IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	28.11.2022
Judgment pronounced on	20.01.2023

C O R A M :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Comm. Div.)No.163 of 2022

1. Mrs.VATSALA JAGANNATHAN
   Residing at:
   No.60, Balasundaram Road,
   Near RTO Office, Pappanaickenpalayam,
   Coimbatore-641 037.

2. K.JAGANNATHAN
   Residing at:
   No.60, Balasundaram Road,
   Near RTO Office, Pappanaickenpalayam,
   Coimbatore-641 037. ... Petitioners

vs.

1. M/s.TRISTAR ACCOMMODATIONS LIMITED,
   Represented by its Managing Director,
   Having office at:
   No.657, Tristar Towers,
   Avinashi Road,
   Coimbatore-641 037.

2. Mrs.PADMINI RAJAN,
   W/o.V.Rajan,
   No.184, Race Course,
   Coimbatore-641 018.

3. MRS.UMA RAJAN,
W/o.Late Naren Rajan,
D.No.657, Tristar Building,
Avinashi Road,
Coimbatore-641 037.

4. MRS. RASHMI RAJAN KAPOOR,
W/o.Gaurav Kapoor,
184, Race Course,
Coimbatore-641 018.

5. MRS.SESHU RAJAN,
W/o.Gregory Hammond
Old No.131,New No.184,
Race Course,
Coimbatore-641 018. ... Respondents

This Petition has been filed under Section 11(5) and 11(6) of the Arbitration and Conciliation Act 1996 to appoint an arbitrator to preside over the disputes between the parties herein and thus render justice and pass such or further orders that this Hon'ble Court deems fit in the interests of justice and equity.

For Petitioners : Mr.Anirudh Krishnan, assisted by
Mr.Subramanian Vaidyanathan

For Respondents : Mr.Sricharan Rangarajan for
M/s.S.V.Pravin Rathinam &
Vignesh Venkat

O R D E R

The petitioners seek the constitution of an arbitral tribunal to adjudicate the disputes between the petitioners, on the one hand, and the respondents, on the other. The petitioners state that they entered into a memorandum of agreement dated 12.11.2008 (the MoA) with the first respondent in relation to the development of land (the Land) owned by the first petitioner into a multi-storied residential or commercial building. For purposes of such development, it is stated that two general powers of attorney were executed by the first respondent on 12.11.2008 in favour of Mr.Naren Rajan, the then Managing Director of the first respondent. By relying on such powers of attorney, the Land was mortgaged in favour of the first respondent's lender, i.e. Indian Bank. The said lender/Indian Bank, in turn, assigned the debt to an asset reconstruction company, namely, Reliance Asset Reconstruction Company Limited (the ARC). The ARC initiated action to enforce the security interest. At that juncture, the petitioners redeemed the mortgage by paying a sum of Rs.9 crore in installments between December 2015 and April 2016.

2. The petitioners assert that the powers of attorney were executed for purposes of developing the Land. By playing fraud on the petitioners, the

Managing Director of the first respondent, who was an "alter ego" of the first respondent, mortgaged the Land in favour of the Indian Bank and received a loan from the lender. Contrary to and in disregard of the terms of the MoA, the first respondent did not put up construction. The said agent, Mr.Naren Rajan, died on 21.05.2015. Upon his death, respondents 2 to 5 stepped into his shoes as his legal heirs.

3. According to the petitioners, the Land was put in the possession of the first respondent and Mr.Naren Rajan for the purposes of development by constructing a multi-storied building thereon. Instead of acting in accordance with the MoA, in breach of trust, the first respondent and Mr.Naren Rajan dealt with the Land for their personal enrichment. The dispute raised by the petitioners for adjudication by an arbitral tribunal is a claim for restitution of the unlawful proceeds arising out of breach of trust committed in relation to the Land.

4. Oral arguments on behalf of the petitioners were advanced by Mr.Anirudh Krishnan, learned counsel, and on behalf of the respondents by Mr.Sricharan Rangarajan, learned counsel.

