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2024 INSC 670

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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 38 OF 2020

COX & KINGS LTD. …PETITIONER

VERSUS

SAP INDIA PVT. LTD. & ANR. …RESPONDENTS

J U D G M E N T

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J. B. PARDIWALA, J.:

1. Cox & Kings Ltd. (hereinafter referred to as the **"petitioner"**) has filed the present petition in terms of Section 11(6) read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996 (for short **"the Act, 1996"**), seeking appointment of an arbitrator for the adjudication of disputes and claims in terms of clause 15.7 of the Services General Terms and Conditions Agreement dated 30.10.2015 entered into between the Petitioner and SAP India Pvt. Ltd. (hereinafter referred to as the **"respondent no. 1"**)

A. FACTUAL MATRIX

2. The petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of providing tourism packages and hospitality services to its customers.

3. Respondent no. 1 is also a company registered under the Companies Act, 1956 and is engaged in the business of providing business software solution services. It is a wholly-owned subsidiary of SAP SE GMBH (Germany) (hereinafter referred to as the **"respondent no. 2"**), a company incorporated under the laws of Germany.

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4. The petitioner and respondent no. 1 entered into a SAP Software End User License Agreement & SAP Enterprise Support Schedule (for short **"License Agreement"**) on 14.12.2010 under which the petitioner was made a licensee of certain Enterprise Resource Planning ("**ERP**") software developed and owned by the respondents. The License Agreement is a mandatory pre-requisite for all customers of the respondents who intend to enter into any software agreement with the respondents.

5. It is the case of the petitioner that while it was developing its own software for e-commerce operations in 2015, it was approached by respondent no. 1 who recommended their 'Hybris Solution' (hereinafter referred to as the "**SAP Hybris Software**") for use by the petitioner. It is the case of the petitioner that respondent no. 1 had, at the relevant point in time, represented that the SAP Hybris Software would be suitable and 90% compatible to the requirements of the petitioner. It was further represented that the customisation of the balance 10% would take about 10 months from the date of execution of an agreement and that the customisation of the SAP Hybris Software would take lesser time than the time the petitioner may take in developing its own technological solution.

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6. The transaction for the purchase, customisation and use of the SAP Hybris Software was divided into three separate agreements entered into between the petitioner and respondent no. 1:

   i. First, Software License and Support Agreement Software Order Form no. 3 (for short **"Order Form no. 3"**) dated 30.10.2015 for the purchase of SAP Hybris Software License by the petitioner.

   ii. Second, the Services General Terms and Conditions Agreement (for short **"GTC agreement"**) dated 30.10.2015 containing the terms and conditions governing the implementation of the SAP Hybris Software.

   iii. Third, SAP Global Service and Support Agreement, Order Form no. 1 dated 16.11.2015 (for short "**Order Form no. 1**") which was executed pursuant to the signing of the GTC agreement and contained the terms of payment between the parties for the services being rendered.

7. It is the case of the petitioner that as it had already entered into the License Agreement with respondent no. 1 in 2010, it was not required to do so again for the purpose of purchasing the SAP Hybris Software. The GTC agreement, Order Form no. 3 and Order Form no. 1 were all executed pursuant to the License Agreement. The said three agreements are ancillary

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to the License Agreement and have a similar underlying commercial purpose.

8. It is pertinent to note that in terms of Clause 15.7 of the GTC agreement, in the event of any dispute, the parties agreed to resolve their disputes through arbitration. Clause 15.7 of GTC agreement reads as under:

> *"**15.7 <u>Dispute Resolution</u>:** In the event of any dispute or difference arising out of the subject matter of this Agreement, the Parties shall undertake to resolve such disputes amicably. If disputes and differences cannot be settled amicably then such disputes shall be referred to bench of three arbitrators, where each party will nominate one arbitrator and the two arbitrators shall appoint a third arbitrator. Arbitration award shall be binding on both parties. The arbitration shall be held in Mumbai and each party will bear the expenses of their appointed arbitrator. The expense of the third arbitrator shall be shared by the parties. The arbitration process will be governed by the Arbitration & Conciliation Act, 1996."*

9. Certain issues arose between the parties regarding the timely completion and implementation of the SAP Hybris Software. After several queries from the petitioner, respondent no. 1 vide e-mail dated 24.04.2016, informed about certain challenges in the execution of the SAP Hybris Software project. Thereafter, a series of emails were exchanged between respondent no. 1 and the petitioner regarding the completion of the project.

