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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ARB. A. (COMM.) 46/2024 and CAV 421/2024, IA 37805-37806/2024

INDRAPRASTHA POWER GENERATION COMPANY LTD .....Appellant

Through: Mr. Chandra Prakash, Advocate

versus

HERO SOLAR ENERGY PRIVATE LIMITED ....Respondent

Through: Mr. Sanjoy Ghose, Sr. Advocate with Mr. Yash Srivastava, Ms. Satakshi Sood, Mr. Rohan Mandal, Ms. Naimish Verma and Ms. Rashmi Priya, Advocates

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% 30.08.2024

1. This is an appeal under Section 37(2)(b) of the Arbitration and Conciliation Act 1996[1] directed against an order dated 15 July 2024, passed by the Arbitral Tribunal presently *in seisin* of the disputes between the appellant and the respondent, under Section 16 of the 1996 Act. The impugned order rejects the application filed by the appellant, as the respondent before the Arbitral Tribunal, to implead the Ministry of New and Renewable Energy[2], Government of India, as an additional party in the arbitral proceedings.

[1] "the 1996 Act", hereinafter
[2] "the MNRE", hereinafter

2. I have heard Mr. Chandra Prakash, learned counsel for the appellant and Mr. Sanjoy Ghose, learned Senior Counsel for the respondent, at length.

Facts

3. The appellant issued a Request for Selection of Bidders (RFS) for design, manufacture, supply, erection, testing and commissioning of a Grid Connected Roof Top Solar Power System to be installed on selected roof tops at various places in Delhi, under the Renewable Energy Service Companies[3] Model for 25 years. The respondent was the successful bidder. A purchase order was placed on the respondent by the appellant for a cost of ₹ 17.75 crores. Separate sanction letters were subsequently issued by the appellant to the respondent for each of the locations on which the solar power system was to be installed.

4. Subsidy in the form of Central Finance Assistance[4] was being provided by the MNRE for installing solar power systems on the rooftops of Government buildings. In the GNCTD[5], the installation of solar power systems on roof tops, availing the subsidy provided by the MNRE was undertaken by the Energy Efficiency and Renewable Energy Management[6] which, in turn, implemented the project through the appellant. The appellant therefore invited bids from entities

[3] "RESCO", hereinafter
[4] "CFA", hereinafter
[5] Government of National Capital Territory of Delhi
[6] "the EE&REM", hereinafter

interested in participating in the RFS for design, manufacture, supply, erection, testing and commission of the Roof Top Solar Power Systems for a period of 25 years in Delhi. There is no dispute that the terms and conditions of the contract between the parties was contained in the RFS.

5. Alleging that, despite its having completed the project to the satisfaction of the appellant, the entire subsidy of 30% had not been released to it, the respondent initiated arbitral proceedings against the appellant. The learned Arbitral Tribunal as already noted, comprised three former Judges of this Court.

6. The appellant filed an application before the learned Arbitral Tribunal seeking addition of the MNRE as a party to the arbitration proceedings. It was sought to be contended that it was the MNRE which was actually providing subsidy for the project and that the appellant was merely a channelizing agency through which the payment was being made. Reliance was placed for this purpose on clause 6.8 of the agreement, which read thus :

> **"6.8 SUBSIDY DISBURSEMENT**
>
> 6.8.1 Vide MNRE letter number 5/38/2013-14/RT dt 27.10.2014, Power Deptt, GNCTD (EE&REM Centre on this behalf) has been nominated as implementing agency and can avail subsidy of 30% from MNRE. EE&REM centre will receive maximum subsidy amount of 30% of Project cost from MNRE, and EE&REM centre will provide 30% of the Project Cost as quoted by the Successful Bidder in Price Bid as subsidy. Subject to a maximum of Rs 2.13 Cr per MWp. Subsidy shall be given @30% of total project cost (maximum project cost @ Rs 7.1 Crores/MWp)

6.8.2 EE&REM will provide 30% of Project Cost limited to 2.13 Cr/MWp as subsidy. The cost quoted by the bidder in the Price Bid shall be considered as the Project Cost for computation of subsidy eligibility of the bidder. The subsidy shall be disbursed as follows.

a) Subsidy equivalent to 30% of the Project Cost will be released after Commissioning and acceptance of project by EE&REM centre on recommendation of IPGCL.

6.8.3 EE&REM may consider to release as case to case basis depending on the actions taken by the Successful Bidder and the progress achieved in the process, the subsidy amount indicated at above Clause 6.8.2 (a) & (b) above in case Grid connectivity of the Project has not been done although the Project is otherwise ready for the commissioning."