5. The first contention of learned counsel for the petitioners was that the dispute is not barred by limitation and that the petitioners are entitled to the benefit of Section 10 of the Limitation Act, 1963 (the Limitation Act). According to learned counsel, Section 10 applies both to express and implied trusts and the latter falls into two categories, namely, constructive trusts and resulting trusts. The MoA between the petitioners and the first respondent read with the general powers of attorney executed by the first petitioner in favour of Mr.Naren Rajan resulted in the creation of a resulting trust. By contending that the characteristic feature of a resulting trust is the intention of parties to vest the property in the trustee for a specific purpose, it was submitted that the Land was vested in the first respondent and its Managing Director with the intention that the same would be used exclusively for purposes of developing a multi-storied building in accordance with the MoA. In support of the contention that Section 10 applies both to express and resulting trusts, such as the trust created in this case, learned counsel referred to and relied upon the following precedents:

(i) *Barclays Bank Ltd. v. Quistclose Investments Ltd (1970) A.C.567: (1968) 3 W.L.R.1097*

(ii)G.V.Films v. Gayathri Holdings & another (2009) 4 L.W.891: (2009) 8 Mad LJ 838.

(iii) K.P.Subramanian & 9 Others v. Elumalai Gramani & 3 Others (1986) 1 MLJ 26.

(iv) United India General Finance P. Ltd. (In Liquidation), In Re Official Liquidator, United India General Finance P. Ltd. v. H.K.Dass Sharma & another 1978 SCC Online Del 88, particularly paragraphs 9 and 10 thereof.

(v) Far Pavilions Tours & Travels Private Limited v. Manish Pratik, 2014 SCC Online Bom 1843, particularly paragraphs 19 to 25 thereof.

(vi) Narendra Prasad and Others v. Ramnath Goenka and Others, Manu/TN/2231/2018, particularly paragraphs 46.2 and 46.3 thereof.

(vii)Thiruvathamcore Devaswom Board v. S.Prathapachandran 2022 SCC Online Ker 1707.

6. Learned counsel next contended that the scope of review under Section 11 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) is *prima facie* and not in-depth. In the context of a plea of limitation, he contended that the Court is required to examine whether the dispute is *ex facie* barred by limitation. In support of this proposition, the following judgments were referred to and relied upon:

*(i) Vidya Drolia v. Durga Trading Corporation (**Vidya Drolia),** 2021 2 SCC 1*

(ii)Secunderabad Cantonment Board v. M/s. B. Ramachandraiah & Sons, (2021) 5 SCC 705.

*(iii) BSNL & Ors. v. Nortel Networks India Private Limited (**BSNL),** (2021) 5 SCC 738.*

(iv) Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited, AIR 2020 SC 979.

7. Learned counsel submitted that the petitioners have a reasonable and arguable case to contend that they are entitled to the benefit of Section 10 of the Limitation Act. Therefore, if the ***Vidya Drolia*** "cutting the deadwood" test is applied, the dispute should be referred to arbitration by leaving it open to the respondents to raise the plea of limitation before the arbitral tribunal.

8. Although respondents 2 to 5 are not parties to the MoA, learned counsel submitted that powers of attorney were executed in favour of the then Managing Director of the first respondent, Mr.Naren Rajan. Mr.Naren Rajan was the controlling shareholder of the first respondent. The second respondent is his mother. Between Mr.Naren Rajan and his mother, at the

time of his death, they owned 99% of the paid-up share capital of the first respondent. Upon the death of Mr.Naren Rajan, his shares were transmitted in favour of his class I legal heirs. The said class I legal heirs are the second, third and fourth respondents herein. The fifth respondent is Mr.Naren Rajan's sister and she also holds shares in the first respondent. Consequently, respondents 2 to 5 are in complete control of the first respondent. By referring to the annual report of the first respondent for the financial year ended on 31.03.2016, learned counsel pointed out that amounts due and payable by the first respondent to its lenders were paid by the legal heirs of the late Shri Naren Rajan. Indeed, he pointed out that the fifth respondent contributed towards the settlement of the loan availed of from the Indian Bank.