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10. Subsequently, as there was no response from respondent no. 1 to the e-mails sent by the petitioner, the latter, vide e-mail dated 31.08.2016 contacted respondent no. 2, i.e., the German parent company of respondent no. 1 and apprised them of the issues being faced by the petitioner in the execution and delivery of the SAP Hybris Software. Respondent no. 2 was informed of the various shortcomings in the execution of the project and the negative ramifications being caused to the petitioner's business as a result thereof. In response to the concerns raised by the petitioner, respondent no. 2, vide e-mail dated 01.09.2016, assured to provide a framework for resolution of the challenges and completion of the project.

11. Respondent no. 2 vide email dated 07.10.2016 assured the petitioner that it would monitor the execution of the project and requested the petitioner for an opportunity to agree on the revised plan and delivery. As per the minutes of the meeting dated 14.11.2016, one of the suggestions given by respondent no. 2 as part of the revised proposal for the execution of the project was that a substantial part of the project work would be outsourced to the more experienced global team, and one representative of respondent no. 2 would overlook the progress of the project at the execution level.

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12. Unable to resolve the issues, the contract for the SAP Hybris Software project ultimately came to be rescinded on 15.11.2016. In response to this, respondent no. 2, vide e-mail dated 23.11.2016, requested the petitioner for one last opportunity to complete the project, which the petitioner declined vide email dated 24.11.2016.

13. Respondent no. 2, vide email dated 09.12.2016 sent to the petitioner, communicated that there were shortcomings at the petitioner's end as well and the respondents could not be said to be solely responsible for the collapse of the SAP Hybris Software project.

14. Despite several correspondences and meetings, the matter could not be settled amicably between the parties. On 29.10.2017, respondent no. 1 issued a notice invoking arbitration under Clause 15.7 of the GTC agreement for the alleged wrongful termination of the contract between the parties and non-payment of Rs. 17 Crore. Upon failure of the petitioner to nominate an arbitrator in response to the aforesaid notice, a Section 11(6) petition was instituted by respondent no. 1 before the Bombay High Court. The said petition came to be allowed vide order dated 30.11.2018 and an arbitral tribunal was constituted to adjudicate the disputes between the

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parties. The petitioner filed its Statement of Defence and counterclaims on 31.07.2019 for an amount of Rs. 45,99,71,098/-.

15. It may not be out of place to state at this stage that respondent no. 2 was not made a party to the aforesaid arbitration proceedings. In the course of the said proceedings, the petitioner filed an application under Section 16 of the Act, 1996 before the arbitral tribunal, contending that the four agreements entered into between the parties were part of a composite transaction and for this reason the agreements should be made a part of a singular proceeding.

16. During the pendency of the aforesaid application, on 22.10.2019, the NCLT, Mumbai admitted an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short **"the Insolvency Code"**) against the petitioner and appointed an Interim Resolution Professional. Vide Public Announcement dated 25.10.2019, the Interim Resolution Professional ordered for the commencement of the Corporate Insolvency Resolution Process (**'CIRP'**). On 05.11.2019, the NCLT passed an order adjourning the arbitration proceedings *sine die* due to initiation of the CIRP.

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17. Meanwhile, upon seeking permission of the Interim Resolution Professional, the petitioner sent a fresh notice to the respondents on 07.11.2019 invoking arbitration under Clause 15.7 of the GTC agreement. Pertinently, the petitioner arrayed respondent no. 2 in the said arbitration notice. The petitioner appointed Dr. Justice Arijit Pasayat, former Judge of this Court, as its nominated arbitrator and called upon the respondents to appoint their arbitrator for the constitution of the tribunal. However, upon failure of the respondents to appoint an arbitrator in terms of the said notice, the petitioner has preferred the present petition.

