

Dispute Resolution Hotline

September 04, 2018

MADRAS HC DELVES INTO 'GROUP OF COMPANY' DOCTRINE AND DIRECTS NON-SIGNATORIES TO ARBITRATION

Madras HC:

- Relied on the decision of the Supreme Court in *Chloro Control* and referred the parties to arbitration seated in Singapore.
- Reiterated that non-signatories to an arbitration agreement can be impleaded in arbitration proceedings in certain situations.
- Took into account the intricacies of the factual matrix and applied the 'Group of Companies' doctrine

Recently, the Madras High Court ("**Madras HC**") in *M/s SEI Adhvan Power Private Limited ("First Appellant") & M/s SunEdison Solar Power India Pvt. Limited ("Second Appellant")* (collectively referred to as "**Appellants**") v. *M/s Jinneng Clean Energy Technology Limited ("First Respondent")*, *M/s SunEdison Energy Holding (Singapore) Pte Ltd ("Second Respondent")* & *M/s Singapore International Arbitration Centre ("Third Respondent")* elucidated on the 'group of companies' doctrine. The Madras HC *inter alia* held that non-signatories to an arbitration agreement can be impleaded if there was an intention to extend the arbitration agreement to the non-signatories.

FACTUAL MATRIX:

The Appellants and the Second Respondent constituted a single economic entity, being the Sun Edison group of companies¹. More specifically, the First Appellant is an Indian company and is constructing a power plant in Tamil Naidu ("**Power Plant**"). The First Appellant engaged Second Respondent as the contractor to provide certain construction-related services relating to the Power Plant. The Second Respondent, in turn, entered into a sub-contract regarding supply of modules to the First Respondent. The Second Respondent held 99.99% of the shares of the First Appellant.

The First Respondent raised certain invoices which were pending payment from the Second Respondent. The Second Respondent executed a Non- Disposal Undertaking ("**NDA**") in favour of the First Respondent to hold and retain at least 24% of the equity in the First Appellant until the complete discharge of the payment obligations.

Contrary to the NDA, shares of the First Appellant were sold by the Second Respondent. Thereafter, First Respondent invoked arbitration² and made the Appellants a party to the proceedings. The Appellants approached the Madras HC and sought a restraint order against the First Respondent from proceedings against the Appellants. The single judge ruled in favour of the First Respondent and thereafter an appeal was filed before the division bench. The First Respondent filed an application seeking rejection of the civil suit and prayed that the parties be referred to arbitration.

SUBMISSIONS ADVANCED:

Appellants:

The Appellants contended that they are not a party to the NDA. They pleaded that they are separate and distinct legal entities, their knowledge cannot be inferred, they never signed or authorized the undertaking and in absence of privity of contrary between the Appellants and the First Respondent, the Appellants cannot be impleaded in the arbitration proceedings. They further contended that Section 45 of the Arbitration and Conciliation Act, 1996 ("**Act**") cannot be invoked in absence of exceptional circumstances which warrants extending the operation of the arbitration agreement to non-signatories.

First Respondent:

The Appellants and the Second Respondent are parts of the same entity having common central control; their email id domain name is the same; the offices are in the same building; 99.99% shareholding of the First Appellant is held by the Second Respondent. The Appellants were the subsidiary of the Second Respondent and all of them represented as the common business venture at the time of entering into the NDA. A review of the purchase orders along with invoices would establish that the Appellants and the Second Respondent are the same, though, operating as different entities.

Importantly, the modules were supplied and delivered to the Second Appellant and the purchase orders were raised in relation to the Power Plant of the First Appellant.

It was contended that merely because the NDA was signed on behalf of the Second Respondent in Chennai, no

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cause of action would arise and the suit was to be dismissed on the principle of *forum non conveniens*. The seat of arbitration is in Singapore, and the proceedings are governed by ICC Rules and hence the civil suit was not maintainable before the Madras HC.

Reliance was placed on the Supreme Court of India (“**Supreme Court**”)’s decision in *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Others*³ (“**Chloro Control**”) to contend that non-signatories to the arbitration agreement can be referred to arbitration and Section 45 of the Act must be invoked to refer the parties to arbitration.

