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BINDING NON-SIGNATORIES TO ARBITRATION

**TRACING THE EVOLUTION OF THE LAW SINCE
MTNL V. CANARA BANK**

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Introduction

In November, 2019, in our paper titled, '*Charting the Shifting Paradigms of Binding Non-Signatories to an Arbitration*'¹, we had analysed the issue, whether a party who was not a signatory to an arbitration agreement could also be bound by such an agreement?

In the aforesaid paper, we had traced the evolution of the law in the Indian context and demonstrated how the dictum in *Sukanya Holdings Private Limited v. Jayesh H. Pandya*,² enumerating that, bifurcation of causes of action was impermissible and no composite arbitral reference between the parties was possible unless all the parties in a suit were parties to a written arbitration agreement, have been considerably diluted by subsequent judgments of the Supreme Court of India ("**Supreme Court**"). The Indian courts, *inter-alia*, *vide* its judgments in the cases of *Chloro Controls (I) Private Limited v. Severn Trent Water Purification Incorporated*,³ *Ameet Lalchand Shah v. Rishabh Enterprises*,⁴ *Cheran Properties Limited v. Kasturi and Sons Limited*,⁵ and *Mahanagar Telephone Nigam Limited ("MTNL") v. Canara Bank*,⁶ have time and again, recognized that, in modern multi-layered and complex commercial transactions, in certain situations, even non-signatories to an arbitration agreement could be referred to a composite arbitration proceeding and/ or be made bound by an arbitral award. However, the courts have also warned that such circumstances must be exceptional and subject to certain thresholds being met.

The aforesaid precedents laid down the 'Group of Companies' doctrine and conditions for its applicability. For instance, in the *MTNL (supra)* judgment, the broad conditions when such doctrine may be applied to refer non-signatories to a composite arbitral proceeding have been mentioned as follows:

- (i) when it is established that it was the intention of all the parties to bind the signatory as well as the non-signatory group companies to the arbitration agreement;
- (ii) when the non-signatory party has either:
 - (a) been engaged in the negotiation or the performance or the termination of the contract; or
 - (b) made statements expressing its intention to be bound by the contract;
- (iii) when the non-signatory party has a direct relationship with the signatory party or the parties are involved in the execution of a composite transaction, i.e. a transaction with a common or shared business objective which would not be possible without the participation of the non-signatory party.
- (iv) the 'Group of Companies' doctrine may also be invoked by the courts if it can be established that the signatory and non-signatory parties exist within a tight group structure with strong organizational and financial links, so as to constitute 'a *single economic unit*', or 'a *single economic reality*'.

Taking a cue from the above, in this paper, we aim to further chart the evolution of the said aforesaid issue in India through an analysis of precedents established by various courts in India, post 2018. Therefore, we shall *first*, analyse the cases wherein the courts have refused to hold a non-signatory third party to be bound by an arbitration agreement, *second*, analyse the specific instances wherein courts have held a non-signatory party to be bound, *third*, look into the powers of an arbitrator to pass interim orders against non-signatory third parties and fourth, determine whether an arbitrator/ arbitral tribunal can pass an order directing a non-signatory third party to beimpleaded in an arbitral proceeding?

¹ '*Charting the Shifting Paradigms of Binding Non-Signatories to an Arbitration*', available at <https://www.mondaq.com/india/arbitration-dispute-resolution/868694/binding-non-signatories-to-an-arbitration-charting-the-shifting-paradigms>, last accessed on March 7, 2022.

² *Sukanya Holdings Private Limited v. Jayesh H. Pandya*, (2003) 5 SCC 351.

³ *Chloro Controls (I) Private Limited v. Severn Trent Water Purification Incorporated*, (2013) 1 SCC 641.

⁴ *Ameet Lalchand Shah v. Rishabh Enterprises*, (2018) 15 SCC 678.

⁵ *Cheran Properties Limited v. Kasuri and Sons Limited*, (2018) 16 SCC 413.

⁶ *Mahanagar Telephone Nigam Limited v. Canara Bank*, (2020) 12 SCC 767.

Analysis

1. Where non-signatory parties have been held to be not bound by the arbitration agreement

Questions pertaining to amenability of non-signatory parties to an arbitration agreement often arises when multiple contracts pertaining to the same transaction are entered into between different parties. While in such cases, based on the facts and circumstances, a reference to composite arbitration can be issued in consonance with the law laid down by the Supreme Court, such power may only be exercised in exceptional situations. We endeavour to discuss the same hereinbelow.

