

Dispute Resolution Hotline

May 24, 2018

SUPREME COURT MAKES EXECUTION OF ARBITRAL AWARDS EASY AND EXPEDIENT

- Parties can directly approach the appropriate forum vested with power to execute particular remedies granted in an arbitral award; the enforcement of an award can be initiated anywhere in the country where the decree can be executed and there is no requirement of obtaining a transfer of the decree from the Court which would have jurisdiction over the arbitral proceedings;
- An arbitral award is binding on the persons who claim under the party at the enforcement stage, even if they are non-signatories to the arbitration agreement.

INTRODUCTION

In *Cheran Properties Limited v. Kasturi and Sons Limited*¹, the Supreme Court interpreted provisions regarding execution of awards under the Arbitration and Conciliation Act, 1996 (“**A&C Act**”) vis-a-vis the power of fora other than civil courts to execute particular remedies under arbitral awards. The Supreme Court has confirmed that an arbitral award for transmission of shares can be executed before the NCLT rather than the civil court by seeking rectification of register of members of a company to effectuate the transmission. The Supreme Court has further clarified that an arbitral award can be enforced against a party who was not originally a signatory to the arbitration in certain situations but constituted a person/entity claiming through or under a party, for the purpose of execution of a decree.

FACTS

An agreement was entered on July 19, 2004 between Sporting Pastime India Limited (“**SPIL**”), Kasturi Sons and Limited (“**KSL**”), KC Palanisamy (“**KCP**”) and Hindcorp Resorts Private Limited (“**Hindcorp**”). Under the agreement, SPIL was to allot 240 lakh equity shares to KSL against the book debts due by it to KSL. KSL offered to sell 243 lakh equity shares to KCP. KCP agreed to take over the business, shares and liabilities of SPIL as per the Shareholders Agreement (“**SHA**”).

Clause 14 of the SHA provided:

“KSL hereby recognizes the right of KCP and/or his nominees to sell or transfer their holding in SPIL to any other person of their choice, provided the proposed transferees accept the terms and conditions mentioned in this agreement for the management of SPIL and related financial aspects covered by this agreement”.

The SHA also contained a provision for dispute resolution by arbitration.

On 17 August 2004, a letter was sent from KCP, acting as the authorized signatory of Cheran Properties Limited (“**Cheran**”), to KSL stating as under (“**Letter**”):

“Re: SHARE PURCHASE AGREEMENT DT. 19. 7. 04

In pursuance of the above Agreement, you have agreed to sell and our Group Companies, by themselves and/or by their nominees have agreed to purchase shares in Sporting Pastime India Limited of a face value of Rs. 2,430 lakhs, for a sum of Rs. 243.00 lakhs.

Accordingly, we send herewith seven Share Transfer Deeds duly executed by us and we request you to execute the same and lodge them with Sporting Pastime India Limited together with relevant Share Certificates for registering the transfers in the following names... [including Cheran Properties Limited]”.

KCP failed to comply with its obligations under the Agreement. KSL and Hindcorp initiated arbitration proceedings against KCP and SPIL. On December 19, 2009, the arbitral tribunal made its award directing KCP and SPIL to return the share certificates of SPIL to KSL and Hindcorp. Contemporaneously, KSL was directed to pay an amount of INR 3,58,11,000 together with interest at 12% p.a. on a sum of INR 2,55,00,000.

KCP challenged this award under Section 34 of the A&C Act. The challenge was dismissed by the High Court of Madras and subsequently by the Supreme Court. The award attained finality.

Since the award attained finality, KSL initiated proceedings against Cheran (on the basis that Cheran is a nominee of KCP) to execute the award which directed transmission of shares. KSL approached the NCLT to seek rectification of the register of SPIL under Section 111 of the Companies Act, 1956 to effectuate the transmission of shares. The NCLT held that that Cheran is a nominee of KCP and holds shares on its behalf. As such, NCLT had jurisdiction to

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entertain the proceedings against Cheran for rectification of the register in order to effectuate the transmission of shares from Cheran to KSL. This position was upheld by the NCLAT and the Madras High Court on appeal. The present decision of the Supreme Court was rendered in an appeal filed by Cheran (“Appellant” / “Cheran”) against the decision of the High Court of Madras.

ISSUES BEFORE THE SUPREME COURT

1. Whether an arbitral award is binding on a third party (*i.e.* Cheran) who is not a signatory to the arbitration agreement?
2. Whether an arbitral award relating to transmission of shares can be enforced by the NCLT through the remedy of rectification of register of members under Section 111 of the Companies Act, 1956?

CONTENTION OF THE PARTIES

Appellant's Contentions

- The appellant, Cheran, contended that it is not a signatory to the SHA, and hence, not a party to the arbitration agreement under the SHA. Therefore, an arbitral award issued under the terms of the SHA did not bind it.
- An arbitral award must be enforced as a decree of a civil court and therefore, it could not have been enforced by pursuing proceedings before the NCLT.