JUDGMENT:

Impleading non-signatories in the arbitration:

The Madras HC referred to the decision of the Supreme Court in *Chloro Control* where the ‘*group of company’s doctrine*’ was considered and it was held that an arbitration agreement entered into by a company within the group of companies can bind its non-signatory affiliates. The Madras HC emphasized the importance of intention of the parties in extending the arbitration agreement to the non-signatories.

The Madras HC relying on the *Chloro Controls* held that the NDA refers to the Appellants and puts them in the same basket as that of the Second Respondent. It is not possible for the Appellants to contend that the NDA is inoperative on the sole basis that they are non-signatories in a literal sense, and this is an unsustainable technical plea to avoid participation in arbitration proceedings.

The Madras HC also considered all the other surrounding facts that are not in dispute. These include (a) the Appellants and the Second Respondent are part of the same group; (b) the Second Respondent held 99.99% share of the First Respondent; (c) the NDA given by the Second Respondent emanated due to non-payment of invoices raised against the Second Appellant; (d) the First Appellant was constructing the Project, and engaged the Second Appellant as contractor and therefore the group of companies divided the work between themselves to carry out different activities among which the Project is one; and (e) the NDA makes it abundantly clear that the Appellants and the Second Respondent were each other’s alter ego.

The Madras HC distinguished the decisions relied on by the Appellants⁴. On the contrary, the Madras HC took note of the Supreme Court’s decision in *Ameet Lalchand Shah and Others v. Rishabh Enterprise & Ors*⁵ that re-affirmed the principles laid down in *Chloro Control* and extended its applicability under Section 8 of the Act (i.e. applicable under Part I of the Act as well).

Cause of Action:

The real cause of action is the invocation of the arbitral proceedings by relying on the NDA, and the single judge was correct in holding that no cause of action was available to the Appellants to maintain the suit, and the only option open to the Appellants is to contest their case before the Third Respondent.

ANALYSIS:

The Supreme Court’s decision in *Chloro Control* has set the trend for binding non-signatories to an arbitration proceeding. In *Chloro Control*, the Supreme Court held that the legal basis to bind *alter ego* to an arbitration agreement are implied consent, third party beneficiary, guarantors, assignment or other transfer mechanism of control rights, apparent authority, piercing of corporate veil, agent principle relationship etc. The Delhi High Court had recently in *GMR Energy Limited v. Doosan Power Systems India*⁶ followed *Chloro Control* and directed non-signatories to arbitration.

Although the Madras High Court relied on the Chloro Control, it did not attempt to satisfy the threshold laid down in Chloro Control with the facts of the case. Instead, the Madras emphasized on the surrounding facts and intention behind the NDA and directed the Appellants to arbitration. Overall, the ruling applies the law and is a step forward towards ensuring that the defaulters do not take shelter under the garb of different corporate entities. It also demonstrates an interpretation giving the parties’ commercial understanding a sense of business efficacy.

– Alipak Banerjee & Sahil Kanuga

You can direct your queries or comments to the authors

¹ The Appellants function from the same office. The group of companies belonging to the Sun Edison correspond through the same email id.

² The arbitration was governed by the International Chamber of Commerce (ICC) Rules and the seat of arbitration was Singapore.

³ (2013) 1 SCC 641

⁴ *Indowind Energy Ltd v. Wescare India Ltd & Anr* (2010) 5 SCC 306 and *Duro Felguera SA v. Gangavaram Port Ltd* (2017) 9 SCC 729 on the ground that the Supreme Court was dealing with an application under Section 11 of the Act which is under Part I. Similarly, in *Economic Transport Organization v. Charan Spinning Mills* (2010) 4 SCC 114, the Supreme Court was dealing with the Consumer Protection Act.

⁵ Civil Appeal No. 4690 of 2018 (Arising out of SLP(C) No.16789 of 2017) decided on 3 May 2018. [Click here](#) to see NDA hotline.

⁶ CS(COMM), 447 of 2017, Judgment Date: 14 November 2017 [Click here](#) to see NDA hotline

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