9. Learned counsel also submitted that the powers of attorney were executed in favour of Mr.Naren Rajan for purposes of fulfilling the objects and purposes of the MoA. The said powers of attorney were misused by creating the mortgage in favour of the Indian Bank and availing of a loan. The said loan represents the proceeds from the first petitioner's Land. The proceeds were misappropriated by Mr.Naren Rajan and his legal heirs and

not used in accordance with the MoA. The said legal heirs qualify as 'alter egos' of the first respondent. Learned counsel contended that non-signatories to an arbitration agreement may be joined as parties to arbitral proceedings either by resorting to the group of companies or the alter ego doctrines.

10. In support of these contentions, learned counsel relied on the following authorities:

*(i) Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc.**(Chloro Controls)**, (2013) 1 SCC 641.*

*(ii) Purple Medical Solutions Pvt. Ltd. v. Miv Therapeutics Inc. and Others **(Purple Medical Solutions)**, Manu/SC/0139/2015*

(iii) *Andal Dorairaj v. Hanudev Infopark (**Andal Dorairaj)**, 2016-2-L.W.9.*

*(iv) Cheran Properties Limited v. Kasturi And Sons Limited**(Cheran Properties)**, (2018) 16 SCC 413.*

*(v) Dr.Papiya Mukherjee v. Aruna Banerjea & another **(Papiya Mukherjee)**, 2022 SCC Online Cal 595.*

(vi) International Commercial Arbitration by Gary B. Born, 2nd Edition, 2014

11. The last contention of learned counsel for the petitioners was that there was no waiver of the arbitration agreement on account of filing two previous suits. By drawing reference to the plaints of the said suits, it was asserted that the two suits deal with declarations of title to property and, therefore, could not have formed the subject of arbitral proceedings. Besides, it was contended that the suits are not in respect of restitution or breach of trust. In support of this contention, learned counsel relied on the judgment in *Indapur Dairy and Milk Products Limited v. Global Energy Private Limited, Manu/MH/2301/2019*, particularly paragraphs 17 and 18 thereof.

12. Learned counsel for the respondents made submissions to the contrary. His first contention was that Section 10 of the Limitation Act is not applicable because it applies only to express and not implied trusts. He also contended that both constructive and resulting trusts are treated similarly by referring to the statement of objects and reasons of the Indian Trusts Act 1882 (the Trusts Act). In support of this contention, learned counsel relied upon the following judgments:

(i) Brahmayya & Co. v. V.S.Ramaswami Aiyar, 1964 SCC OnLine Mad 280.

(ii) Krishna Gopal Kakani v. Bank of Baroda (2008) 13 SCC 485.

(iii) Bank of Baroda, Indore v. Krishna Gopal Kakani 2001 SCC OnLine MP 116

(iv)E.D.Sassoon& Co. Ltd. v. K.A.Patch, MANU/MH/0220/1922.

13. Since Section 10 is inapplicable, learned counsel contended that the dispute raised by the petitioners is *ex facie* barred by limitation and that rejection of the Section 11 petition is warranted as per the law laid down by the Hon'ble Supreme Court in ***Vidya Drolia*** and ***BSNL.***

14. The next contention of learned counsel was that respondents 2 to 5 are non-signatories to the arbitration agreement. According to learned counsel, the threshold for referring disputes involving non-signatories for arbitration is high. By turning to the judgment in ***Andal Dorairaj*****,** learned counsel submitted that the dispute was referred for arbitration in the factual context of both agreements containing arbitration clauses. Similarly, in ***Purple Medical Solutions*****,** learned counsel pointed out that the second respondent was the Chairman of the first respondent and had executed several corporate documents on behalf of the first respondent. By contrast,

he submitted that the fifth respondent holds only 100 shares in the first respondent company and the third and fourth respondents were not involved in the first respondent company and became shareholders after the death of Mr.Naren Rajan. In this factual context, he contended that the dispute should not be referred for arbitration.