7. The learned Arbitral Tribunal has rejected the appellant's application. The reasoning of the learned Arbitral Tribunal is contained in paras 8 and 9 of the impugned order, which read thus:

"8. It is not in dispute that MNRE is not a signatory to the Arbitration Agreement. It is also not disputed before us that MNRE is not a sister nor part of group companies and thus in our view on this ground the MNRE cannot be impleaded as a party to the present proceedings. Additionally, Clause 3.35.8 extracted above would show the intention of the parties. A categorical term has been included that the present Contract is not intended and shall not be construed to confer on any person other than IPGCL and successful bidder (parties to the Agreement) any rights and/or remedies. Mr. Chandra Prakash has relied upon paras 120 to 123 in the case of ***Cox and Kings***[7] which we reproduced below: -

"120. In ***Reckitt Benckiser***[8], this Court was called upon to determine whether the representation of a purported promoter of a non- signatory entity would bind it to the said representation. In that case, entered into an agreement with the applicant an Indian company for the supply of packing materials. During the stage of negotiation, the applicant circulated a draft of the agreement by email with the Indian

[7] **Cox and Kings Ltd v SAP India Pvt Ltd and Anr, 2023 SCC OnLine SC 1634,** hereinafter "**Cox and Kings-II**"
[8] **Reckitt Benckiser (India) Pvt Ltd v Reynders Label Printing India Pvt Ltd and Anr, (2019) 7 SCC 62**

company. This email was reverted by one Mr. Frederick Reynders, who the applicant claimed was the promoter of a Belgian sister company of the Indian company. The Belgian company was a non-signatory to the agreement. Yet, the applicant sought to implead the Belgian company on the basis that it had participated during the negotiations preceding the execution of the agreement. This Court refused to allow the joinder of the Belgian company to the arbitration agreement on the grounds that Mr. Reynders was not the promoter of the Belgian company, and was therefore not acting in that capacity on or behalf of the company and the applicant failed to discharge its burden to prove that the Belgian company consented to the arbitration agreement.

121. Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a number of reasons. First, by being actively involved in the performance of a contract, a non- signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement; second, the conduct of the non- signatory may be in harmony with the conduct of the other members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other party has legitimate reasons to rely on the appearance created by the non-signatory party so as to bind it to the arbitration agreement

V. **Threshold standard**

122. In ***Cox and Kings***[9], Justice Surya Kant observed that ***Reckitt Benckiser*** fixed a higher threshold of evidence for the application of the group of companies doctrine as compared to earlier decisions of this Court. This Court's approach in ***Reckitt Benckiser*** is indicative of the fact that the mere presence of a group of companies is not the sole or determinative factor to bind a non-signatory to an arbitration agreement. Rather, the courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. The nature or standard of involvement of the non- signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance

[9] **Cox and Kings Ltd v Sap India Pvt Ltd and Anr, (2022) 8 SCC 1**, hereinafter "**Cox and Kings-I**"

upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The burden is on the party seeking joinder of the non- signatory to the arbitration agreement to prove a Conscious and deliberate conduct of involvement of the non-signatory based on objective evidence.

123. An arbitration agreement is a distinct and separate agreement from the substantive commercial contract which contains the arbitration agreement. An arbitration agreement is independent of the other terms of the contract, to the extent that nullification of the contract will not lead to invalidation of the arbitration agreement. The concept of separability of the arbitration agreement from the underlying contract ensures that the intention of the parties to resolve the disputes through arbitration does not vanish merely because of a challenge to the legal validity of the underlying contract. To join a non-signatory to arbitration, the decisive question that has to be answered is whether a non-signatory consented to the arbitration agreement, as distinct from the underlying containing the arbitration agreement."

9. A complete reading of the aforesaid paragraphs would show that there has to be a somewhat connection or a positive act by conduct of a party subsequent to the conclusion of a Contract or participation by the non- signatory party in the negotiation, performance or termination besides some connection in the contractual duties of the parties. Nothing has been shown to us which would show that MNRE at any time pre, post or during the continuation of the Agreement had any positive participation. Resultantly, the aforesaid judgment would not apply to the facts of the present case. We may also add that assuming for the sake of argument, a third party which according to the Respondent is a stumbling block in release of payment to the Claimant is made a party this Tribunal would be saddled with deciding the dispute between the Respondent and MNRE which cannot be the aim and purpose of addition of any party to ongoing arbitration proceedings. Resultantly, we find no merit in the application. The same is accordingly dismissed."

