has submitted that thus it was incumbent upon to the Sole Arbitrator to consider when called upon to do so the impleadment of non-signatories by judiciously applying the said doctrine, which the Sole Arbitrator has done.

25. Mr. Sarada has submitted that the Supreme Court in *Cox and Kings Ltd (Supra)* has expressly laid down that the applicability of the 'group of companies' doctrine or otherwise can be decided by the Arbitral Tribunal and that there is no prohibition in law do so. He has placed reliance upon paragraph 165(h) of the judgment authored by Dr. Justice D.Y. Chandrachud (currently the Chief Justice of India) on behalf of himself, Justice Hrishikesh Roy, Justice J.B. Pardiwala and Justice Manoj Misra as also paragraphs 11, 15(viii), 53 and 56 (i) of the separate Judgment of Justice P.S. Narsimha's which is concurring judgment.

26. Mr. Sarda has submitted that the observation of the Supreme Court in paragraph 164 of the judgment in *Cox and Kings Ltd. (Supra)* to the effect that “... 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 complexity of such a determination, “the Referral Court should leave it for the Arbitrator to decide, whether non-signatory party is indeed a party to the Arbitration Agreement on the basis of the factual evidence and application of legal doctrine” would only mean that such a determination is to be prima facie made and then left for the Arbitral Tribunal if such an argument exists before the Referral Court, only. This observation should not be read out of context to mean that unless the Referral Court specifically grants power / authority / permission to the Arbitral Tribunal, such a determination cannot be made by the Arbitral Tribunal.

27. Mr. Sarda has submitted that the Supreme Court in *National Insurance Company Ltd. (Supra)*, which decision has been relied upon by the Petitioners, has held that ‘merits or any claim involved in the arbitration’ ought to be left exclusively to the Arbitral Tribunal. He has submitted that reliance placed by the Petitioner on

paragraph 22.1 of this judgment to contend that the Section 11 Court “will have to decide” the issue of impleadment is misplaced. Since paragraph 22.1 (b) is applicable only when a non-signatory makes an application under Section 11 of the Act and not a signatory. When a signatory makes an application under Section 11 of the Arbitration Act, the issue regarding impleadment is to be decided exclusively by the Arbitral Tribunal in terms of paragraph 22.3(ii) of the judgment.

28. Mr. Sarda has submitted that at the Section 11 stage the power to refer the parties to arbitration is exercised only to weed out the deadwood i.e. absolutely meritless and frivolous litigation. This has been held in paragraph 75(b) of *Vidya Drolia & Ors. Vs. Durga Trading Corporation*⁸.

29. Mr. Sarda has submitted that even if Respondent Nos.1 and 2 would have impleaded the Petitioners as party Respondents to the Section 11 Application, the Referral Court would have not given any conclusive finding on the issue except to leave it open to the Sole Arbitrator to decide the issue. He has submitted that if the argument of the Petitioners is accepted, it would amount to placing fetters –

⁸ Civil Appeal No.2402 of 2019 dated 14th December, 2020.

which are not supported by the letter and spirit of the law on the Arbitral Tribunal's remit. He has submitted that the observation, even if any, made in the Referral Order that the Arbitrator shall decide the issue of non-signatories being bound, does not bring about any fundamental change to the position of rights of the parties to the Section 11 Application as well as those of non-signatories who are not parties to the Section 11 Application so as to warrant a conclusion that the absence of such an observation in the Referral order is fatal to the applicability of the 'group of companies' doctrine. He has submitted that as a sequiter, in absence of such an observation neither makes any legal or factual difference to remit of the Arbitral Tribunal nor does it prejudice any party, whether signatory or non signatory.