In the case of *Huawei Telecommunications (India) Company Private Limited v. BSNL*,⁷ a party, who had executed a contract for a particular project (to be implemented by BSNL) with a sub-contractor of BSNL which was responsible for execution of the project, sought to implead the principal employer, i.e. BSNL in the arbitration proceedings with such sub-contractor. There was no privity of contract between the petitioner and BSNL, while a separate contract with a separate arbitration clause existed between BSNL and its sub-contractor. The Delhi High Court opined that, the arbitration agreement in one contract cannot be incorporated into another contract unless there is a clear intention of the parties to do so while entering into a second agreement, which was absent in the case. The Delhi High Court thus, held that, the 'Group of Companies' doctrine was inapplicable in the instant case and refused to refer all the parties to one composite arbitral proceeding.

Similarly, in the case of *Laxmi Civil Engineering Services Limited v. GAIL (India) Limited*,⁸ a subcontractor of GAIL, sought a composite arbitral reference under Section 11(6) of the Arbitration and Conciliation Act ("the Act"),⁹ between itself, GAIL (with whom it had executed a contract containing an arbitration clause) and its sub-contractors (with whom it had executed separate subcontracts with distinct arbitration clauses). Refusing such a reference, the Delhi High Court held that, the petitioner's reliance on the *Ameet Lalchand Shah (supra)* decision was totally misplaced, as in the facts of that case the issue was, whether disputes under ancillary contracts which had been entered into between some of the parties to the main contract could also be referred to arbitration under the main contract. The Court noted that there was no dispute as to existence of arbitration clause in the main contract. However, in the instant case, there was no privity between the petitioner's sub-contractors and GAIL. Further, the parties had never expressed any intention to be bound by the arbitration agreement contained in the contract between the petitioner and GAIL.

⁷ *Huawei Telecommunications (India) Company Private Limited v. BSNL*, ARB.P. 591/2019, before the Delhi High Court Delhi, judgment dated February 27, 2020.

⁸ *Laxmi Civil Engineering Services Limited v. GAIL (India) Limited*, ARB.P. 175/2020, before the Delhi High Court Delhi, judgment dated March 8, 2021.

⁹ Section 11(6) of the Act states as follows-

"11. Appointment of arbitrators. — ...

(6) Where, under an appointment procedure agreed upon by the parties, —

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

The Delhi High Court in the case of *Hindustan Prefab Limited v. Messrs NCC Limited*,¹⁰ has held that the non-signatory third party was not bound by the arbitration agreement and hence refused to direct the parties to a single composite arbitral proceeding.

Furthermore, in the case of *STCI Finance Limited v. Shreyas Kirti Lal Doshi*¹¹, in a suit filed by a lender against the borrower company (with whom the lender had an arbitration agreement) as well as its directors, such non-signatory directors filed an application under Section 8 of the Act¹² seeking reference to arbitration by virtue of the arbitration agreement contained in the facility agreement between the lender and the borrower. The Delhi High Court observed that the facility agreement referred to the deeds of guarantee, but the same were not covered within the definition of “facility documents” as contained in the facility agreement. The Court went on to hold that, mere reference does not mean that the deeds of guarantee, which were executed separately, will form a part of the facility agreement, and thus, went on to dismiss the application made by the non-signatory guarantors for a composite reference to arbitration.

It is also pertinent to mention that the Delhi High Court in the case of *Cannes Property Management Services Private Limited v. Allahabad Bank*,¹³ has held that, a stranger or a third party cannot be bound if there no is assignment of contractual rights and liabilities.

2. Where non-signatory parties have been held to be bound by the arbitration agreement

There are precedents reflecting situations wherein non-signatory parties have been held to be bound by an arbitration agreement which they did not expressly subscribe to. We discuss the same in the segment below:

2.1 Where non-signatory parties are the ‘alter ego’ of the signatory party

Pursuant to the evolution of the law post the decision in *Chloro Controls (supra)*, the courts have sometimes applied the ‘Group of Companies’ doctrine to conclude that a non-signatory third party can be referred to an arbitral proceeding, not only because they were claiming through the signatory party or they were part of a tight economic structure, but in some cases, because the non-signatory party was an ‘alter ego’ of the signatory party which had no purpose for an independent existence otherwise.