B. REFERENCE ORDER

18. This petition was heard by a three-Judge Bench of this Court. By an order dated 06.05.2022, Chief Justice N.V Ramana (as he then was) speaking for himself and Justice A.S. Bopanna doubted the correctness of the application of the Group of Companies doctrine by the Indian courts. Chief Justice Ramana criticised the approach of a three-Judge Bench of this Court in ***Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc*** reported in **(2013) 1 SCC 641** which relied upon the phrase "claiming through or under" appearing in Section 45 of the Act, 1996 to adopt the Group of Companies doctrine. He noted that the subsequent decisions of

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this Court read the doctrine into Sections 8 and 35 of the Act, 1996 without adequately examining the interpretation of the phrase "claiming through or under" appearing in those provisions. He also observed that economic concepts such as tight group structure and single economic unit alone cannot be utilized to bind a non-signatory to an arbitration agreement in the absence of an express consent. Consequently, he referred the matter to the larger bench to seek clarity on the interpretation of the phrase "claiming through or under" appearing under Sections 8, 35 and 45 respectively of the Act, 1996. The following two questions were formulated by him for reference:

i. Whether the phrase "claiming through or under" in Sections 8 and 11 respectively of the Act, 1996 could be interpreted to include the Group of Companies doctrine; and

ii. Whether the Group of Companies doctrine as expounded by ***Chloro Controls*** *(supra)* and subsequent judgments is valid in law?

19. Justice Surya Kant, in a separate opinion, observed that the decisions of this Court before ***Chloro Controls*** *(supra)* adopted a restrictive approach by placing undue emphasis on formal consent. Justice Surya Kant traced the evolution of the Group of Companies doctrine to observe that it had gained a firm footing in Indian jurisprudence. However, he opined that this

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Court has adopted inconsistent approaches while applying the doctrine in India, which needed to be clarified by a larger bench. Accordingly, he highlighted the following questions of law for determination by the larger Bench:

i. Whether the Group of Companies Doctrine should be read into Section 8 of the Act, 1996 or whether it can exist in Indian jurisprudence independent of any statutory provision;

ii. Whether the Group of Companies Doctrine should continue to be invoked on the basis of the principle of 'single economic reality';

iii. Whether the Group of Companies Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties; and

iv. Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies Doctrine into operation even in the absence of implied consent?

C. SUBMISSIONS ON BEHALF OF THE APPELLANT

20. Mr. Hiroo Advani, the learned counsel appearing on behalf of the petitioner, submitted at the outset that the GTC agreement, Order Form no. 1, Order Form no. 3 and the License Agreement are interlinked and form

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part of a composite transaction. The said four agreements cannot be performed in isolation and have to be read coherently for achieving the common object underlying the agreements.

21. The counsel submitted that respondent no. 1 is indisputably a fully owned subsidiary of respondent no. 2 and the customisation of the SAP Hybris Software to meet the requirements of the petitioner was not feasible without the aid, execution and performance of respondent no. 2. He submitted that for such reason, it could be said that there exists a direct commercial relationship between the petitioner and both the respondents.

22. The counsel further submitted that the various emails exchanged between the petitioner and respondent no. 2 are indicative of the intention of respondent no. 2 to monitor the execution of the SAP Hybris Software project and to ensure the compliance of the contractual obligations on behalf of respondent no. 1. The counsel adverted to the contents of many such emails in support of his contention.

23. The counsel placed reliance on certain clauses of the License Agreement, Order Form no. 3 and GTC agreement to submit that although respondent no. 2 may not have been a signatory to the agreements, yet it had been

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entrusted with certain liabilities and obligations under the agreements entered into between the petitioner and respondent no. 1, thereby making it a veritable party to the transaction.