30. Mr. Sarda has submitted that the law laid down by the Supreme Court and various High Courts is that the Arbitral Tribunal is itself empowered to apply this doctrine and implead non-signatories if found fit. He has placed reliance upon the decision of the Supreme Court in *Oil and Natural Gas Corporation Ltd. Vs. Discovery Enterprises Pvt. Ltd. and Anr.*⁹ more particularly

⁹ Civil Appeal No.2402 of 2022 decided on 27th April, 2022.

paragraphs 1, 4, 7 and 53(iii) and (vii). Further, he has placed reliance upon the decision of the Supreme Court in *Vidya Drolia & Ors. (Supra)* which has held that the jurisdictional issues such as applicability of 'group of companies' doctrine are best left for the Arbitral Tribunal to handle. He has placed reliance upon the decision of the Gujarat High Court in the case of *IMC Ltd. V. Board of Trustees of Deendayal Port Trust*¹⁰ which concerned the specific argument of non-signatories who were impleaded by the Arbitral Tribunal in this case was that the Arbitral Tribunal erred in impleading them without resorting to remedies under Section 11 of the Arbitration Act. This argument is identical to the argument being raised by the Petitioners before this Court and the same was rejected by the Division Bench of the Gujarat High Court when the impleadment was found appropriate on facts.

31. Mr. Sarada has placed reliance upon the decision of the Madras High Court in *V.G. Santhosam & Ors. Vs. Shanthi Gnanasekaram & Ors.*¹¹ in a case where appointment of the Arbitral Tribunal was made through the Court under Section 11 of the Arbitration Act and a specific argument regarding the authority of the

¹⁰ MANU/GJ/1010 OF 2018.

¹¹ 2020 SCC OnLine Mad 560.

Arbitral Tribunal to implead third parties were raised. The Court held that the Arbitral Tribunal did not have the power available to a Civil Court under Order 1 Rule 10 of the CPC on the factual matrix of the case. However, the ratio is required to be seen from paragraph 101 of the said judgment, wherein the Madras High Court held that though there is no express provision and / or implied provision, the principles laid down by the Supreme Court in the case of *Chloro Control (Supra)* ought to be followed for impleadment of non-signatories.

32. Mr. Sarda has relied upon the decision of the Karnataka High Court in *Alkesh Vinod Shah & Ors. Vs. Nitin K. Shah*¹² which was also a case where the appointment of the Arbitral Tribunal was made through the Court under Section 11 of the Arbitration Act and a specific argument regarding the authority of the Arbitral Tribunal to implead third parties were raised. The impleadment of the non-signatories was upheld by placing reliance on the decisions of the Supreme Court.

33. Mr. Sarda has placed reliance upon the decision of the

¹² MANU/KA/1065 OF 2021 decided on 25th February, 2021.

Madras High Court in *Vijayashanthi Builders Ltd. and Ors. Vs. Amient Hotels Resorts and Estates Private Ltd. and Ors.*¹³ wherein the power of the Arbitral Tribunal to implead non-signatories was upheld when such application was made before the Arbitral Tribunal for the first time without a direction of the Referral Court. He has further placed reliance upon the decision of the Kerala High Court in *Kepto KDN Co. Ltd. and Vs. Enzen Global Solution Pvt. Ltd. & Ors.*¹⁴ wherein the Court upheld the power of the Arbitral Tribunal to implead the non-signatories when such application was made before the Arbitral Tribunal for the first time. The exercise of power of impleadment by the Arbitral Tribunal was also upheld by the Kerala High Court in *Maniyappan T.V. and Ors. Vs. Pattanakkad Service Co-Operative Bank Ltd. & Ors.*¹⁵. He has submitted that though this decision has been sought to be distinguished by Mr. Rustomjee on the ground that it was a statutory arbitration under the provisions of the Kerala Co-Operative Societies Act, and whereunder the Arbitral Tribunal was vested with specific powers and was akin to a Civil Court the power to implead third parties was not specifically mentioned. Despite that the Kerala High Court read such a power to exist.

13 MANU/TN/7455/2022 decided on 18th July, 2022.

14 MANU/KE/5547 OF 2019 decided on 11th December, 2019.

15 MANU/KE/219 of 2020 decided on 14th August, 2020.

34. Mr. Sarda has submitted that the decision relied upon by Mr. Rustomjee in *Arupri Logistics Pvt. Ltd. (Supra)* in support of his contention that the application for impleading Petitioners was filed by the Respondent Nos.1 and 2 under Order 1 Rule 10 of the CPC which powers an Arbitral Tribunal does not possess is misplaced. He has submitted that the power to implead non-signatories is expressly conferred on the Arbitral Tribunal by the Supreme Court as well as High Court from time to time. Further, the power is also traced to the power under Section 16 of the Act. He has submitted that even assuming (but not admitting) that the application relied on a wrong provision, it is a settled position of law that once there is a power, merely because a wrong section is quoted, cannot abrogate the exercise of the power. Therefore, the argument of the Petitioners is academic in nature.