¹⁰ *Hindustan Prefab Limited v. Messrs NCC Limited*, ARB. A. (COMM.) 26/2021 and IA Nos. 7261/2021 & 7262/2021, before the Delhi High Court, judgment dated June 3, 2021.

¹¹ *STCI Finance Limited v. Shreyas Kirti Lal Doshi*, CS(COMM) 528/2019 and I.As. 13157/2019 & 15801/2019, before the Delhi High Court, judgment dated June 3, 2021.

¹² Section 8 of the Act states as follows-

“8. Power to refer parties to arbitration where there is an arbitration agreement –

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

¹³ *Cannes Property Management Services Private Limited v. Allahabad Bank*, ARB.P. 591/2020, before the Delhi High Court, judgment dated October 7, 2021.

A similar view was also taken in the case of *Magic Eye Developers Private Limited v. Green Edge Infra Private Limited*¹⁴, wherein a suit was filed by the plaintiff which had an arbitration agreement with only the first defendant but not the other defendants. The Delhi High Court allowed the application under Section 8 of the Act to refer all the parties in the suit to arbitration. According to the Court, the plaintiff itself, in the plaint, had stated that the non-signatory defendant companies had only been incorporated to perpetrate financial jugglery with the funds of the signatory party and their corporate veil ought to be pierced. Hence, basis the same, the Court held that the defendants were group companies of a single family within a tight economic structure and, could be referred to a composite arbitration.

Further, *Shapoorji Pallonji and Company Private Limited v. Rattan India Power Limited*¹⁵, the Delhi High Court allowed an application filed under Section 11 of the Act, referring a group company of the respondent, who was not a party to the arbitration agreement between the petitioner and the respondent, to a composite arbitral proceeding. The rationale for the same being, as per the Court, there was enough material on record to evince that the non-signatory group company was heavily involved in the negotiation as well as the performance of the contract between the petitioner and the respondent. Therefore, the Court opined that the respondent was only an 'alter ego' of its non-signatory group company and hence, all the parties ought to be referred to a composite arbitration.

2.2 Whether non-signatory guarantors in a transaction can be bound by an arbitration agreement?

The answer to the aforesaid question would be that, the same depend on the facts and circumstances of each case. We have hereinabove deliberated on the case of *Shreyas Kirti Lal Doshi (supra)*, wherein considering the facts of the case, the Delhi High Court held that the non-signatory guarantors would not be bound by the arbitration agreement contained in the facility agreement. However, the Court did not hesitate to pass orders directing that, such non-signatory guarantors also be referred to the arbitration process and/ or arbitral awards can be enforced against them even in cases where, the guarantor has been found to be intrinsically involved in the transaction and the transaction documents, including the guarantee agreements, were seen to have been executed by common signatories.

Further, the Madras High Court in the case of *Finnish Fund for Industrial Corporation Limited v. VME Precast Private Limited*,¹⁶ observed that, the guarantor respondent was the parent company of the borrower company and the same person has executed the documents on behalf of both companies. Hence, the award was capable of being enforced against the non-signatory guarantor company.

Additionally, the Bombay High Court in the case of *Anheuser Busch Inbev India Limited v. East Godavari Breweries Private Limited*¹⁷, noted that, the common signatories had executed the main contract as well as the guarantee agreement and the fact that but for such guarantee agreement *vide* which the performance of the main contract was assured, the main contract might never have been entered into between the parties. Therefore, the

¹⁴ *Magic Eye Developers Private Limited v. Green Edge Infra Private Limited*, IA No. 1645/2019 in CS(COMM) 1290/2018, before the Delhi High Court, judgment dated May 21, 2020.

¹⁵ *Shapoorji Pallonji and Company Private Limited v. Rattan India Power Limited*, ARB. P. 716/2019 and I. A. No. 7836/2020, before the Delhi High Court, judgment dated April 7, 2021.

¹⁶ *Finnish Fund for Industrial Corporation Limited v. VME Precast Private Limited*, original petition nos. 891 of 2018 & O.A.No.957 of 2018 & A.No.8143 & 8145 of 2018, before the Madras High Court, judgment dated October 14, 2020.