8. The appellant assails the aforesaid decision of the Arbitral Tribunal by way of the present appeal.

Rival Submissions

Submissions of Mr. Chandra Prakash for the appellant

9. Mr. Chandra Prakash, appearing for the appellant, submits that the subsidy, which was subject matter of the claim of the respondent before the learned Arbitral Tribunal, was disbursed by the MNRE. The EE&REM, through the appellant, merely paid to the respondent, the subsidy received form MNRE. The liability of the appellant to disburse CFA to the respondent was therefore dependent on the receipt of the CFA by the appellant from the MNRE. Clause 6.8 of the agreement, he submits makes this clear.

10. Mr. Chandra Prakash points out that on 27 September 2023, the appellant had addressed a communication to the MNRE requesting it to join the arbitral proceedings. He has referred this Court to the following paragraphs from the said communication :

> "…It is further relevant to state that against the non-payment of balance CFA for the capacity 1648.96 KW (commissioned after 30.09.2017), the contractor M/s Hero Solar Energy Pvt. Ltd. has dragged the IPGCL into litigation and is making claims from IPGCL and for the said purpose the contractor has served the arbitration notice dated 09.06.2023 through its Lawyers M/s Amaltas Law Chamber and recommend the name of Hon'ble Justice (Retd.) M. L. Mehta as sole arbitrator for adjudicating the disputes between IPGCL and HSEPL.

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... Therefore, **Director-Rooftop MNRE was requested to join the arbitration proceedings against the HSEPL in order to verify the losses or damages if any, as would be claimed by the M/s HSEPL in the arbitration proceedings.** It is very important because of the fact that IPGCL was selected a executing agency and payment of the balance subsidy has been stopped by the Ministry of New & Renewable Energy (MNRE), Govt. of India and not by IPGCL for their own reasons which might be very genuine but the contractor has sued only IPGCL without making necessary parties involved in the entire process, now at present the contractor has filed the statement of claim making various claims against the IPGCL and it needs to be countenanced by the reasons to be given only by the Ministry of New & Renewable Energy (MNRE), Govt. of India, therefore it is requested to come forward and join the arbitration proceedings in which claims for the non-payment has been made against the IPGCL which is not at all responsible for any stoppage of payments or for explaining the losses or damages if any would be claimed by the M/s HSEPL, Since IPGCL has very limited role, only for tendering and monitoring the execution of the projects, therefore in view of above said it is requested to proathe consent within a week time as the time line has been fixed in the first meeting dated 10.08.2023 of the arbitration proceedings and now claims is filed by the claimants, then the same would have to be responded by the concerned necessary parties for which IPGCL would be providing the every required infrastructure and logical or legal support whatsoever would be required to respond to statements of claim received but since having received no response therefore this 2nd reminder letter making urgent requests is being sent."

11. This was followed by a reminder by the appellant to the MNRE on 6 October 2023 in which the MNRE was once again requested to join the arbitral proceedings, failing which the appellant would be compelled to take legal steps to implead the MNRE as a necessary party.

12. Mr. Chandra Prakash submits that, therefore, the EE&REM and

in turn, the appellant were merely executing agencies, executing the project of the MNRE. They had no independent liability towards the respondent. The respondent, he submits, was well aware of this fact and had itself in fact written to the MNRE on 17 April 2020, seeking release of the pending CFA amount to the appellant, so that it could in turn release the amount to the respondent.

13. It was because the liability of the appellant to disburse 30% CFA to the respondent was dependent on the appellant receiving CFA from the MNRE that, submits Mr. Chandra Prakash, the appellant sought impleadment of the MNRE in the arbitration proceedings. He refers the Court to three orders passed by the learned Arbitral Tribunal consequent on the impleadment application having been filed by the appellant on 7 May 2024, 29 May 2024 and 2 July 2024. These orders read thus :

Order dated 7 May 2024

"Procedural Order No.9
Minutes of Arbitral Tribunal held on
May 7th 2024 via video-conference at 06:30 pm

> Although on the last date of hearing the proceedings were adjourned for May 16th 2024 at 6.45 PM, in the notice addressed to MNRE, inadvertently, May 7th 2024 was mentioned. After this was brought to the notice of the Presiding Arbitrator, with the consent of the Co-Arbitrators and learned counsel for the parties, it was decided to take up the proceedings today.
>
> That Mr.Divyanshu Jha, Deputy Secretary, MNRE has entered appearance and seeks three weeks' time to examine the matter and file the reply to the application filed by the respondent for adding MNRE as a party to the present proceedings.

The date of 16th May 2024 stands cancelled. The matter is next listed on 29th May 2024 at 6:45 PM."

Order dated 29 May 2024

"**Procedural Order No.10**
Minutes of Arbitral Tribunal held on
May 29th 2024 via video-conference at 06:45 pm

Mr. Divyanshu Jha, Deputy Secretary, MNRE who had appeared on the last date of hearing has not appeared today, neither was he responded to the phone calls made by the learned counsel for the Claimant and the Respondent. He has also not responded to the WhatsApp message sent to him during the hearing itself. To say the least, we express our displeasure in the manner MNRE has acted in these proceedings. Despite seeking time, reply has not been filed.

