Dispute Resolution Hotline

May 11, 2018

SUPREME COURT'S DICTUM ON REFERENCE OF NON-SIGNATORIES TO ARBITRATION IN DOMESTIC ARBITRATIONS

- Agreements that are inter-connected, with a similar underlying commercial purpose, would bind all the parties to the agreements, even though one of them might be lacking an arbitration clause, or an entity is not party to all such agreements.
- Principles laid down in the *Chloro Controls* case applied in context of Section 8 of the Act
- Reiterating the principles of the *Ayyaswamy* case, Supreme Court rules that mere allegations of fraud would per se not make a dispute non-arbitrable.

INTRODUCTION

With the expanding dimensions of arbitration in India, Indian courts have maintained their stance in referring parties to arbitration, besides ensuring minimal interference in the same. Recently, the Supreme Court of India ("**Supreme Court**"), in the case of *Ameet Lalchand Shah and Others* ("**Appellants**") v. *Rishabh Enterprises and Another* (***"Respondents"***)[1], had the opportunity to interpret Section 8[2] of the Arbitration and Conciliation Act 1996 ("**Act**"), as amended by the Arbitration and Conciliation (Amendment) Act 2015 ("**Amendment Act**"). The Supreme Court applied the principles laid down in *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and others*[3] ("***Chloro Controls***") in relation to domestic arbitrations. It ruled that in cases where the agreements are inter-connected and several parties are involved in a single commercial project executed through several agreements, all the parties can be made amenable to arbitration. Further, on examining the facts of the case, the Supreme Court followed the principles laid down in *A. Ayyasamy v. A. Paramasivam*[4] ("**Ayyasamy**") in concluding that mere allegations of fraud would not prevent arbitration.

FACTS OF THE CASE

Rishabh Enterprises ("**Rishabh**"), entered into four agreements for the commissioning of the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh:

i. Equipment and Material Supply Contract (dated 01.02.2012) between Rishabh and M/s Juwi India Renewable Energies Pvt. Ltd ("**Juwi India**");
ii. Engineering, Installation and Commissioning Contract (dated 01.02.2012) between Rishabh and Juwi India;
iii. Sale and Purchase Agreement (dated 05.03.2012) between Rishabh and Astonfield Renewable Pvt. Ltd ("**Astonfield**"); and
iv. Equipment Lease Agreement (dated 14.03.2012) between Rishabh and Dante Energy ("**Dante Energy**").

Of the above, only the third agreement dated 05.03.2012, was without an arbitration clause.

Disputes arose between the parties when Rishabh raised allegations of fraud and misrepresentation against Astonfield – that it had induced Rishabh to purchase the Photovoltaic products for a huge amount.

Rishabh preferred a civil suit against the Appellants before the Delhi High Court levelling various allegations including fraud and misrepresentation. There was a further claim that the four agreements concluded with the Appellants be declared null and void as had been vitiated by fraud, and a recovery of sum along with interest. On receipt of notice, the Appellants preferred an application under Section 8 of the Act to refer the dispute to arbitration.

Upon dismissal of the said application by the Delhi High Court, the Appellants preferred an appeal before the Supreme Court.

HELD

Reference to arbitration

The issue before the court related to whether the principles laid down in *Chloro Controls* case could be applied to refer non-signatories to domestic arbitrations under section 8 of the Act. The *Chloro Controls* case provided for reference of non-signatories to foreign seated arbitration under Section 45 of the Act in certain circumstances such as in case of inter-connected agreements meeting certain criteria.

The High Court had held that even post the Amendment Act, the ruling provided in *Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya*[5] ("***Sukanya***") would continue to hold good in context of section 8. In the *Sukanya* case, it had

Research Papers

Littler International Guide (India) 2024
November 08, 2024

Unmasking Deepfakes
October 25, 2024

Are we ready for Designer Babies
October 24, 2024

Research Articles

The Bitcoin Effect
November 14, 2024

Acquirers Beware: Indian Merger Control Regime Revamped!
September 15, 2024

Navigating the Boom: Rise of M&A in Healthcare
August 23, 2024

Audio

Digital Lending - Part 1 - What's New with NBFC P2Ps
November 19, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part I
August 26, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part II
August 26, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

"Investment return is not enough" Nishith Desai with Nikunj Dalmia (ET Now) at FII8 event in Riyadh
October 31, 2024

Analysing SEBI's Consultation Paper on Simplification of registration for FPIs
September 26, 2024

been held that where a suit contains matters which are beyond the scope of the arbitration agreement and is also between parties who are not parties to the arbitration agreement, then such suits cannot be referred to arbitration.