¹⁷ *Anheuser Busch Inbev India Limited v. East Godavari Breweries Private Limited*, Civil Miscellaneous Petition No.304/2019, before the Bombay High Court, judgment dated March 31, 2021.

Bombay High Court held that, in order to give business efficacy in a commercial sense to the transaction, all parties ought to be referred to a composite arbitral proceeding.

It is pertinent to mention that, an appeal filed against the afore-mentioned judgment in the *Anheuser Busch (supra)* case was dismissed by the Supreme Court.¹⁸

Similar observations were also made by the Delhi High Court in the case of *Eveready Industries India Limited v. KKR India Financial Services Limited*.¹⁹(*supra*), wherein refusing to set aside the interim measures passed under Section 9 of the Act against non-signatory guarantors, the Court noted the pivotal positions held in the signatory companies by the guarantors as well as the overlapping shareholding patterns qua the entire group. The Court, thus, concluded that, considering the tight group structure, as well as the fact that the facilities would never have been extended but for the assurances provided by the non-signatory parties, they were rightly held to be amenable to the interim measures passed against them.

2.3 Whether non-signatory entities are bound by deeds executed towards settlement of inter-family disputes?

In certain cases, courts have been called upon to decide whether arbitration agreements contained in deeds/ agreements executed for settlement of inter-family disputes, which are often executed between members and/ or entities controlled by members of prominent business families, can also bind entities connected to signatories of such deeds/ agreements, who have otherwise themselves not put their signatures to such settlement deeds/ agreements. In certain factual situations, the courts have held that companies connected to and claiming through such signatory entities, may also be bound by such arbitration agreements. We discuss the same hereinafter.

In *Atul Chandrakant Kirloskar v. Sanjay Chandrakant Kirloskar*,²⁰ deciding an application under Section 8 of the Act, the Bombay High Court referred all parties involved to a composite arbitration under the arbitration agreement caused in the deed for family settlement ('DFS'), despite a number of the parties being companies controlled by the signatory family members but not being parties to the DFS themselves. The Court held that, since there was a clear commonality of facts that bound all the parties together, as well as the clear intent expressed in the DFS to refer all inter-family disputes to arbitration under the aegis of the same, the 'Group of Companies' doctrine was applicable in this case.

Similarly, in the case of *Vijay Kumar Munjal v. Pawan Munjal*,²¹ the Delhi High Court proceeded to refer all parties, including companies incorporated after the family settlement agreement ('FSA'), wherein the arbitration agreement in question was contained, had been executed. The Court, thereafter, went on to expound the various circumstances in which a non-signatory to an arbitration agreement may be compelled to participate in the arbitration proceedings, as mentioned below:

“113. In addition, there are various principles on the basis of which a non-signatory may be compelled to arbitrate. These include cases where a non-signatory is an alter ego signatory; the non-signatory is found to be a party by lifting the corporate

¹⁸ *Scarpe Marketing Private Limited v. Anheuser Busch Inbev India Limited*, petition(s) for Special Leave to Appeal (C) No(s). 6908/2021, before the Supreme Court of India, order dated June 29, 2021.

¹⁹ *Eveready Industries India Limited v. KKR India Financial Services Limited.*, FAO(OS) (COMM) 2/2021 and CM APPL. 173/2021 & 2166/2021, before the Delhi High Court, judgment dated February 7, 2022.

²⁰ *Atul Chandrakant Kirloskar v. Sanjay Chandrakant Kirloskar*, Arbitration Appeal (ST) No.1661 of 2021, before the Bombay High Court, judgment dated May 3, 2021.

²¹ *Vijay Kumar Munjal v. Pawan Munjal*, ARB.P. 975/2021 and IA Nos. 12836/2021 & 14638/2021, before the Delhi High Court, judgment dated February 17, 2022.

veil; the non-signatory is a part of the same group of companies; the non-signatory is a party to a composite transaction; the non-signatory's consent is implied; the non-signatory is estopped from avoiding arbitration where it knowingly received benefits under the agreement." (emphasis supplied)

2.4 Whether a non-signatory party can step into signatory's shoes through amendment or assignment of contract?

Another interesting question that arises in this regard is whether a party, which was not originally a signatory to the contract containing the arbitration agreement, can become a signatory party or step into its shoes *vide* assignment of contractual rights or amendment of the contract.