24. In the last, the counsel submitted that as per the decision of the Constitution Bench of this Court in ***Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr.*** reported in **2023 INSC 1051** the court at the stage of referral is only required to look *prima facie* into the validity and existence of an arbitration agreement and should leave the questions relating to the involvement of the non-signatory to the arbitral tribunal.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

25. Mr. Ritin Rai, the learned senior counsel appearing on behalf of the respondents made the following submissions which can be broadly divided into four categories:

i. Contentions and claims sought to be raised by the petitioner are pending adjudication before another arbitral tribunal constituted under the same dispute resolution clause

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- The same contentions and claims as sought to be advanced in the present petition have already been raised and are pending adjudication before an arbitral tribunal constituted under the GTC Agreement. In the said proceedings, the Bombay High Court appointed an arbitrator and the same was affirmed by this Court.
- The claims of the petitioner pertaining to the GTC agreement read with Order Form no. 1 (collectively referred to as the "**Service Agreement**") are already *sub-judice* and cannot be permitted to be reagitated. The petitioner has already filed its counterclaims for an amount of Rs. 45,99,71,098/- before the arbitral tribunal presided by Justice Madan B. Lokur (Retd.).
- Allowing parallel arbitration proceedings emanating from the same agreement and transaction would entail a risk of conflicting judgments on the same subject matter including the analogous set of facts in evidence. As such, the principles of *res sub-judice and res judicata* would be attracted to the second arbitration proceedings and consequently the present petition.

ii. Respondent no. 2 has neither impliedly nor explicitly consented to the arbitration agreement between the petitioner and respondent no. 1

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- The agreements in question have been executed only between the petitioner and respondent no. 1. Respondent no. 2 is not a signatory to any of the agreements between the petitioner and respondent no. 1.
- Respondent no. 2 has been unnecessarily and disingenuously made a party to the present proceedings. Not a single limb of the transaction between the petitioner and respondent no. 1 was to be performed by or has been performed by respondent no. 2. Respondent no. 2 was never part of the negotiation process between the petitioner and respondent no. 1. Respondent no. 2 did not by its conduct, agree, either impliedly or explicitly, to be bound by the terms and conditions of the agreements between respondent no. 1 and the petitioner.
- It is preposterous to suggest that by trying to address the concerns of a customer of the subsidiary company (who had voluntarily reached out), respondent no. 2 would become liable under the contracts executed solely between the petitioner and respondent no. 1.
- Respondent no. 2 entered the fray only when the petitioner, of its own accord, approached it and levelled certain allegations and

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raised issues concerning the SAP Hybris Software project with its management in August, 2016.

- There is nothing on record either in the contractual framework or otherwise to indicate that the project was to be performed by respondent no. 2. The only communication with respondent no. 2 in respect of the SAP Hybris Software project arose after the escalation emails in August, 2016 where the petitioner itself requested the management of respondent no. 2 company to help with the alleged issues plaguing the SAP Hybris Software project. It was neither the intention of the petitioner nor that of respondent no. 1 to bind respondent no. 2 to the agreements.
- The references to respondent no. 2 in the License Agreement only indicate that respondent no. 1 has obtained a license from respondent no. 2. No part of the License Agreement between the petitioner and respondent no. 1 was to be performed by respondent no. 2 and it is only in such circumstances that the parties chose not to make respondent no. 2 a party thereto. The references to respondent no. 2 in the License Agreement are standard references used by global software licensing companies. These references cannot bind a foreign owner of such licenses. Any finding to the

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contrary would completely upset the well-established commercial practice in this sector and would set a dangerous precedent.

iii. Claims raised by the petitioners are beyond the ambit of Clause 15.7 of the GTC agreement

- There exists no commonality between the four agreements entered into between the petitioner and respondent no. 1. The contention of the petitioner that the four agreements form part of a "single composite transaction" is incorrect as the License Agreement and Order Form no. 3 bear no significance to the implementation of the software, which is covered by the Services Agreement comprising of the GTC agreement and Order Form no. 1. Implementation is an exercise *de hors* the purchase of the license of the software.
- The claims raised by the petitioner are beyond the ambit of the Services Agreement. As the License Agreement read with Order Form no. 3 is distinct and independent from the Services Agreement, it naturally follows that the arbitration agreement contained under the GTC agreement read with Order Form no. 1 does not apply to the License Agreement read with Order Form no. 3.