15. The third objection of learned counsel for the respondents was on the basis of waiver. By referring to the plaints in the two suits filed by the first petitioner herein, he pointed out that the suits were filed only by the first petitioner because the Land was owned by the first petitioner. By drawing reference to paragraph XIV of the plaint in O.S.No.487 of 2013, he pointed out that the plaintiff therein had reserved her right to file a separate suit for declaration and damages at the appropriate time. Likewise, by drawing reference to paragraph XIV of the plaint in O.S.No.695 of 2016, he pointed out that the plaintiff had referred to the payment of the entire OTS amount of Rs.9 crore to the ARC. After referring to such OTS, he pointed out that the plaintiff reserved her right to file a separate suit for recovery of the amount and that an application under Order II Rule 2 of the Code of Civil Procedure, 1908 (the CPC) was filed for such purpose. By filing two suits

and reserving the right to file separate suits, including in relation to the loss of Rs.9 crore, learned counsel submitted that the petitioners had waived their right to refer the present dispute for arbitration.

16. In support of these contentions, learned counsel for the respondents also relied on the following authorities:

(i) Extracts from Limitation Act (IX of 1908) by V.V.Chitale & K.N.Annarao, All India Reporter Nagpur, 1938 Edition.

(ii) Venkamamidi Balakrishnamurthi v. Gogineni Sambayya and others, AIR 1959 AP 186.

(iii) Sangramsinh P.Gaekwad & Ors v. Shantadevi P Gaekwad & others, (2005) 11 SCC 314.

(iv) Extracts from Lewin on Trusts, Sweet & Maxwell 19th Edition, 2017.

(v) Rewa Infrastructure Private Ltd. v. Samir Narain Bhojwani and another 2020 SCC OnLine Bom 5574.

Discussion, analysis and conclusions

17. From the contentions of the petitioners and respondents, it appears that the petition is opposed on three grounds. The said grounds are limitation, the presence of non-signatories to the arbitration agreement, and

waiver. I intend to deal with the presence of non-signatories and waiver before turning to the ground of limitation.

18. The admitted position is that respondents 2 to 5 are not parties to either the MoA or the powers of attorney. The MoA was executed by and between the first and second petitioner, on the one hand, and the first respondent, on the other. Clause 10 thereof, which deals with dispute resolution, is set out below:

> *"10. In case of any disputes inter se the same can be referred to a common arbitrator Mr.V.Gopalakrishnan son of R.Venkatesalu, residing at No.5, Ramakrishna nilayam, Netaji Road, P.N.Palayam, Coimbatore-37 who shall decide the case as per the Arbitration and Conciliation Act, 1996 which shall be binding on both the parties. The Arbitration shall be conducted only within COIMBATORE CITY JURISDICTION."*

The text of the arbitration clause indicates that the scope of arbitration would be confined to disputes *inter se*. The expression '*inter se*' means between the parties. The arbitration clause provides for a named arbitrator. The petitioners have placed on record a communication dated 21.02.2022

from the named arbitrator stating that he is not willing to act as arbitrator due to personal commitments/inconvenience.

19. The general powers of attorney dated 12.11.2008 are on record. These documents were executed by the first petitioner, as principal, to and in favour of Mr.Naren Rajan. The recitals of the powers of attorney refer to an agreement between the petitioners and the first respondent in relation to the construction of a building on the property described in the schedule to the respective power of attorney. From these recitals, it is evident that the powers of attorney were executed in relation to the MoA. Clause 19 and 18 of the powers of attorney expressly empower the agent to deposit the title deeds of the properties described in the schedule to the power of attorney with banks or institutions or private parties for purposes of creating mortgages in relation to loans availed of by the first respondent herein. Once again, this clause underscores the link between the powers of attorney and the MoA.

20. It is an admitted fact that the agent under the powers of attorney, Mr.Naren Rajan, passed away on 21.05.2015. It is also admitted

that the second respondent is the mother of the late Naren Rajan, the third respondent is his widow, the fourth respondent is his daughter and the fifth respondent is his sister. The question that arises for consideration is whether respondents 2 to 5 are bound by the arbitration agreement in the MoA in spite of being non-signatories thereto.