In *Aarti Razee v. S. Sivagurunathan*,²² one of the respondents contended that he could not be joined in a composite arbitral reference despite being the partner in a firm and the subject matter being inter-partner disputes, as he was not a signatory to the partnership deed containing the arbitration agreement and had only been made a partner subsequently *vide* execution of an amended partnership deed, which did not contain any arbitration clause or any specific reference to the arbitration clause contained in the previous partnership deed. The Madras High Court rejected the argument and held that, only because the non-signatory respondent had signed the deed of amendment or reconstitution, it did not mean that he was not bound by all the clauses of the original partnership deed, including the arbitration agreement contained therein.

Similarly, in the case of *Blue Star Limited v. Bhasin Infotech and Infrastructure Private Limited*,²³ where the non-signatory party resisted reference to arbitration on the ground that it had only signed an addendum to the original agreement which did not incorporate the arbitration clause contained in the original agreement by specific reference but merely stated that all the other clauses contained therein shall be applicable, the Delhi High Court held that, since the addendum signified the intention of the parties to be bound by all clauses in the original agreement, it could not be said that the arbitration clause therein was excluded in its application to the parties.

However, it may be pertinent to note that, unless there is voluntary assignment of the contractual rights and liabilities to the non-signatory party, an arbitration agreement contained therein cannot be foisted upon such party, as held by the Delhi High Court in the case of *Cannes Property Management (supra)*.

Therefore, in the light of the above discussion, it can be stated that, whether a non-signatory party can be referred to an arbitration in case of amendment or assignment of the contract containing the arbitration agreement, would depend upon the facts and circumstances pertaining to such amendment or assignment.

2.5 Whether homeowner is bound by arbitration clause in development agreement signed by housing society?

The Bombay High Court, in the case of *Chirag Infra Projects Private Limited v. Vijay Jwala Co-Op Housing Society Limited*,²⁴ has unequivocally held that, once a housing society has signed a development agreement with a property developer, a homeowner in such a society is bound by the arbitration clause contained in such a development agreement and

²² *Aarti Razee v. S. Sivagurunathan*, O.P.NO.1162 OF 2018 and O.A.NO.1132 OF 2018, before the Madras High Court, judgment dated August 20, 2020.

²³ *Blue Star Limited v. Bhasin Infotech and Infrastructure Private Limited*, ARB.P. 444/2020, before the Delhi High Court, judgment dated July 29, 2021.

²⁴ *Chirag Infra Projects Private Limited v. Vijay Jwala Co-Op Housing Society Limited*, Arbitration Petition (L) No. 108 of 2021, before the Bombay High Court, judgment dated March 12, 2021.

the argument that interim measures could not be passed against a dissenting homeowner under Section 9 of the Act, in such a case, is misplaced.

The aforesaid principle of law was also reiterated by the Bombay High Court in the case of *Westin Sankalp Developers v. Ajay Sikandar Rana*.²⁵

3. Powers of arbitrators to pass interim orders against non-signatory parties

Under Part-I of the Act, an interim order in connection with a particular arbitral proceeding may be passed by a 'Court', as defined at Section 2(1)(e) of the Act,²⁶ under Section 9 thereof,²⁷ or by an arbitral tribunal, during the continuance of the arbitral proceedings, under Section 17 of the Act.²⁸ From the aforesaid discussion, it is apparent that the courts have exercised their

²⁵ *Westin Sankalp Developers v. Ajay Sikandar Rana*, Comm. Arbitration Petition (L) No. 221 of 2020, before the Bombay High Court, judgment dated March 19, 2021.

²⁶ Section 2(1)(e) of the Act states as follows-

"2. Definitions. – (1) In this Part, unless the context otherwise requires, – ...

(e) "Court" means – (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes; (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;"

²⁷ Section 9 of the Act states as follows-

"9. Interim measures, etc., by Court. – (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court –

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely: –
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - (d) interim injunction or the appointment of a receiver;
 - (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."

²⁸ Section 17 of the Act states as follows-

"17. Interim measures ordered by arbitral tribunal. – (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal –

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely: –
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

rights, where the circumstances so warranted, to pass interim measures against third parties under Section 9 of the Act, and such right of the Courts is now, more or less, well recognized through judicial precedents. However, there is a considerably larger debate as to whether an arbitrator/ arbitral tribunal can, under Section 17 of the Act, pass interim measures against a non-signatory party. In this section of the paper, we will examine certain decisions which have tried to address this issue.