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- As the arbitration clause under the License Agreement read with Order Form no. 3 has not been invoked till date by either of the parties, it stands to reason that any alleged claims pertaining to the License Agreement read with Order Form no. 3 as mentioned in the notice of arbitration are time-barred and cannot be adjudicated upon. On this ground alone, the present Petition is liable to be dismissed.

iv. The present petition is not *bona fide* and the petitioners have suppressed material facts from this Court

- The present proceedings are a belated and misconceived attempt on the part of the petitioner to inflate amounts that it claims are due from respondent no. 1 and respondent no. 2. This is sought to be done by the petitioner to portray and provide a false view of its financial position to the creditors and subvert the due process of law through colourable actions. The petitioner is indulging in forum-shopping by once again attempting to appoint an arbitrator under the GTC agreement, a right which both the Bombay High Court and this Court, in two separate lengthy proceedings, under Sections 11 and 14 respectively of the Act, 1996, had decisively held to be forfeited by the petitioner for all times to come.

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- The petitioner failed to disclose that respondent no. 1 had challenged the notice of arbitration before the NCLT, Mumbai.

E. SUBMISSIONS ON BEHALF OF THE INTERVENOR, UNCITRAL NATIONAL COORDINATION COMMITTEE FOR INDIA (UNCCI)

26. Mr George Pothan Poothicote and Ms Manisha Singh, the learned counsel appearing on behalf of the intervenors in I.A. no. 69863 of 2023, made the following submissions:

i. UNCITRAL Model Law on International Commercial Arbitration ("**model law**") was amended in 2006 to address the concerns about the formal requirements necessary for constituting an arbitration agreement. The amendment was adopted by the United Nations General Assembly vide Resolution 61/33 dated 04.12.2006. Post the amendment, Article 7 of the model law provides two options to the member states – the first option requires the arbitration agreement to be in the form of a clause in a contract or a separate agreement, both of which must be in writing; the second option is silent on the requirement of a written agreement and thus the contract law applicable in a specific jurisdiction remains available for the

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determination of the level of consent necessary for a party to become bound by an arbitration agreement allegedly made by reference. Section 7 of the Act, 1996 is similar to (but not the same as) the first option.

ii. As per the Constitution Bench decision in ***Cox and Kings*** *(supra)*, the court, at the referral stage, is not bound to go into the merits of the case to decide if the non-signatory is bound by the arbitration agreement. On the contrary, the referral court should leave it to the arbitral tribunal to decide such an issue.

F. ANALYSIS

27. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether the application of the petitioner for the appointment of an arbitrator deserves to be allowed.

28. On the scope of powers of the referral court at the stage of Section 11(6), it was observed by us in ***Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*** reported in **2023 INSC 976** as follows:

> *"26. Taking cognizance of the legislative change, this Court in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 :*

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(2017) 4 SCC (Civ) 764] , noted that post 2015 Amendment, the jurisdiction of the Court under Section 11(6) of the 1996 Act is limited to examining whether an arbitration agreement exists between the parties — "nothing more, nothing less."""

(Emphasis supplied)

29. A Constitution Bench of this Court in ***In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Stamp Act, 1899*** reported in **2023 INSC 1066**, speaking through one of us (Dr. D.Y. Chandrachud, CJI), considered the scope of judicial interference by the referral court in a Section 11 application. A few relevant observations made therein are reproduced hereinbelow:

"81. One of the main objectives behind the enactment of the Arbitration Act was to minimise the supervisory role of Courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act provides that the Arbitral Tribunal may rule on its own jurisdiction "including ruling on any objection with respect to the existence or validity of the arbitration agreement". The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the Arbitral Tribunal. Although Sections 8 and 11 allow Courts to refer parties to arbitration or appoint arbitrators, Section 5 limits the Courts from dealing with substantive objections pertaining to the existence and validity of arbitration agreements at the referral or appointment stage. A Referral Court at Section 8 or Section 11 stage can only enter into a prima facie determination. The legislative mandate of prima facie determination ensures that the Referral Courts do not trammel the Arbitral Tribunal's authority to rule on its own jurisdiction."