Left with no option, we adjourn the matter for 02.07.2024 at 06:45 pm through VC. A copy of this order will be sent by email to Mr. Divyanshu Jha. We make it clear that in case reply is not filed or MNRE is not represented, the application shall be heard in their absence."

Order dated 2 July 2024

"Procedural Order No.11
Minutes of Arbitral Tribunal held on
July 2nd 2024 via video-conference at 06:45 pm

"None was present on the last date of hearing on behalf of the MNRE and none is present even today. The Learned Counsel for the applicant submits that the last order passed by this Arbitral Tribunal was sent to MNRE through email. The application is adjourned for 15.07.2024 at 06:30 pm at I-21 Jangpura Extension, New Delhi – 110014. In case MNRE does not appear or is not duly represented, the application will be decided in their absence. Copy of this order will be mailed to MNRE."

14. Despite the MNRE having failed to respond to the notices issued to the learned Arbitral Tribunal, he submits that the Arbitral Tribunal, instead of directing impleadment of the MNRE, rejected the

appellant's application.

15. The grounds on which the impugned order has been passed by the Arbitral Tribunal, according to Mr. Chandra Prakash are completely unsustainable. He reiterates that the EE&REM, or the appellant, in turn, were merely nodal agencies implementing the solar power project of the MNRE. He places reliance on paras 21, 25 and 26 of the judgment of this Bench in ***RBCL Piletech Infra v Bholasingh Jaiprakash Construction Ltd***[10] and para 17 of the judgment of a Coordinate Bench in ***HLS Asia Ltd v Geopetrol International Inc***[11], which read thus:

> ***RBCL Piletech Infra***
>
> 21. Equally, one of the circumstances which would justify the inclusion of a non-signatory to an arbitration agreement in arbitral proceedings is a contractual relationship which makes a non-signatory also responsible to one extent or the other to the obligations towards the claimants. In ***O.N.G.C. v Discovery Enterprises Pvt Ltd***[12], the Supreme Court held that "a non-signatory may be bound by the operation of the group of companies doctrine as well as by the operation of the principles of assignment, agency and succession." The extent to which the clause, on which Ms. Karnwal places reliance, justifies inclusion of BHEL as a party to the arbitration, has to be assessed on the basis of the above legal position.
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> *****
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> 25. These two clauses, seen in conjunction, leave no manner of doubt that, sans the approval by BHEL and release of payment by BHEL to BJCL, BJCL would not release the payments to the petitioner.

[10] **2024 SCC OnLine Del 4913**
[11] **(2013) 196 DLT 52**
[12] **(2022) 8 SCC 42**

26. I hasten to observe, at this juncture, that these observations are not being made by me as reflective of the right of the petitioner to any payment which it claims from BJCL or the right of BHEL to withhold any such payment. They are only intended to indicate the extent to which BHEL also has a role to play in the petitioner being paid by BJCL for the work undertaken by it.

HLS Asia Ltd

17. In a recent decision in ***Chloro Controls (I) P Ltd v Severn Trent Water Purification Inc***[13], the Supreme Court has, in the context of Section 45 of the Act, explained the relevant provisions of the New York Convention and observed that "reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be refereed to arbitration." It has been further explained in the same judgment as under:

> "The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main party to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful, by execution of various agreements, like in the present case." "

16. He also cites para 132 of the judgment of the Constitution

[13] **(2013) 1 SCC 641**

Bench of the Supreme Court in ***Cox and Kings***:

> "132. We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if the factors laid down under ***Discovery Enterprises*** are applied holistically. For instance, the involvement of the non-signatory in the performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is an important aspect. Other factors such as the composite nature of transaction and commonality of subject matter would suggest that the claims against the non-signatory were strongly interlinked with the subject matter of the tribunal's jurisdiction. Looking at the factors holistically, it could be inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial obligations which are intricately linked to the subject matter, are not actually strangers to the dispute between the signatory parties."