21. In order to establish that respondents 2 to 5 are bound by the arbitration agreement between the petitioners and the first respondent, learned counsel for the petitioners invoked the doctrine of alter ego. For such purpose, the relevant extract from the book 'International Commercial Arbitration' by Gary B.Born was relied upon. At page 1432 of the book, it is stated as under:

> *"Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an "alter ego" of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from "the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a*

separate legal entity possessed of separate rights and liabilities."

The learned Author proceeded to further state as under:

".... In the context of arbitration agreements, demonstrating an "alter ego" relationship under most developed legal system requires convincing evidence that one entity dominated the day-to-day actions of another and/or that it exercised this power to work fraud or other injustice or inequity on a third party or to evade statutory or other legal obligations."

22. From the above extracts of the learned author's work, it is clear that the doctrine of alter ego is resorted to in exceptional cases to depart from the fundamental principle that only a signatory to an arbitration agreement is bound by it. It is further clear that it is a significant and exceptional departure which should not be resorted to unless there is convincing evidence that the non-signatory is the alter ego of the signatory. The doctrine of alter ego was also dealt with by the Supreme Court and this Court in decisions cited at the bar, and the same are dealt with next.

23. In ***Chloro Controls***, the Supreme Court dealt extensively with

and sanctioned the reference to arbitration of intertwined disputes arising out of composite agreements executed by and between the petitioners therein, on the one hand, and one or more members of a group of companies, on the other. Although not all members of the group of companies were parties to all the agreements, by taking note of the arbitration clauses in those agreements and drawing the inference that parties intended to resolve disputes by arbitration, the dispute was referred for arbitration. In course of the judgment, the Court also recognised other principles on which non-signatories could be treated as bound such as agent-principal relations, piercing the veil, succession and estoppel at paragraph 103.2 thereof. In ***Cheran Properties***, in an appeal arising out of rectification proceedings pursuant to an arbitral award, the Supreme Court held that, as per Section 35 of the Arbitration Act, the arbitral award was binding on a nominee (to whom shares were issued) of a party to arbitral proceedings. At paragraphs 27 and 28 thereof, reference was made to Garry B.Born's book "*International Commercial Arbitration"* and the "alter ego" doctrine was distinguished from the "group of companies" doctrine in the following words:

"While the alter ego principle is a rule of

law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question."

24. In ***Purple Medical Solutions***, the second respondent, who was a non-signatory to the arbitration agreement, was held to be bound by such agreement because he was the Chairman/President of the Board/CEO/CFO and Secretary of the first respondent therein. In that context, the corporate veil of the signatory was pierced by taking into account that all acts/deeds/transactions were performed by the non-signatory. In ***Andal Dorairaj,*** in the factual context of a joint development agreement between the petitioner and the first respondent and the execution of sale deeds by the petitioner in favour of the second to fourth respondents pursuant to such joint development agreement, this Court relied on ***Purple Medical Solutions*** and concluded that the expression "developer" included successors-in-interest, legal representatives, administrators and assignees and, therefore, the non-signatories were subject to the arbitration clause in the relevant

agreement. Lastly, in ***Papiya Mukherjee,*** the Calcutta High Court dealt with the question as to whether the legal heirs of a deceased partner may be arrayed as parties to arbitral proceedings as per Section 40 of the Arbitration Act and answered in the affirmative. By way of summation, it should be noted that the group of companies and not alter ego doctrine was the basis of the decision in ***Chloro Controls. Cheran Properties*** turned on the fact that the nominee of a party was claiming under/through such party and was, therefore, bound by the arbitral award. ***Andal Dorairaj*** also illustrates the applicability of the group of companies doctrine in the context of composite, intertwined agreements involving companies with common shareholders and directors and containing arbitration clauses. ***Papiya Mukherjee*** applied Section 40 of the Arbitration Act and thereby concluded that the non-signatory legal heirs were bound by the arbitration clause in the relevant partnership deed. Thus, albeit in the fact situation outlined at the beginning of this paragraph, the only case in which the corporate veil was pierced is ***Purple Medical Solutions.*** In light of these principles, whether this dispute may be referred to arbitration by invoking the "alter ego" or any other doctrine is addressed next.