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30. In a recent decision in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** reported in **2024 INSC 532**, it was observed by us that the arbitral tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts. A few relevant paragraphs of the said decision are extracted hereinbelow:

> *"98. What follows from the negative facet of arbitral autonomy when applied in the context of Section 16 is that the national courts are prohibited from interfering in matters pertaining to the jurisdiction of the arbitral tribunal, as exclusive jurisdiction on those aspects vests with the arbitral tribunal. The legislative mandate of prima facie determination at the stage of Sections 8 and 11 respectively ensures that the referral courts do not end up venturing into what is intended by the legislature to be the exclusive domain of the arbitral tribunal.*
>
> ***xxx xxx xxx***
>
> *114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. […]*
>
> ***xxx xxx xxx***
>
> *125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference,*

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most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."

(Emphasis supplied)

31. Further, on the scope of enquiry at the referral stage for the determination of whether a non-signatory can be impleaded as a party in the arbitration proceedings, it was observed by the Constitution Bench in ***Cox and Kings*** *(supra)* as follows:

"158. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.

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160. In Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd. [Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd., (2021) 5 SCC 671 : (2021) 3 SCC (Civ) 307] , a Bench of three Judges of this Court was called upon to decide an appeal arising out of a petition filed under Section 11(6) of the Arbitration Act for appointment of sole arbitrator. The issue before the Court was the determination of existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. This Court prima facie opined that there was no conclusive evidence to infer the

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existence of a valid arbitration agreement between the parties. Therefore, the issue of existence of a valid arbitration agreement was referred to be decided by the Arbitral Tribunal after conducting a detailed examination of documentary evidence and cross-examination of witnesses.

161. The above position of law leads us to the inevitable conclusion that at the referral stage, the Court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the Arbitral Tribunal. The referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the Arbitral Tribunal to exercise its primary jurisdiction. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234], this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the Tribunal : (Shin-Etsu Chemical Co. case [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] , SCC p. 267, para 74)

> *"74. ... Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration."*

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164. 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-

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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.

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

… … …

(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 […]"

(Emphasis supplied)

32. As discussed above, the respondents have raised a number of objections against the present petition, however, none of the objections raised question or deny the existence of the arbitration agreement under which the arbitration has been invoked by the petitioner in the present case. Thus, the requirement of *prima facie* existence of an arbitration agreement, as stipulated under Section 11 of the Act, 1996, is satisfied.

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33. Once the arbitral tribunal is constituted, it shall be open for the respondents to raise all the available objections in law, and it is only after (and if) the preliminary objections are considered and rejected by the tribunal that it shall proceed to adjudicate the claims of the petitioner.

34. Further, on the issue of impleadment of respondent no. 2, which is not a signatory to the arbitration agreement, elaborate submissions have been made on both the sides, placing reliance on terms of the agreements, email exchanges, etc. In view of the complexity involved in the determination of the question as to whether the respondent no. 2 is a party to the arbitration agreement or not, we are of the view that it would be appropriate for the arbitral tribunal to take a call on the question after taking into consideration the evidence adduced before it by the parties and the application of the legal doctrine as elaborated in the decision in ***Cox and Kings*** *(supra).*

35. In view of the aforesaid, the present petition is allowed. We appoint Shri Justice Mohit S. Shah, former Chief Justice of the High Court of Judicature at Bombay to act as the sole arbitrator. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

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36. It is made clear that all the rights and contentions of the parties are left open for adjudication by the learned arbitrator.

37. Pending application(s), if any, shall stand disposed of.

……CJI

(Dr. Dhananjaya Y. Chandrachud)

……J.

(J.B. Pardiwala)

……J.

(Manoj Misra)

New Delhi;
9th September, 2024