35. Mr. Sarda has submitted that the present Petition is not maintainable since the impugned Order is not an Award / Interim Award. He has placed reliance upon the decision of the Delhi High Court in *Goyal MG Gases Pvt. Ltd. Vs. Panama Infrastructure Developers Pvt. Ltd. and Ors.*¹⁶ where the Delhi High Court held that

¹⁶ Neutral Citation Number 2023:DHC:2267 -DB decided on 29th March, 2023.

an order passed on an application for impleadment (akin to an application under Order I Rule 10 of CPC) is not an interim award as it does not decide any substantive question of law nor touches upon the merits of the case. This has also been held by a Single Judge of the Delhi High Court in *National Highway Authority of India Vs. Lucknow Sitapur Expressway Ltd.*¹⁷ it has been held that the Petitioners ought to challenge the rejection of their plea regarding the Sole Arbitrator not having jurisdiction qua them, only after the final arbitral Award is made. Therefore the present Petition cannot be filed against impugned order.

36. Mr. Sarada has submitted that the reliance placed upon the aforesaid points for determination by the Petitioners in support of their contention that these points of determination has been finally determined is entirely misplaced. These points of determination remain open and it is open for the Petitioners to show how the arbitration did not relate to the properties transferred in favour of the Petitioners.

37. Mr. Sarada has submitted that apart from the present

¹⁷ 2022 SCC OnLine Del 4527.

challenge to the impugned Order not being supported by the provisions of the law and legal precedents, the impugned Order also does not cause any prejudice to the Petitioners and the remedy of the Petitioners to challenge their impleadment and / or the adjudication of the dispute on merits, continues to be available to them after such adjudication. Therefore, the present Petition is not maintainable.

38. Mr. Sarda has accordingly submitted that the Petition requires to be dismissed on the ground that the impugned Award is not an Award / Interim Award and the present Petition is therefore not maintainable. Further, the Sole Arbitrator has the power to implead the Petitioners by applying the 'group of companies' doctrine and the Sole Arbitrator has correctly applied the said doctrine.

39. Having considered the rival submissions, it would be necessary to determine whether the Sole Arbitrator in the present case could have on his own accord allowed the impleadment of the Petitioners who were non-signatories to the Arbitration Agreement without such a power being expressly endowed upon it by the Referral Court at the time of reference.

40. The Sole Arbitrator has referred to the decision of the Supreme Court in *Cox and Kings (Supra)* where the Supreme Court has enunciated the ‘Group of Companies’ doctrine and in particular the impleadment of a non-signatory to an Arbitration Agreement in arbitral proceedings based on such doctrine. The Supreme Court in the said decision has considered a case where an Application was made to the Referral Court to join a non-signatory to the Arbitration Agreement and it was in such scenario that the Supreme Court held that, the Referral Court is required to prima facie rule on the existence of the Arbitration Agreement and whether the non-signatories is a veritable party to the Arbitration Agreement. The Supreme Court has held that in view of the complexity of such a determination, the Referral Court should leave it for the Arbitrator 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. It is necessary to reproduce paragraphs 171 and 172 of the said decision which read as under:-

“171. 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 arbitral tribunal under Section 16.

H. Conclusions

172. In view of the discussion above, we arrive at the following conclusions:

- a. The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;*
- b. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;*
- c. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;*

- d. Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement;*
- e. The underlying basis for the application of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement;*
- f. The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine;*
- g. The group of companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act;*
- h. To apply the group of companies doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises (supra). Resultantly, the principle of single economic unit cannot be the sole basis for Invoking the group of companies doctrine;*
- i. The persons "claiming through or under" can only assert a right in a derivative capacity;*
- j. The approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" is erroneous and against the well- established principles of contract law and corporate law;*
- k. The group of companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the Intention of the parties in the context of complex transactions Involving multiple parties and multiple agreements;*
- l. At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement; and*
- m. In the course of this judgment, any authoritative determination given by this Court pertaining to the group of companies doctrine should not be interpreted*

to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.”