25. In order to invoke and apply the doctrine of alter ego, the corporate veil of the first respondent should be pierced to see who lurked behind at the relevant point of time. At the outset, it should be noted that, on instructions, learned counsel for the petitioners submitted that the petitioners were willing to give up the fifth respondent as a party, but not respondents 2 to 4. Since company law is founded on the status of a company as a distinct juristic entity, the corporate veil is pierced in exceptional circumstances such as the use thereof to evade tax or commit fraud. Even proceeding on the assumption that the situation warrants the piercing of the veil, the next question would be on what date or dates should the veil should be pierced. For instance, should it be on the date when the MoA and powers of attorney were executed or on the date when the mortgage was created in favour of Indian Bank? Given the fact that the MoA and the powers of attorney were executed on 12.11.2008, a good place to begin would be to examine who were the shareholders and directors of the first respondent at that point of time. I start this scrutiny by looking at the position of the fifth respondent in relation to the first respondent in the financial year 2008-2009 when the above documents were executed. The fifth respondent is the sister of the late Naren Rajan. The annual return made up to 30.09.2009 is on record and

discloses the names of six shareholders, including the fifth respondent. The fifth respondent held 100 shares out of 90000 shares. Therefore, her share holding was insignificant. The annual return also discloses the names of three directors: Naren Rajan, Padmini Rajan and M. Ramakrishnan. On examining the annual reports and returns of the first respondent for the financial years 2008-2009 to 2020-2021, it is evident that the fifth respondent was not a director of the first respondent in any of the above mentioned financial years and her shareholding remained at 100 shares.

26. As regards the second respondent, she was one of the first directors of the company as per the Articles of Association when the first respondent was incorporated on 11.07.1990. She was also one of the original subscribers with 100 shares at the outset. The annual reports disclose that she signed the financial statements at least from the financial year ended 31.03.2004. As per the Annexure to the Annual Return made up to 30.09.2004, she held 20,100 shares as on that date. The Annexure to the Annual Return made up to 30.09.2009 (the financial year when the relevant documents were executed) reflects the same shareholding. This constituted about 22.33% of the paid-up share capital of the company at that point of

time. The share holding of the late Naren Rajan was 69,300 shares as on 30.09.2009, which constituted about 77% of the paid-up share capital. This position continued through financial years 2003-2004 to 2016-2017. For the first time, after the death of Naren Rajan, albeit with some lag, some of his shares were transmitted to the second respondent and she became the owner of 43,200 shares in the first respondent company. The company master data as of November 2022 indicates that she continues as one of the directors. The third respondent, who is the widow of late Naren Rajan, was not a shareholder of the first respondent until the financial year 2016-2017. She became a shareholder of the company holding 23,100 shares after the death of Naren Rajan. In addition, upon the death of her husband, she was inducted as an additional director on 02.01.2017. The fourth respondent's association with the first respondent company began from 03.06.2015, when she was appointed as an additional director. The records indicate that she was not a shareholder of the company until the financial year ended 31.03.2017. In the financial year ended 31.03.2018, upon transmission of shares held by her late father, she became the owner of 23,597 shares. The annual report for the financial year 2016-2017 discloses that the fourth respondent became the managing director of the company and the second

respondent continued as a director.

27. Thus, the documents on record disclose that the second respondent was a director from the date of incorporation and held about 22.33% of the paid-up share capital of the first respondent even prior to the death of Naren Rajan. She continued as a director after his death and her shareholding increased from 22.33% to about 48%. Hence, she was a director of the company when the MoA was executed. She was also involved in the affairs of the company when the power of attorney was executed in favour of her son, Mr.Naren Rajan. Along with the late Naren Rajan, she also executed a guarantee on 01.06.2009 in relation to the borrowing by the first respondent from Indian Bank. In these circumstances, there is an arguable case to contend that the arbitration agreement in the MoA is binding on her. As regards the third and fourth respondents, neither of them were either shareholders or directors of the first respondent when the MoA or the power of attorney was executed or even when the mortgage was created. As such, their involvement is subsequent to not only the execution of the MoA and power of attorney, but also subsequent to the creation of a mortgage by Mr.Naren Rajan in favour of the Indian Bank.