Submissions of Mr. Sanjoy Ghose for the respondent

17. Responding to the submission of Mr. Chandra Prakash, Mr. Ghose submits that there is no error in the decision of the learned Arbitral Tribunal not to allow impleadment of the MNRE as an additional party in the arbitration. He submits that the liability of the appellant to pay subsidy to the respondent, equivalent to 30% of the project cost, was not dependent on receipt of the said amount from the MNRE. He also refutes Mr. Chandra Prakash's submission that the appellant was a mere agency of the MNRE. Clause 6.8 of the contract, he submits, does not in any manner indicate that, till the 30% subsidy amount was received by the EE&REM/appellant, it would not be paid to the respondent. Rather, he submits that the appellant has, from the beginning, been acting independently. He has drawn my

attention in this context to Clauses 3.14, 3.15, 3.15.1, 3.22, 3.22.1 and 3.22.3 of the contract in this regard:

"**3.14 BID BOND**

The Bidder shall furnish the Interest free Bid Bond @ Rs.30.00 Lakhs (Rupees Thirty Lakhs only) per MWp in the form of Bank Guarantee (BG) / Demand Draft drawn in favour of "Indraprastha Power Generation Company Limited", payable at New Delhi. The initial validity of Bid Bond shall be for a period of **12 months from the Bid Deadline.** The Bid Bond of unsuccessful bidders shall be returned within 30 days from the date of issue of Letter of Allocation(s). The bid bond of successful bidder shall be returned to them on submission of PBG.

The formula applicable to calculate the Bid Bond amount will be:

Bid Bond amount = (Rs. 30.00 Lakh) X 1 MW ie Rs30.00 lakhs

3.15 PERFORMANCE SECURITY/PERFORMANCE BANK GUARANTEE (PBG)

3.15.1 Within 30 days from the date of issue of Allocation letter, Successful Bidder shall furnish the Performance Security in favour of IPGCL calculated in the same manner as Bid Bond amount for the allocated capacity only.

The formula applicable to calculate the PBG amount will be:
PBG amount for allocation= (Rs. 30.00 Lakh) X Allocated Capacity in MWp

Example: Allocating for 1000kWp in, the bidder has to submit PBG of Rs. 30.00 Lakh x 1000/1000 MWp = Rs. 30.00Lakh (Rupees Thirty Lakhs Only).

3.22 IPGCL SERVICE CHARGES

3.22.1 IPGCL is inviting this bid on behalf of roof top beneficiary. Therefore will be charging for its services The tariff based competitive bidding shall be invited for the levelized tariff of 25 years but service charges of IPGCL shall be @32.30 Lacs/MWp of the allocated capacity. The service charge is to be paid in form of DD/Pay order in favour of IPGCL payable at Delhi at the time of Acceptance of LOA by the successful bidders.

The IPGCL Bank details are as under.

The service tax no of IPGCL : - AABCI0243HST001
CST/TAN No.- DELI03600C
Account No.- 10021675045
MICR No.-110002103
IFSC Code-SBIN0004281
Name of Bank- SBI, Rajghat Power House Branch
PAN No. – AABCI0243H

3.22.3 IPGCL service are for site visits, inspection; liaison, monitoring etc. Taxes and duties shall be paid extra. **The IPGCL service charges are non-refundable**. Further, any delay beyond 15 days shall attract interest @ 1.25 % per month of the amount not paid, calculated on day to day basis till the full payment including interest is paid. IPGCL has the right to recover / adjust any unpaid IPGCL service charges including interest from the 1st instalment of subsidy due to the Successful Bidder. IPGCL at its sole discretion may cancel the Sanctioned capacity and forfeit 100% of Performance Security in case IPGCL service charges are not paid within 30 days of issue of LOA."

18. Mr. Ghose submits that schemes of the Central Government such as the present scheme of installing solar power systems on roof tops are always implemented through the concerned State Governments, who, in turn, either implement the projects themselves or through independent entities such as the appellant. In the present case, the decision to implement the scheme of the MNRE was taken by the Department of Power, GNCTD. The Department of Power decided to implement the scheme through the EE&REM which availed the services of the appellant. The appellant was therefore acting independently in the matter and there was no justification for seeking impleadment of the MNRE.

19. Mr. Ghose also places reliance, without prejudice, on the

judgment of a Coordinate Single Bench of this Court in ***Arupri Logistics Pvt Ltd v Vilas Gupta***[14] for the proposition that the Arbitral Tribunal cannot add parties. The judgments on which Mr. Chandra Prakash placed reliance, he submits, are decisions rendered at the stage of referring the disputes to arbitration by the High Court under Section 11(6). The entitlement to add non signatories as parties to the arbitration, he submits, vests only in the referral Court under Section 11(6). It is not open to the Arbitral Tribunal to add parties who have not been subjected to arbitration by the referral Court and who are not signatories to the arbitration agreement.

Analysis

I. The decision in ***Arupri Logistics***

20. In ***Arupri Logistics***, as Mr. Ghose correctly points out, a coordinate Bench of this Court has clearly held that an Arbitral Tribunal cannot join or delete parties, or proceed on principles akin to Order I Rule 10 of the Code of Civil Procedure 1908. The power to join or delete parties in a proceeding, it is held, vests only in Court. As such, it is only the Referral Court which, at the stage of referring the dispute to arbitration, can join non-signatories to the arbitral proceedings. The Arbitral Tribunal is bound to decide the issue *inter se* the parties who are before it and cannot carry out any addition or deletion thereto.