The Supreme Court discusses the amendments made to Section 8 and what had been proposed in the 246th Report of the Law Commission. Further while, not stated expressly, the Supreme Court applies the *Chloro Controls* case and analyses the facts in the context of principals laid down in the said case. It found that though there were different agreements involving several parties, it was for a single commercial project, i.e. the commissioning of the Photovoltaic Solar Plant project. The averments made in the underlying plaint gave *prima facie* indication that all the four agreements are inter-connected. After going through the clauses of different agreements, it held that the Equipment Lease Agreement was the principal/main agreement and the remaining three agreements were ancillary agreements. So even though the Sale and Purchase Agreement between Rishabh and Astonfield did not contain arbitration clause, it was integrally connected with the commissioning of the solar plant. Further, all the agreements contained clauses referring to the main agreement.

Thus, the Supreme Court referred to "*the facts and intention of the parties*" which was "*to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy*, and concluded that all the parties could be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement. The Supreme Court ruled that in cases where the agreements are inter-connected and several parties are involved in a single commercial project executed through several agreements, all the parties can be made amenable to arbitration. This would hold true even where one of the agreements does not contain an arbitral clause or a party to one agreement is a third party to another agreement.

The Supreme Court also referred to the recommendations of the 246th Law Commission Report that a prima facie existence of an arbitration agreement was sufficient to refer the parties to arbitration unless it was null and void.

Allegations of fraud and arbitrability of disputes

Relying on the *Ayyaswamy* case which stated that serious allegations of fraud were non-arbitrable, while mere allegations of fraud would be arbitrable, and on assessment of the facts of the case, the SC concluded that the allegations in this case cannot be said to be so serious to refuse reference of the parties to arbitration. In arriving at this conclusion, the SC considered that the parties had consciously proceeded with the commercial transactions to commission the solar plant. Only in serious and complicated cases which warrant a case of criminal offence, requiring appreciation of evidence, would such complex issues be decided by the civil court. The SC recognized that it is the duty of the court to impart the commercial understanding with a sense of business efficacy and not by mere averments made in the plaint.

ANALYSIS

The SC has interpreted Section 8 in the light of the Amendment Act, in allowing any party, "*claiming through or under*" a party who was party to an arbitration agreement, to refer the dispute to arbitration. With such an interpretation, the SC has preferred to follow the principles laid down in *Chloro Controls* case.

Further, in conjunction with the language of Section 8(1) that "*notwithstanding any judgment, decree or order of the Supreme Court or any Court*", it may be considered that the SC has restricted the applicability of the Sukanya case to the amended Section 8. While not stated expressly, SC's reference to the 246th Report of Law Commission also reflects, that the Sukanya case may no longer be applied to proceedings under Section 8 of the Act. Law Commission had recommended incorporation of principles laid down in the Sukanya case within the statute. However, this was not accepted and instead language like that of Section 45 was introduced in Section 8 of the Act.

Accordingly, parties may now be referred to arbitration even if only the principal agreement contained an arbitration clause and ancillary agreements did not. If the parties' intention is to not resolve disputes through arbitration, then it may be advisable for the parties to exclude arbitral clauses from all agreements forming part of the same transaction.

Further, while quoting the *Ayyaswamy* case, the SC has also strived towards curbing instances where recalcitrant parties resort to allegations of fraud etc. to merely disable or obstruct an arbitration.

– Shweta Sahu & Ashish Kabra
You can direct your queries or comments to the authors

[1] Civil Appeal No. 4690 of 2018 arising out of SLP(C) No. 16789 of 2017, decided on May 3, 2018

[2] "*Power to refer parties to arbitration where there is an arbitration agreement.—*
(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.
(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

[3] (2013) 1 SCC 641, para 107: "*reference of even non-signatory parties to an arbitration agreement can be made…*"

[4] (2016) 10 SCC 386. See here (our hotline)

[5] (2003) 5 SCC 531

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996
September 22, 2024

based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

list.