In *Prabhat Steel Traders Private Limited v. Excel Metal Processors Private Limited*,²⁹ the Bombay High Court recognized that, interim orders passed by an arbitral tribunal under Section 17 of the Act may affect non-signatory third parties in a direct or indirect manner, especially post the 2015 amendments to the Act, whereby the powers of the court (under Section 9 of the Act) and the arbitral tribunal (under section 17 of the Act) in granting interim measures, in the opinion of the Court, have become identical.

However, the Bombay High Court, in the case of *Bombay Slum Redevelopment Corporation Limited v. Samir Narain Bhojwani*,³⁰ relying upon the Supreme Court's judgment in the case of *State Bank of India v. Ericsson India Private Limited*,³¹ held that, an arbitral tribunal passing interim orders against third party secured creditors would be overstepping its jurisdiction under Section 17 of the Act. Thus, even though the non-signatory third parties, against whom interim orders had been passed by the arbitrator, were not impleaded in this case, the Court opined that, "*In my view, even if those third parties would have been impleaded as the parties before the learned arbitrator, since they were not the parties to the arbitration agreement, no such order could be passed against such third parties by the learned arbitrator.*"

Further, the Delhi High Court, in the case of *Blue Coast Infrastructure Development Private Limited v. Blue Coast Hotels Limited*,³² held that, unlike a court under Section 9 of the Act, an arbitral tribunal had no power to pass interim measures against third parties under Section 17 of the Act. The Court observed therein as follows:

"27. Reading of Section 9 of the Act as well as the judgments in Value Advisory (supra) and Gatx India (supra) makes it clear that the scope of power of a Court under Section 9 of the Act is not limited to parties to an Arbitration Agreement and the Court can issue interim directions even against a third party. The distinction between the powers under Section 9 of the Act and Section 17 of the Act has a clear rationale. An Arbitrator is a creature of the contract between the parties and therefore cannot venture outside the contract to issue directions to parties who are non-parties to the Arbitration Agreement. This limitation is not applicable to a Court exercising power under Section 9 of the Act". (emphasis supplied)

However, in the case of *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited*,³³ where the Delhi High Court was called upon to decide whether an interim order passed

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court."

²⁹ *Prabhat Steel Traders Private Limited v. Excel Metal Processors Private Limited*, Arbitration Petition No.619 of 2017, before the Bombay High Court, judgment dated August 31, 2018.

³⁰ *Bombay Slum Redevelopment Corporation Limited v. Samir Narain Bhojwani*, Commercial Arbitration Petition No.527 of 2019, before the Bombay High Court, judgment dated September 13, 2019.

³¹ *State Bank of India v. Ericsson India Private Limited*, (2018) 16 SCC 617.

³² *Blue Coast Infrastructure Development Private Limited v. Blue Coast Hotels Limited*, O.M.P. (I) (COMM) No. 35/2020 and I.A. 3251/202, before the Delhi High Court, judgment dated June 10, 2020.

³³ *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited*, O.M.P(ENF)(COMM) 17/2021, before the Delhi High Court, judgment dated March 18, 2021.

by an emergency arbitrator under the Singapore International Arbitration Centre ('SIAC') Rules against non-signatory third parties was enforceable in India, the Court answered the question in positive.

Therefore, the Delhi High Court, in the aforesaid *Amazon.com (supra)* judgment, seems to have recognized the power of an arbitral tribunal to pass interim orders against non-signatory third parties under Section 17(1) of the Act. Thus, the *status quo* seems to be that there is a broad consensus as to the power of a court to pass interim orders affecting third parties under Section 9 of the Act, however, the same is absent when it comes to the power of the arbitral tribunal to do so under Section 17 of the Act. Hence, the position can be said to be unclear regarding the issue in hand.

4. Impleadment of non-signatory parties to arbitral proceedings by arbitrator

Another issue that might require attention is, the power of the arbitrator/ arbitral tribunal to implead non-signatory third parties to the arbitral proceedings.