[14] **308 (2024) DLT 327**

II. ***Arupri Logistics*** *vis-à-vis* ***Discovery Enterprises***, ***Vidya Drolia v Durga Trading Corporation***[15] and ***Cox and Kings-II***

21. ***Arupri Logistics*** thus, holds that an Arbitral Tribunal cannot add parties to the proceedings before it, and that the jurisdiction to do so vests only in the referral Court.

22. After the decision was rendered by the Coordinate Bench in ***Arupri Logistics***, however, the Constitution Bench of the Supreme Court has rendered its decision in ***Cox and Kings-II*** on 6 December 2023, and the issue of whether an Arbitral Tribunal can join parties may once again be debatable after the said decision. In ***Cox and Kings-II***, the Supreme Court endorsed the following view expressed in para 239 of the report in ***Vidya Drolia***:

> "239. … Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good faith, etc. in a multi-party arbitration raises complicated factual questions, which are best left for the tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference."

23. The judgment further refers to the decision in ***Deutsche Post Bank Home Finance Ltd v Taduri Sridhar***[16] and observes as under:

> "170. In ***Deutsche Post Bank Home Finance Ltd v Taduri Sridhar***, a two-Judge Bench of this Court held that when a third party is impleaded in a petition under Section 11(6) of the Arbitration Act, the referral court should delete or exclude such third party from the array of parties before referring the matter to the tribunal. This observation was made prior to the decision of this

[15] **(2021) 2 SCC 1**
[16] **(2011) 11 SCC 375**

Court in ***Chloro Controls*** and is no longer relevant in light of the current position of law. Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement.

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*."

(Emphasis supplied)

24. These passages indicate that the Section 11 Court should leave, to the Arbitral Tribunal, the decision as to whether a non-signatory to the arbitration agreement should be bound by it. The corollary would obviously be that if the Arbitral Tribunal were to find that a non-signatory is bound by arbitration agreement, it would necessarily have to include such non-signatory in the arbitration proceedings. Following ***Cox and Kings-II***, therefore, it may be possible to argue that an Arbitral Tribunal does possess the jurisdiction to implead non-

signatories who may be bound by the outcome of the arbitral proceedings.

III. The test laid down in ***Cox and Kings-II*** regarding the impleadment of non-signatories and the reasoning of the learned Arbitral Tribunal

25. Paras 127 and 128 of the report in ***Cox and Kings-II,*** endorse the view of Surya Kant J in ***Cox and Kings-I***.

26. The impugned order of the Arbitral Tribunal has observed that, in the above passages from ***Cox and Kings-I*** as endorsed in ***Cox and Kings-II***, a non-signatory could be impleaded in arbitral proceedings only if there is some kind of connection or positive act by the conduct of the non-signatory subsequent to the execution of the contract, or participation by the non-signatory in the negotiation, performance or termination of the contract indicating a connection in the contractual duties of the parties. The Arbitral Tribunal finds that there was nothing to indicate that the MNRE had, before, during or after execution of the contract, any positive participation in its performance. In the absence of any such positive participation by the MNRE in the performance of the contract executed between the appellant and the respondent, the Arbitral Tribunal has found no justification to implead the MNRE in the proceedings before it.

27. To my mind, the reasoning of the Arbitral Tribunal is unexceptionable.

28. The only reason for impleading the MNRE as a party in the arbitral proceedings, as advanced by the appellant, is that the appellant was merely disbursing, on behalf of the EE&REM, the 30% subsidy paid by the MNRE. This submission is really tangential to the issue at hand, which is whether there was any justification for impleading the MNRE in the arbitral proceedings. Even if this submission were to be regarded as correct, and if it is the appellant's case that its liability to pay the 30% subsidy to the respondent arose only consequent on the appellant receiving subsidy from the MNRE, that line of defence would always be available to the appellant before the Arbitral Tribunal. If the Arbitral Tribunal were to agree with it, it would always be open to the Arbitral Tribunal to exonerate the appellant of any liability in the matter and reject the respondent's claim. Mr. Chandra Prakash, learned counsel for the appellant, repeatedly stressed on the appellant's plea that it had no independent liability towards the respondent, except to pass on, to the respondent, the 30% subsidy received from MNRE. Mr. Chandra Prakash's contention is that the respondent is, therefore, barking up the wrong tree. Instead of proceeding against the MNRE, the respondent, according to Mr. Chandra Prakash, is erroneously proceeding against the appellant. The appellant, according to him, is a mere agent of the MNRE. If the MNRE does not pay 30% subsidy to the appellant, the appellant cannot be made liable to forward the subsidy to the respondent. The subsidy, he says, is not to be paid out of the appellant's pocket.