28. In an action for restitution based on alleged breach of trust, it could be argued with a fair measure of justification that the proceeds of such breach of trust may have flowed to all the respondents, especially respondents 2 to 4. Consequently, it may be contended that the said respondents are necessary parties to an action seeking restitution. Even if one were to proceed on the assumption that such contentions or assertions are correct, in order to decide if non-signatories to an arbitration agreement may be compelled to arbitrate, the follow-on question would be: who would have been behind the veil if it were pierced on the date or dates when the material events took place? For reasons set out above, undoubtedly, the third and fourth respondents would not have been found lurking behind the veil. As regards the fifth respondent, even today, she is a minority shareholder holding only 100 shares in the first respondent company.

29. Instead of applying the alter ego doctrine, invoking Section 40 of the Arbitration Act would also not advance the cause of the petitioners because the second to fifth respondents are not the successors of the first respondent. In the context of a limited company, a resulting company under

a scheme of arrangement would qualify as a successor-in-interest but not the second to fifth respondents. Obviously, the situation would have been different if the MoA had been executed by the late Naren Rajan as an individual because the second to fourth respondents would then have qualified as his legal heirs and, therefore, successors-in-interest. The execution of the powers of attorney in favour of the late Naren Rajan is also of no consequence because the powers of attorney and the MoA constitute composite documents and cannot be looked at in isolation.

30. Arbitral proceedings enable the resolution of disputes by a private consensual forum which derives authority from the contract between parties as opposed to the public court system, which traces authority to the Constitution of India and/or statute. Given the fountainhead of authority, such proceedings should, as a rule, be only between parties to the arbitration agreement and any deviation therefrom should necessarily be the exception. As discussed earlier, the exception on the ground of "alter ego" should be resorted to with considerable circumspection. For reasons discussed above, the petitioner has failed to establish that respondents 3 to 5 qualify as "alter egos" of the first respondent or as successors-in-interest. As a corollary, the

petitioners are not entitled to join respondents 3 to 5 as parties to arbitral proceedings.

31. The next objection that I intend to deal with is on the ground of waiver. The respondents pointed out that two suits were filed previously by the first petitioner. The first suit, O.S.No.487 of 2013, is for a declaration that sale deed dated 23.07.2009 (document No.2330 of 2009) was executed by forgery and for purposes of defrauding the plaintiff; on that basis, consequential injunctive relief was prayed for. The said suit was instituted against the first respondent herein, the late Mr.Naren Rajan and the Sub-Registrar, Peelamedu SRO. The plaint schedule property matches Item I of the property under the MoA. In paragraph XIV of the plaint, the first petitioner herein stated as under:

> *"XIV. The plaintiff submits that she learnt that the defendants 1 and 2 have with intention to defeat the right of the plaintiff and complicate the situation have creating all sorts of problems in respect of the other properties belonged to her referred in the Memorandum of Understanding dated 12.11.2008 and the said acts are all null and void and not binding either on the plaintiff or over the properties*

belonged to the plaintiff. The plaintiff submits that she has been taking steps to apply for the copies of the alleged Mortgage loan availed of by the 1st defendant and the alleged mortgage created by the 2nd defendant in favour of the M/s. Indian Bank, Chinniampalayam Branch, Coimbatore and yet to receive the same. Hence, the plaintiff reserves her right to file separate suit for declaration and damages at the appropriate time when it becomes necessary in the circumstances of the case."

