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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment pronounced on: 29.10.2024

\+ **ARB.P. 721/2022**

SURESH KUMAR KAKKAR & ANR ..... Petitioners

Through: Ms. Akanksha Kaul, Mr. Harsh Sethi and Mr. Anant, Advocates.

versus

M/S ANSAL PROPERTIES
AND INFRASTRUCTURE LIMITED & ANR. ..... Respondents

Through: Mr. Ravi Sikri, Sr. Adv. alongwith Mr. Sachin Midha, Mr. Deepank Yadav, Mr. Aditya Vikram Bajpai and Ms. Kanak Grover, Adv. for R1.
Mr. Aditya Kumar and Mr. Parv Verma, Advocates for R3.
Mr. Vijay Kasana, Mr. Abhijeet Vikram Singh and Mr. Kshitij Chhabra, Advocates for R4.
Mr. Ajay Choudhary and Mr. Bhanu Gupta, Advocates for R5.

\+ **O.M.P.(I) (COMM.) 14/2022, CRL.M.A. 23067/2022, I.A. 18367/2022, I.A. 9831/2023**

SURESH KUMAR KAKKAR & ANR ..... Petitioners

Through: Ms. Akanksha Kaul, Mr. Harsh Sethi and Mr. Anant, Advocates.

versus

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Through: Mr. Ravi Sikri, Sr. Adv. alongwith Mr. Sachin Midha, Mr. Deepank

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Yadav, Mr. Aditya Vikram Bajpai and Ms. Kanak Grover, Adv. for R1.
Mr. Aditya Kumar and Mr. Parv Verma, Advocates for R3.
Mr. Vijay Kasana, Mr. Abhijeet Vikram Singh and Mr. Kshitij Chhabra, Advocates for R4.
Mr. Ajay Choudhary and Mr. Bhanu Gupta, Advocates for R5.

\+ **ARB.P. 722/2022**

BADRINATH KAKKAR & ANR ..... Petitioners

Through: Mr. Harsh Sethi, Mr. Anant Nigam and Mr. Raghav Luthra, Advs

versus

M/S ANSAL PROPERTIES
AND INFRASTRUCTURE LIMITED& ANR. ..... Respondents

Through: Mr. Tanmay Mehta and Mr. Nikhil Palli, Advs. for R-3 and 4.

\+ **OMP(I) (COMM) 15/2022 & IA Nos. 5424/2022, 7587/2022, 8605/2023**

BADRINATH KAKKAR & ANR ..... Petitioners

Through: Mr. Harsh Sethi, Mr. Anant Nigam and Mr. Raghav Luthra, Advs.

versus

M/S ANSAL PROPERTIES
AND INFRASTRUCTURE LIMITED& ANR. ..... Respondents

Through: Mr. Sachin Midha, Mr. Aditya and Mr. Vikram Bajpai, Advs. for R-I and 2.
Mr. Nikhil Palli, Adv. for R4.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

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ARB.P. 721/2022

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter '***A&C Act***') seeking appointment of a sole arbitrator to adjudicate the disputes between the parties.

Factual Background

2. The Family Members / Companies of the petitioner no.1 and the respondent no.1 (Ansal Properties and Infrastructure Ltd.) have entered into Four Collaboration Agreements dated 14.10.2010.

3. This petition is concerned with the Third Collaboration Agreement dated 14.10.2010 (hereafter '***Third Collaboration Agreement***'). The said Third Collaboration Agreement has been executed between petitioner no.1 and respondent no.1 in respect of land admeasuring 28 Kanal, 12 Marla (3.575 Acre.), situated in revenue estate of village Badshahpur, Tehsil & District Gurgaon in Sector 67, Gurgaon. The purport of the said agreement was that the respondent no.1 would develop the said land and construct a Residential/Group Housing/Commercial Colony thereon. Clause 7 of the said agreement mentions that the petitioner/owner's share in the said project shall be an area of 5183.75 Sq Yd. of the developed residential plots and the respondent no.1/ developer's share shall comprise the balance area of the residential plots and the entire community, commercial and other sites including sites for EWS/LIG categories.

4. Pursuant to execution of the aforesaid Third Collaboration Agreement on 14.10.2010, Plot Buyer Agreements dated 23.12.2010 came to be executed between the petitioner no.1, respondent no. l and a group company of respondent no. l i.e. M/s Ansal Townships & Infrastructure Ltd., (the respondent no.2 herein), as a Confirming Party, whereby specific Plot No(s).

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C-1018 and C-1019, Esencia, Sector-67, Gurugram, Haryana (hereafter '**Plots**') were allotted to the petitioner no.1. However, neither the possession of the Plots was handed over to the petitioner no.1 nor the sale deeds were executed.