In this regard, it is pertinent to highlight the case of *V.G. Santhosam v. Mrs. Shanthi Gnanasekaran*,³⁴ wherein the partners of a partnership firm challenged the decision of an arbitrator to implead a person who was not a partner (and therefore not party to the partnership deed containing the arbitration clause) to inter-partner disputes. The Madras High Court observed that, while there was no express power in the Act which enables an arbitrator to implead a non-signatory party, such an order could be treated to be an interim measure under Section 17(1)(ii)(e) of the Act. The Madras High Court thereafter, went on to hold that, the ratio laid down in *Chloro Controls (supra)* could only be applied in a very narrow conspectus of facts and has no applicability in the circumstances of the case. The Court thus, proceeded to set aside such order of impleadment passed by the arbitrator.

An appeal filed against the judgment in the case of *V.G. Santhosam (supra)* was dismissed by the Supreme Court.³⁵

However, the Delhi High Court seems to have taken a slightly contrary view in its judgment in *Hindustan Prefab Limited (supra)*, wherein, while setting aside an order passed by the arbitrator allowing joinder of a non-signatory party to the arbitration proceedings, the Court expressed its reservation as to whether such an order can be said to be an 'interim measure' passed under Section 17 of the Act at all.

Further, in *M. Mythrai v. T. Ramesh*³⁶, the Madras High Court was faced with a challenge from an order of a sole arbitrator who had proceeded to implead certain non-signatories, against whom certain counterclaims had been made by the respondents in such arbitral proceedings. Relying heavily on the *VG Santhosam (supra)* judgment as well as the provisions of the Act and the legislative history behind the same, the Court held that, the Act does not contemplate any power of the arbitrator to implead third parties to the proceedings. The Court proceeded to set aside the order of impleadment of such non-signatory third parties and held that, counterclaims against third parties in an arbitration proceeding is not contemplated under the provisions of the Act.

At this juncture, it may be relevant note that, in the *Amazon.com (supra)* judgment, the Delhi High Court while enforcing an order passed by an emergency arbitrator under the SIAC Rules, whereby the emergency arbitrator, *inter-alia*, impleaded non-signatory parties to the arbitral proceeding and passed interim orders against them, observed that, "even if the *Emergency Arbitrator had not*

³⁴ *V.G. Santhosam v. Mrs. Shanthi Gnanasekaran*, C.M.A.Nos.4465, 4467 to 4469 of 2019 and C.M.P.Nos.25291, 25293, 25294 and 25295 of 2019, before the Madras High Court, judgment dated February 24, 2020.

³⁵ *Shanthi Gnanasekaran v. V.G. Santhosam*, Petition(s) for Special Leave to Appeal (C) No(s). 9234-9237/2020, before the Supreme Court of India, order dated August 21, 2020.

³⁶ *M. Mythrai v. T. Ramesh*, C.M.A.Nos.1582 and 1584 of 2020, before the Madras High Court, judgment dated February 2, 2021.

impleaded respondent No.2, the interim order of the Emergency Arbitrator is enforceable against respondent No.2 before this Court". The Court further went on to hold therein that, "order of the Emergency Arbitrator is an order under Section 17(1) and enforceable as an order of this Court under Section 17(2) of the Arbitration and Conciliation Act". Therefore, the Delhi High Court, *vide* the afore-mentioned observations, may have recognized the power of an arbitrator to implead and pass orders against non-signatory third parties under Section 17 of the Act, though it needs to be borne in mind that these observations were in the context of an order passed in an international commercial arbitration under SIAC Rules.

Concluding Remarks

It is evident from the above discussion that the law with regard to binding non-signatory third parties to an arbitration agreement has evolved significantly in the period in-between the passing of the *Sukanya Holdings (supra)* and the *MTNL (supra)* judgments. Thereafter, the Courts across the country have further streamlined the law in this regard by ruling on a myriad variety of topics pertaining to the issue, as we have discussed hereinabove. Thus, it can be construed that, non-signatories may be bound to an arbitration agreement only in exceptional circumstances where the facts of the case so warrant and not as a matter of course.

Further, while there is still some confusion as to certain aspects of this broader issue, notably the powers of an arbitrator to implead and/ or pass interim orders against third parties, as we have seen above; there is absolutely no doubt about the fact that the body of judicial precedents on this issue certainly seems to be getting richer with the passage of time and these aspects will also no doubt come to be settled sooner or later by the appropriate judicial authorities.

This paper has been written by Somdutta Bhattacharyya (Partner) with inputs from Arka Majumdar (Partner).

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