32. The second suit, O.S.No.695 of 2016, was also filed by the first petitioner herein. This suit is directed against respondents 2 to 4 herein, M/s.Govel Trust, represented by its Trustee, G.Srinivasan, and the Sub-Registrar, Gandhipuram SRO. The principal relief prayed for in this suit is for a declaration that the sale deed dated 16.03.2016 (Doc.No.2570 of 2016) allegedly executed by defendants 1 to 4 therein in favour of the 5th defendant was executed to defraud the plaintiff. Injunctive relief was also prayed for in relation thereto. In paragraph XIV of the plaint, in that suit, the plaintiff stated as under:

"XIV. The plaintiff submits that she learnt that the defendants 1 to 5 have with intention to

defeat the right of the plaintiff and complicate the situation have creating all sorts of problems in respect of the suit properties. The plaintiff submits that she has paid the entire OTS amount of Rs.9 crores to the Reliance Asset Reconstruction Company Limited, Mumbai and yet to record the same before the Debt Recovery Tribunal, Coimbatore. The plaintiff being the alleged guarantor for the loan obtained by said Naren Rajan, and now she only has paid the amount in order to safeguard her property to the bank and hence she is entitled to recover the entire amount paid by her to the bank in the said account from the said Naren Rajan and as such at present the defendants 1 to 3 have stepped into the shoes of Naren Rajan. Therefore, the plaintiff is very much entitled to recover the same from the defendants 1 to 3 and she reserves her right to file a separate suit for efficacious remedy for recovery of the amount, after getting the appropriate order from the Debts Recovery Tribunal, Coimbatore. The plaintiff has filed a separate application under Order 2 Rule 2 of CPC to grant leave to file a separate suit on same cause of action against the defendants."

33. From the above averments in paragraph XIV of the respective plaint, it appears that the first petitioner herein was fully aware of the creation of the mortgage by the late Naren Rajan in favour of Indian Bank. The first petitioner was also aware of the assignment of the loan to the ARC. The redemption of the mortgage is expressly referred to in the plaint in O.S.No.695 of 2016. In an action for alleged breach of trust, the bundle of facts constituting the cause of action would be the execution of the MoA and general powers of attorney on 12.11.2008, the execution of the mortgage deed pursuant thereto and the loss caused to the petitioner as a result thereof. The first petitioner reserved her right to file a suit in respect of this cause of action. In these proceedings, it was contended on behalf of the petitioners that the first petitioner reserved her right to file a suit to recover damages for losses caused by the actions of the first respondent, late Naren Rajan and his legal heirs, whereas, the constitution of the arbitral tribunal is being requested for in relation to a claim for restitution and not a claim for damages. This contention is tenuous because both the relief of damages and restitution flow from the same cause of action.

34. If the plea of waiver were to be examined in isolation, in a petition under Section 11, given the limited *prima facie* review, the question of waiver could have been relegated to the arbitral tribunal to decide. However, this objection cannot be looked at in isolation but should be viewed cumulatively against the backdrop of several non-signatories being made parties to this petition. If so viewed, the petitioners are not entitled to resolve this dispute through arbitral proceedings.

35. Extensive arguments (supported by precedents) were placed before me with regard to the applicability of Section 10 of the Limitation Act. While learned counsel for the petitioners contended that Section 10 applies to a resulting trust, learned counsel for the respondents contended that Section 10 is limited to express trusts. In view of the conclusion in the preceding paragraphs that the petition fails on the ground of the presence of non-signatories coupled with waiver, I do not intend to enter any findings on limitation. If findings are entered in this proceeding on limitation, it would prejudice the parties if the plea of limitation were to be raised in an appropriate civil proceeding. Consequently, no opinion is expressed on the plea of limitation.

36. For reasons set out above, Arb.O.P.(Com. Div.)No.163 of 2022 is dismissed without any order as to costs. It is clarified that it is open to the petitioners to institute appropriate civil proceedings. If such civil proceedings are instituted, the receiving court may consider and decide all objections raised in such civil proceedings uninfluenced by the observations made herein.

20.01.2023

Speaking Order

Index : Yes
Intermet : Yes

kal/rrg

SENTHILKUMAR RAMAMOORTHY J.,

kal/r

rg

Pre-deliver order in

Arb.O.P.(Comm. Div)No.163 of 2022

20.01.2023