5. Certain disputes have also arisen between the parties in relation to the land admeasuring 9 Kanal & 1 Marla (1.1312 acres) situated in the revenue estate of village Badshahpur, Tehsil & Distt. Gurgaon in Sector 67, Gurgaon, purportedly forming part of the Fourth Collaboration Agreement. Pursuant thereto, *vide* letter dated 29.11.2018, the respondent no.1 froze/suspended the handing over of possession of the aforesaid plots to the petitioners.

6. Disputes having arisen between the parties, the petitioners sent notice invoking arbitration dated 14.04.2022 to the respondent no.1 and 2, invoking the arbitration clause contained in the Third Collaboration Agreement dated 14.10.2010. However, no reply thereto is stated to have been sent by the said respondents. The arbitration clause reads as under:

> *"29. That the dispute, if any, arising out of this agreement, the same shall be referred for arbitration to a sole arbitrator. The proceeding of arbitration shall be in accordance with Arbitration and Conciliation Act, the language of arbitration shall be English and the venue shall be New Delhi/Delhi only. The Courts having jurisdiction at Delhi/New Delhi shall be competent to entertain and dispose any issue arising out of this indenture."*

7. After filing of the present petition, certain additional facts have come to light. *Vide* sale deeds dated 10.12.2018, Plot Nos. C-1018 and C-1019 had been sold by respondent no.1 to M/s RSD Finance Ltd, who is arrayed as respondent no.3 in the present petition. These plots have been carved out/form part of the land which is the subject matter of the settlement

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agreement. Respondent no.3 had further sold Plot No. C-1018 to 'Omwati', and Plot No. C-1019 to M/s Alliance Land Developers Pvt. Ltd., who were, consequently, arrayed as respondent no. 4 and 5 respectively in the present petition. The petitioners have sent notice invoking arbitration to respondent no. 3 to 5 on 11.10.2023. However, no reply thereto was sent by the said respondents.

Submissions of the parties

8. Learned counsel for the petitioners has submitted that *vide* order dated 18.09.2023 the respondent nos. 1 and 2 have already consented for constituting an arbitral tribunal to resolve the disputes between the parties. So far as respondent nos. 3 to 5 are concerned, it is submitted that the said respondents ultimately claim their purported title to the plots through respondent nos. 1 and 2 and therefore the assignees and/or have acquired the benefits which have accrued to the respondent nos. 1 and 2 under the Collaboration Agreement. It is submitted that the Third Collaboration Agreement, which contains the arbitration clause, defines the term "developer" to include its assignees. It is also submitted that the said respondents have impliedly consented to remain bound by the arbitration clause. In support of these submissions reliance has been placed on ***Rajesh Gupta v. Mohit Lata Sunda,***[1] and ***Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd.***[2]**.** Learned counsel for the petitioner has also made submission on the merits of the disputes. It is submitted that the petitioners are the owner of the land and at no point any sale deed was executed by the petitioners in favour of respondent no.1. The respondent nos.1 and 2 have

[1] (2020) 269 DLT 575
[2] (2021) 281 DLT 246

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allotted the Plots to the petitioners and at no point the said allotment was cancelled. The Plots are the petitioner's share of developed land under the Third Collaboration agreement and the same could not have been dealt/sold by the respondent nos.1 and 2. It is alleged that the respondent nos. 3 to 5 are not bona fide purchasers.

9. Learned senior counsel for the respondent nos.1 and 2 had initially opposed the appointment of an arbitrator. However, as recorded in order dated 18.09.2023, learned senior counsel submitted, on instructions, that the said respondents have no objection to the constitution of an arbitral tribunal to comprehensively adjudicate the disputes between the parties.

10. Learned counsel for the respondent no. 3 has submitted that the respondent no. 3 is a *bonafide* purchaser of the said Plot Nos. C-1018 and C-1019. It is submitted that the respondent no. 3 had been allotted / purchased the Plots as a part of a settlement with the respondent no.1 and another group company of respondent no.1. It is submitted that respondent no. 1 being the absolute owner of the Plots transferred the same to respondent no. 3 in accordance with law. It is submitted that the respondent no. 3 had further sold the Plots to respondent nos.4 and 5. It is submitted that respondent no. 3 is not a party to the Third Collaboration Agreement; being a third-party and a non-signatory to the Third Collaboration Agreement, it cannot be made a party to the arbitration. It is contended that in these circumstances, the respondent no. 3 cannot be referred to arbitration under the said agreement. In this regard, reliance has been placed on ***Gujarat Composite Ltd. v. A Infrastructure Ltd.,***[3] and ***Chloro Controls India (P)***