41. Thus from the conclusions of the Supreme Court, it is clear that the Supreme Court has held that where at a referral stage impleadment of a non-signatory to the Arbitration Agreement is raised, the Referral Court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the Arbitration Agreement. Thus, it is clear that the Arbitral Tribunal has the power to decide whether the non-signatory is bound by the Arbitration Agreement and to implead the non-signatory if answered in the affirmative.

42. I do not find from a reading of the decision of the Supreme Court in *Cox and Kings Ltd.(Supra)* that merely by there being no prayer for impleadment of a non-signatory in the Section 11 Application, the applicability of the doctrine of ‘group of companies’ by the Sole Arbitrator is excluded. The Arbitrator does have the power / authority to implead the non-signatory if such non-signatory is otherwise liable to be impleaded on the basis of the ‘group of companies’ doctrine. Thus, the Supreme Court has infact considered

that the Arbitral Tribunal is the appropriate forum to determine the issue as to joinder of a non-signatory to an Arbitration Agreement. I thus find no merit in the submission of Mr. Rustomjee that in the event the issue of joinder of a non-signatory to an Arbitration Agreement is not raised before the Referral Court, the Arbitral Tribunal on its own accord does not have the power to determine this issue and / or allow the impleadment of a non-signatory to an Arbitration Agreement. I do not find there to be any estoppel on the Arbitral Tribunal determining this issue.

43. I further find much substance in the argument of Mr. Sarda on behalf of the Respondent Nos.1 and 2 that the Arbitral Tribunal is obliged to follow the law laid down by the Supreme Court and / or judge made law. This would be the case despite the Arbitral Tribunal not having specific power to consider an application for impleadment and / or the power of the Civil Court under Order I Rule 10 of the CPC. The Delhi High Court in *Abhibus Services India Private Ltd. and Ors. (Supra)*, paragraph 136 has the recognized concept of judge made law. However, it has been held that in the absence of any trace of such power in the entire scheme of the Act, the power of impleadment cannot be said to be conferred upon the

Tribunal on the basis of judge made law. This decision of the Delhi High Court was prior to the decision of the Supreme Court in ***Cox and Kings (Supra)*** which in my view has changed the law with regard to impleadment of non-signatories to the Arbitration Agreement on the 'group of companies' doctrine and has left it to the Arbitral Tribunal to determine this issue.

44. There have been submissions made by Mr. Rustomjee on the power of the Referral Court to determine whether the Arbitration Agreement exists and / or validity of the Arbitration Agreement and which would include whether the Arbitration Agreement is applicable to non-signatories to the Agreement. The Supreme Court in ***National Insurance Company Ltd (Supra)*** at paragraph 22 has referred to the issues which the Chief Justice or his designate is bound to decide and which includes whether there is an Arbitration Agreement and whether the party who has applied under Section 11 of the Act is a party to such agreement. However, this will not preclude the Arbitral Tribunal from deciding the issue of impleadment of a non-signatory to an Arbitration Agreement, particularly when this issue was not before the Referral Court. Thus, in my view, the Sole Arbitrator in the present case was perfectly justified in determining the issue of

whether the Petitioners as non-signatories to the Arbitration Agreement could be impleaded as parties to the arbitration.

45. The aforementioned findings are on the premise that the impugned Order is an interim award. However, one cannot lose sight of the fact that the Arbitrator under Section 16 of the Arbitration Act has the power to determine issues of jurisdiction which in my view would include whether the Arbitrator has jurisdiction over non-signatories to an Arbitration Agreement. Any such decision taken by the Arbitrator can always be the subject matter of a challenge by the Petitioners in a Petition filed under Section 34 of the Arbitration Act after the final Award is passed. Further, I do not find merit in the submission of Mr. Rustomojee that the aforesaid points for determination namely, issue Nos.(ii), (iii) and (v) which have been extracted above have been finally determined. It is always open for the Petitioners to lead evidence on these issues and invite final adjudication by the learned Sole Arbitrator on these issues. The decisions of the Delhi High Court in *National Highway Authority of India (Supra)* and *Goyal MG Gases Pvt. Ltd. (Supra)* are apposite.

46. Thus, I find that there are no valid grounds raised under

Section 34 of the Arbitration Act which can at all result in the impugned award being set aside.

47. I find no merit in the Arbitration Petition and accordingly the Arbitration Petition is dismissed. There shall be no order as to costs.

[R.I. CHAGLA J.]