29. The MNRE does not have be co-opted as a party before the Arbitral Tribunal in order to enable the appellant to establish this stand.

30. Mr. Sanjoy Ghose, learned Senior Counsel for the respondent does not concede to any of these contentions advanced by Mr. Chandra Prakash. It is not for me to pronounce on their correctness or otherwise. Suffice it to reiterate there is nothing inhibiting the appellant from raising these contentions in defence to the claim of the respondent and therefore seeking to be exonerated of any liability towards the respondent. Whether these contentions are acceptable or not, is for the Arbitral Tribunal to decide.

31. In any case, this being the main concern of the appellant, there is no error in the decision of the Arbitral Tribunal not to allow impleadment of the MNRE. A party cannot be impleaded merely to support the stand taken by the litigant before the Arbitral Tribunal. It is always open to a party before the Arbitral Tribunal to lead the evidence of a non-signatory, if it so desires to support its stand. The non-signatory does not have to be made a party in the arbitral proceedings merely for that purpose.

IV. <u>On the anvil of the principles applicable to Order I Rule 10 CPC</u>

32. Even if the matter were to be examined from the point of view of Order I Rule 10 CPC, no case for impleading the MNRE as a party

before the Arbitral Tribunal can be said to exist. In the oft-cited ***Kasturi v. Iyyamperumal***[17], the Supreme Court held that two tests had clearly emerged as determinative of the question of necessary parties to a litigation, which were, firstly, whether any relief was sought against such party and secondly, whether no effective decree could be passed in the absence of such party. Para 13 of ***Kasturi*** incapsulate the position thus :

> "13. From the aforesaid discussion, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person."

33. In ***Mumbai International Airport Pvt Ltd v Regency Convention Centre and Hotels (P) Ltd***[18], the Supreme Court held:

> "12. The said order is challenged in this appeal by special leave. The question for consideration is whether the appellant is a necessary or proper party to the suit for specific performance filed by the first respondent.
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> 14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to

[17] **(2005) 6 SCC 733**
[18] **(2010) 7 SCC 417**

enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

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24.4 If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bona fides, etc., the court will normally implead him, if he is found to be a proper party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and the court finds him to be a proper party, the court may direct his addition as a defendant; but if the court finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the court may direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms. For example, if D claiming to be a co-owner of a suit property, enters into an agreement for sale of his share in favour of P representing that he is the co-owner with half-share, and P files a suit for specific performance of the said agreement of sale in respect of the undivided half-share, the court may permit the other co-owner who contends that D has only one-fourth share, to be impleaded as an additional defendant as a proper party, and may examine the issue whether the plaintiff is entitled to specific performance of the agreement in respect of half a share or only one-fourth share; alternatively the court may refuse to implead the other co-owner and leave open the question in regard to the extent of share of the defendant vendor to be decided in an independent proceeding by

> the other co-owner, or the plaintiff; alternatively the court may implead him but subject to the term that the dispute, if any, between the impleaded co-owner and the original defendant in regard to the extent of the share will not be the subject-matter of the suit for specific performance, and that it will decide in the suit only the issues relating to specific performance, that is, whether the defendant executed the agreement/contract and whether such contract should be specifically enforced.
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> 25. In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party.
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> *****
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> 27. On a careful examination of the facts of this case, we find that the appellant is neither a necessary party nor a proper party. As noticed above, the appellant is neither a purchaser nor the lessee of the suit property and has no right, title or interest therein. The first respondent-plaintiff in the suit has not sought any relief against the appellant. The presence of the appellant is not necessary for passing an effective decree in the suit for specific performance. Nor is its presence necessary for complete and effective adjudication of the matters in issue in the suit for specific performance filed by the first respondent-plaintiff against AAI. A person who expects to get a lease from the defendant in a suit for specific performance in the event of the suit being dismissed, cannot be said to be a person having some semblance of title in the property in dispute."