[3] (2023) 7 SCC 193

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Ltd. v. Severn Trent Water Purification Inc.[4]. It is submitted that the contention to the effect that the respondent no.3 is the assignee of the respondent no.1 is without any merit. There is no assignment of rights/obligations under the Third Collaboration Agreement from respondent no. 1 to respondent no. 3. Reliance has also been placed on ***Kapilaben v. Ashok Kumar Jayantilal Sheth,***[5] to submit that such an assignment is impermissible in law. It is further submitted that disputes, if any, have arisen under the Plot Buyer Agreements which do not contain an arbitration clause. It is submitted that if petitioners are desirous of filing a claim of specific performance and for cancellation of the subsequently executed sale deeds and other relevant documents, appropriate remedy would be a suit and not arbitration.

11. Learned counsel for the respondent no.4 has submitted that the respondent no. 4 is a *bonafide* purchaser of Plot No. C-1018 having purchased it from respondent no. 3 *vide* registered sale deed dated 03.03.2021 for a lawful consideration, who in turn had purchased it from respondent no.1. It is submitted that the petitioners are not the owners of Plot No. C-1018. It is submitted that as per Haryana Development and Regulations of Urban Areas Act, 1975, the petitioners had vested their land for development to the developer/respondent no.1, who has obtained licence for development from the Director, Town and Country Planning, Haryana. Once the license has been obtained by the developer, the said developer becomes the absolute owner of the land and only the developer can execute sale deed/conveyance deed in respect thereof. It is submitted that Plot Buyer

[4] (2013) 1 SCC 641
[5] (2020) 20 SCC 648

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Agreement at clause F clearly records that the petitioner no. 1 was 'provisionally' allotted Plot No. C-1018; the said allotment agreement was cancelled on 29.11.2018. It is submitted that even if petitioners were the real owners of the Plot, the respondent no.3 had purchased the Plots from the ostensible owner/respondent no.1 and thus the rights of the respondent nos. 3 and 4 are protected under Section 41 of The Transfer of Property Act, 1882. It is further submitted that the arbitration clause contained in the Third Collaboration Agreement was novated with the jurisdiction clause entered into the Plot Buyer Agreements dated 23.12.2010 and therefore the present petition is not maintainable. It is further submitted that the claim of the petitioners seeking cancellation of sale deed executed in favour of respondent no. 3 and subsequently in favour of respondent no. 4 by respondent no. 3 is beyond the scope of the arbitration clause. It is also submitted that the respondent no.4 is a non-signatory/third party to the Third Collaboration Agreement. It is submitted that there is no legal basis to compel the respondent no.4 to arbitrate. In its written submissions, the said respondent sought to place reliance on the following judgements: ***Ramcoomar Koondoo v. Macqueen***[6]***, Harphool Singh v. Daropati***[7]***, Sankara Hali &Sankara Institute of Philosophy and Culture v. Kishori Lal Goenka***[8]***, Vidya Drolia v. Durga Trading Corpn.***[9]***, Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.***[10]***, Florentine Estates of***

[6] 1872 SCC OnLine PC 29 : (1811-72) 4 IR 541
[7] 2011 SCC OnLine Del 957, the said judgment has been set aside by the Supreme Court in Daropti v. Harphool Singh, (2013) 10 SCC 622
[8] (1996) 7 SCC 55
[9] (2021) 2 SCC 1
[10] (2017) 162 DRJ 412

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***India Ltd. v. Lokesh Dahiya*[11], *Gujarat Composite Limited (supra), Simran Sodhi v. Sandeep Singh,*[12] and *Cox & Kings Ltd. v. SAP India (P) Ltd. (3J).*[13]**

12. Learned counsel for the respondent no.5 has submitted that the respondent no. 5 is a *bonafide* purchaser of Plot No. C-1019 having purchased it from respondent no. 3 *vide* registered sale deed dated 30.09.2020 for valuable consideration. It is submitted that no litigation/ charge or lien pending against the Plots was reflected anywhere in the records of the Department of Town & Country Planning, Haryana at the time of purchase. The developer/respondent no.1 had duly transferred the Plots to respondent no.3, as it possessed rights to sale/ transfer the developed land. It is submitted that respondent no. 5 is neither a party nor is a person claiming through or under any party, under the Third Collaboration Agreement; therefore, the terms of the said agreement, including arbitration clause, do not bind the respondent no. 5. It is further submitted that disputes sought to be raised against respondent no.5 are beyond the scope of the arbitration clause. It is also submitted that disputes, if any, arise out of the Plot Buyer Agreement and the said agreement does not have an arbitration clause. In support of these submissions, reliance has been placed on ***S.N. Prasad v. Monnet Finance Ltd.,*** [14] ***Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya,***[15] ***Usha D. Rana vs Raj State Coop. Tribunal Jaipur,***[16] ***Deutsche***