Respondent's Contentions

- The SHA clearly provides that the nominees of KCP would have to accept the terms and conditions to the SHA. As such, the SHA and the arbitration agreement were binding on Cheran.
- It was necessary to approach the NCLT as it is the only forum to effectuate matters relating to the transfer of shares.

JUDGMENT

An Arbitral Award is Binding on the Persons Claiming Under It

The Supreme Court explained that Section 35 of the A&C Act² states that an arbitral award is “*binding on the parties and persons claiming under them*”. The expression “persons claiming under them” is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. This expression was held to widen the net to include those who claim under the award, irrespective of whether such person was a party to the arbitration agreement or the arbitral proceedings. Hence, the pertinent question remained as to when can a party, a non-signatory to an arbitration agreement, be considered to claim under a party.

The Court placed heavy reliance on the case of *Chloro Controls*³ to expound on the principles and categories of relationships which would qualify a non-signatory to be a person claiming under a party. The first category involved relationships entailing third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. The legal basis to connect these relationships is implied consent and good faith. The second category involves agent and principal, apparent authority, piercing of veil, joint venture relations, succession and estoppel; the legal basis being force of the applicable law. The third category involves group of companies. The legal basis to connect an arbitration agreement entered by a company within a group of companies with its non-signatory affiliates is mutual intention *i.e.* if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

Relying on these principles, the Supreme Court conducted a scrutiny of the facts to determine whether Cheran would qualify as a party under KCP, so as to bind Cheran with the SHA entered into between KCP and KSL.

The Court considered that the parent agreement *i.e.* the SHA dated July 19, 2004 envisaged the allotment of equity shares of KSL to KCP with the intent that KCP would take over the business, assets and liabilities of SPIL. While KCP was entitled to transfer his shareholding, this was expressly subject to the condition of the acceptance by the transferee of the terms and conditions of the agreement. As such, Cheran being KCP's transferee had accepted the terms of the SHA. Further, KCP's letter dated 17 August 2004 to KSL contained a specific reference to the SHA. It was in pursuance of that agreement that KCP indicated, as authorized signatory of the appellant, that his group of companies had agreed to purchase the shares in SPIL. Quoting its holding in *Chloro Controls*, the Supreme Court held that the facts in this case display a mutual intention of the parties to be bound by the arbitral award.

NCLT can effectuate transmission of shares

The Court dealt with the issue of execution of an arbitral award through the NCLT. The arbitral award envisaged that KSL was entitled to the return of documents of title and the certificates pertaining to the shares of SPIL, contemporaneously with the payment or tendering of a sum of INR 3.58 crores together with interest. Thus, KSL was entitled to the share certificates in terms of the arbitral award. That necessarily meant transfer of the share certificates.

The Court resorted to Section 35 of the A&C Act on finality of arbitral awards. It held that the central facet of Section 35 is that an arbitral award shall be final and binding on the parties and persons claiming under them. The mere fact that Cheran was not a party to the arbitral proceedings did not conclude the question as to whether the award can be enforced against it. Hence, the arbitral award could be executed against Cheran on the ground that it claimed under a party *i.e.* KCP.

The arbitral award has the character of a decree of a civil court under Section 36 and is capable of being enforced as if it were a decree. To effectuate the transfer of shares awarded in the arbitration proceedings, recourse to the remedy of the rectification of the register under Section 111 was appropriate and necessary. Thus, armed with that decree, KSL was entitled to seek rectification before the NCLT by invoking the provisions of Section 111 of the Companies Act, 1956.

Therefore, the remedy to approach the NCLT to effectuate the transfer of shares through rectification in register was held to be competent.

ANALYSIS

The judgment of the Supreme Court is exemplary of its approach to facilitate expedient execution of arbitral awards by identifying and tapping powers of competent fora, other than solely civil courts, to execute awarded remedies. In the instant case, the Court identified and recognized the power of NCLT to execute an award that directed transmission of shares. It is pertinent to note that this power would only be confined to specific instances under the Companies Act that make it quintessential to approach the NCLT for execution.

Through this judgment, the Court has ruled out a potential added layer of execution of arbitral award as a decree of the court *i.e.*, by way of first approaching the court that has jurisdiction over the arbitral proceedings, followed by the court within whose territory the assets are located or the appropriate remedy (as in the instance case) can be sought.

The Court has thus adopted a dynamic view by ruling that the NCLT can enforce arbitral awards, relating to transmission of shares. However, it remains to be seen as to how courts will address situations where an arbitral award grants remedies that can be executed by several different competent fora. Nevertheless, this is a welcome change, following another recent decision⁴ of the Supreme Court which affirmed that execution proceedings can be initiated anywhere in the country without having to obtain a transfer decree from the court which had jurisdiction over the arbitral proceedings. The enforcement-friendly approach of the Supreme Court will certainly increase the ease of execution of arbitral awards in India and foster an environment of speedy execution.

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You can direct your queries or comments to the authors

¹ *Cheran Properties Limited v. Kasturi and Sons Limited*, Civil Appeal Nos. 10025-10026 of 2017.

² Section 35. Finality of arbitral awards. — Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

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

⁴ *Sundaram Finance v. Abdul Samad*, (2018) SCALE 467.

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