34. The parties who desire to be impleaded in pending proceedings in a Court, or whose impleadment is sought, have either to be necessary or proper parties. In ***Globe Ground (India) Employees Union v. Lufthansa German Airlines***[19], the Supreme Court has set out the legal position thus :

[19] **(2019) 15 SCC 273**

> "10. Whenever, an application is filed in the adjudication proceedings, either before the Industrial Tribunal in a reference made under the Industrial Disputes Act, 1947 or any other legal proceedings, for impleadment of a party who is not a party to the proceedings, what is required to be considered is whether such party which is sought to be impleaded is either necessary or proper party to decide the lis. The expressions "necessary" or "proper" parties have been considered time and again and explained in several decisions. The two expressions have separate and different connotations. It is fairly well settled that necessary party, is one without whom no order can be made effectively. Similarly, a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings.
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> 14. There cannot be any second opinion on the ratio decided in the aforesaid cases relied on by the learned Senior Counsel for the appellant. But, whenever an application is filed for impleadment of a third party, who is not a party to the reference under the Industrial Disputes Act or any other proceedings pending before the Court, what is required to be considered is whether such party is either necessary or proper party to decide the lis. It all depends on the facts of each case; the allegations made and the nature of adjudication proceedings, etc. In this case it is to be noted that only the scope of reference is limited which is already discussed above. However, it is also clear from Section 10(4) of the Industrial Disputes Act, 1947 that whenever a reference is made, the Industrial Court shall confine its adjudication to the point of reference and matters incidental thereto only."

35. A direct interest in the subject matter of a pending litigation was also found to be necessary for a party to seek impleadment, in ***Ramesh Hirachand Kundanmal v Municipal Corporation of Greater Bombay***[20].

V. <u>The sequitur</u>

[20] **(1992) 2 SCC 524**

36. Even if one were to apply the above tests, postulated by the Supreme Court in the context of Order I Rule 10 CPC, the impugned decision of the Arbitral Tribunal is unexceptionable. The mere fact that 30% subsidy which were being paid by the appellant to the respondent was by way of implementation of the scheme of the MNRE encouraging use of Solar Power, or even the entitlement of the appellant if any, to be paid the 30% subsidy by the MNRE, cannot justify impleadment of the MNRE in the arbitration proceedings. No relief was sought by the respondent against the MNRE. The MNRE is not a party to the agreement between the appellant and the respondent. The MNRE has not, explicitly or by implication, agreed to remain bound by the outcome of the arbitral proceedings. There is no participation, by the MNRE, in the execution of the contract between the appellant and respondent. Indeed, there is nothing to even indicate that the MNRE was aware of the invitation of bids by the appellant, or the consequent execution of the contract between the appellant and the respondent.

37. The presence of the MNRE is not necessary for the Arbitral Tribunal to take a decision on the liability of the appellant towards the respondent, or whether the respondent is entitled to succeed in its claims against the appellant. To ventilate a stand that it has no liability towards the respondent unless it receives subsidy from the MNRE, it is not necessary for the appellant to implead the MNRE. The tests laid down by the Supreme Court in ***Cox and Kings-I and Cox and Kings-***

II with respect to the circumstances in which a non-signatory to an arbitration agreement can be impleaded in arbitral proceedings are not satisfied in the present case, nor are the classical tests which apply while considering a prayer for impleadment under Order I Rule 10 CPC, satisfied.

38. Mr. Ghose has also sought to submit that the appellant's stand that it is a mere agent of the MNRE is not correct. He has pointed out that the invitation for bids in this case was independently floated *by the appellant* and the MNRE played no part therein. Clause 3.14 of the contract required an interest free bid bond of ₹ 30 lakhs per MW to be provided in the form of a Bank Guarantee/demand draft drawn *in favour of the appellant*. The successful bidder was also required to furnish performance security within 30 days from the issuance of the allocation letter *in favour of the appellant*, calculated as per the calculation applicable to the bid bond. Clause 3.22.1 clearly stated that the bid was being invited *by the appellant* on behalf of the roof top beneficiary and that therefore the appellant was charging for the services provided by it. The tariff for the amount charged by the appellant was also fixed by it. The appellant also charged service charges, which were non-refundable. *Clause 3.22.3 further clothed the appellant with sole discretion to cancel the sanctioned capacity and forfeit the entire performance security in the event of non-payment of service charges to the appellant within 30 days of issuance of the LOA*. The contract was, therefore, clearly between the appellant and the respondent. It does not appear to have been drawn up at the

instance of the MNRE. It is a self-sustaining contract independent in its terms, and the rights and liabilities in the contract are exclusively between the appellant and the respondent. If the appellant has any right to recover, from the MNRE, any amount to which the Arbitral Tribunal may find the appellant liable towards the respondent, that is an independent right which the appellant would have to exercise against the MNRE. That cannot constitute a justification to include the MNRE in the proceedings pending before the Arbitral Tribunal.

Conclusion

39. For all the aforesaid reasons, I find no reason to interfere with the impugned decision. The appeal is accordingly dismissed *in limine*.

C.HARI SHANKAR, J

AUGUST 30, 2024/yg

Click here to check corrigendum, if any