

# Dispute Resolution Hotline

September 26, 2024

## BEYOND THE GROUP OF COMPANIES DOCTRINE: INCLUSION OF NON-SIGNATORIES IN ARBITRATION THROUGH INTERLINKED TRANSACTIONS

- A non-signatory can be arraigned into arbitration proceedings if it is a party to an inter-connected agreement which is executed to achieve a common commercial goal.
- If a non-signatory is part of a contractual relationship which makes it responsible towards the claimant in the arbitration proceedings, then such a non-signatory can be made part of the arbitration proceedings.
- Even if a non-signatory is arraigned into arbitration proceedings by a court appointing the arbitral tribunal, it will be open for the tribunal to independently consider such an issue.

### INTRODUCTION

In the recent case of *RBCL Piletech Infra v. Bholasingh Jaiprakash Construction Limited & Ors.* ("RBCL"), a Single Judge Bench of the Delhi High Court ("Court") held that the inclusion of a non-signatory in arbitration proceedings is not solely dependent on the non-signatory being part of the same group of companies as the signatory. The Court relied on the principle that a non-signatory can be referred to arbitration if there is a contractual relationship that imposes certain obligations upon the non-signatory towards the claimant in the arbitration proceedings.

### FACTUAL BACKGROUND

Bharat Heavy Electrical Ltd. ("BHEL") was awarded a project by National Thermal Power Corporation ("NTPC").<sup>1</sup> BHEL subcontracted part of the project to Bholasingh Jaiprakash Construction Ltd. ("BJCL"). Subsequently, BJCL further subcontracted a portion of the project to RBCL Piletech Infra ("RBCL") by way of a Work Order dated April 4, 2022 ("Work Order"). This Work Order was executed only between BJCL and RBCL. Neither BHEL or NTPC were parties to the Work Order.

RBCL claimed idling charges, damages and other costs from BJCL, BHEL and NTPC. However, the parties failed to resolve the disputes. Consequently, RBCL issued the notice of arbitration and commenced arbitration proceedings under the Work Order against BJCL, BHEL and NTPC.

The arbitration agreement in the Work Order provided for dispute resolution by a sole arbitrator. Upon failure to arrive at a consensus to appoint the sole arbitrator, RBCL filed an application before the Court to appoint an arbitrator. NTPC and BHEL opposed inclusion in the arbitral proceedings and contended that they have no privity of contract with RBCL as they were not parties to the Work Order which was a bilateral agreement solely between RBCL and BJCL.

### JUDGEMENT

The Court referred to the judgment of the Supreme Court in *Cox and Kings v. SAP India Pvt. Ltd.*,<sup>2</sup> and noted that the legal framework for including a non-signatory in arbitration is well-established. The Court noted that a non-signatory can be included in arbitration proceedings if the non-signatory and one of the signatories belong to the same 'group of companies' (commonly referred to as the Group of Companies Doctrine ("GOCD")).

The Court stated that the GOCD is not the only tool through which a non-signatory can be arraigned in arbitration proceedings. The Court explained that if the contractual relationship between the parties is such that a non-signatory owes any obligation to a signatory-party, then such a non-signatory can also be included in the arbitration proceedings.

In this regard, the Court referred to a decision in *Ameet Lalchand Shah v. Rishabh Enterprises*,<sup>3</sup> wherein the Supreme Court upheld the inclusion of a non-signatory to the arbitration proceedings based on the fact that such non-signatory was a party to an inter-connected agreement, which was executed to achieve a common commercial goal. The Court also drew reference to a decision in *ONGC v. Discovery Enterprises Pvt. Ltd.*,<sup>4</sup> wherein the Supreme Court had held that a non-signatory could be bound by principles other than GOCD as well.

In the facts of the present case, the Court referred to Clauses 21 and 28 of the Work Order which relate to obligations of BHEL regarding payment and indemnity. The Court noted that all payments made by BHEL affected RBCL's quantum of compensation in the project. In light of the same, the Court found that the aforesaid clauses established a *prima facie* case for including BHEL in the arbitration proceedings. The Court noted that NTPC did not have any contractual responsibility towards RBCL and hence concluded that NTPC should not be included in the arbitration proceedings.

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The judgment highlights the role of direct contractual relationship of the non-signatory with the signatory party in the arbitration. The thresholds set out in *Cox and Kings* and *Chloro Control* refer to ‘direct commonality of the subject matter’, ‘agreements forming part of a composite transaction’, and ‘inter-related and inter-dependent performance of agreements’. With the judgment in *RBCL*, it is clear that the aforesaid thresholds can apply independently without fulfilling the requirement that the non-signatory should form part of the group of companies with the signatory parties. If these conditions are met, the non-signatory parties may be included in the arbitration.

It is important to refer to the observations of the Court on the scope of interference and inquiry in an application under Section 11 of the A&C Act. The Court referred to earlier judgments which have held that the scope of interference in a Section 11 application is limited to a scrutiny of *prima facie* existence of the arbitration agreement. The Court clarified that its order did not constitute an opinion on merits, and hence its order should not prevent (a) BHEL to contest its inclusion before the arbitrator, and (b) RBCL to apply to the arbitral tribunal to arraign NTPC as a necessary party. The Court further clarified that the arbitrator is entitled to consider the said applications on their merits without any regard to the *prima facie* findings in its order in the Section 11 application. The aforesaid observations align with a pro-arbitration approach which upholds the authority of an arbitral tribunal to independently decide the issue of arraigning a non-signatory.

- Shruti Dhonde, Adimesh Lochan and Arjun Gupta

*The authors express their gratitude to Durgeshwari Paliwal for her efforts on this article.*

You can direct your queries or comments to the relevant member.

<sup>1</sup>At a site owned by NTPC.

<sup>2</sup>*Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Ors.*, (2024) 4 SCC 1.

<sup>3</sup>(2018) 15 SCC 678

<sup>4</sup>(2022) 8 SCC 42.

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