[11] (2022) 295 DLT 722
[12] (2023) 296 DLT 363
[13] (2022) 8 SCC 1
[14] (2011) 1 SCC 320
[15] (2003) 5 SCC 531
[16] Order dated 13.09.2022 passed by Rajasthan High Court bench at Jaipur in S.B. Civil Writ Petition No. 4540/2006

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Post Bank Home Finance Ltd. v. Taduri Sridhar.[17]

Analysis and Findings

13. I have perused the record and heard counsel for the parties.

14. At the outset, it is important to note that in terms of the judgment of the Supreme Court in ***In Re: Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899 - (7J),***[18] and as further explained in ***SBI General Insurance Co. Ltd. v. Krish Spinning,***[19] the scope of examination under Section 11 of the A&C is confined to the 'existence' of an arbitration agreement. Further, it is not permissible to take recourse to/ apply tests like the "eye of the needle" and "ex-facie meritless" to decline reference to arbitration, and that the observations to the contrary in some prior judgements such as ***NTPC Ltd. v. SPML Infra Ltd***.[20]and ***Vidya Drolia*** (supra), are not in conformity with the principles of modern arbitration. In ***SBI General Insurance*** (supra), it has been held as under:

> *"114.* ***In view of the observations made by this Court in In Re : Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else****. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re : Interplay (supra).*
>
> *xxx* *xxx* *xxx*
>
> *118.* ***Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie***

[17] (2011) 11 SCC 375
[18] (2024) 6 SCC 1
[19] 2024 SCC OnLine SC 1754
[20] (2023) 9 SCC 385

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evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.

119. Appointment of an arbitral tribunal at the stage of Section 11 petition also does not mean that the referral courts forego any scope of judicial review of the adjudication done by the arbitral tribunal. The Act, 1996 clearly vests the national courts with the power of subsequent review by which the award passed by an arbitrator may be subjected to challenge by any of the parties to the arbitration.

xxx xxx xxx

125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."

15. In context of a situation where non-signatories are sought to be impleaded in arbitration, the standard of determination at the reference stage, has been set out by the Supreme Court in ***Cox & Kings Ltd. v. SAP India (P) Ltd. - (5J),***[21] wherein it has been held as under:

"***G. The standard of determination at the referral stage — Sections 8 and 11***

[…]

164. In Vidya Drolia, N.V. Ramana, J. (as the learned Chief Justice then was) held that the amendment to Section 8 rectified the shortcomings pointed out in Chloro Controls with respect to domestic arbitration. ***He further observed that the issue of determination of parties to an arbitration agreement is a complicated exercise, and should best be left to the Arbitral Tribunals*** *: (Vidya Drolia case, SCC p. 161, para 239)*

"239. … Jurisdictional issues concerning whether certain parties

[21] (2024) 4 SCC 1

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> *are bound by a particular arbitration, under group-company doctrine or good faith, etc. in a multi-party arbitration raises complicated factual questions, which are best left for the tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference."*

165. In Pravin Electricals (P) Ltd. v. Galaxy Infra &Engg. (P) Ltd., a Bench of three Judges of this Court was called upon to decide an appeal arising out of a petition filed under Section 11(6) of the Arbitration Act for appointment of sole arbitrator. The issue before the Court was the determination of existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. This Court prima facie opined that there was no conclusive evidence to infer the existence of a valid arbitration agreement between the parties. Therefore, the issue of existence of a valid arbitration agreement was referred to be decided by the Arbitral Tribunal after conducting a detailed examination of documentary evidence and cross-examination of witnesses.

166. ***The above position of law leads us to the inevitable conclusion that at the referral stage, the Court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the Arbitral Tribunal. The referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the Arbitral Tribunal to exercise its primary jurisdiction.*** *In Shin-Etsu Chemical Co. Ltd. v. AkshOptifibre Ltd., this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the Tribunal : (Shin-Etsu Chemical Co. case SCC p. 267, para 74)*

> *"74. … Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration."*

167. In Chloro Controls, this Court held that it is the legislative intent of Section 45 of the Arbitration Act to give a finding on whether an arbitration agreement is "null and void, inoperative and incapable of

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being performed" before referring the parties to arbitration. In 2019, the expression "unless it prima facie finds" was inserted in Section 45. In view of the legislative amendment, the basis of the above holding of Chloro Controls[1] has been expressly taken away. The present position of law is that the referral court only needs to give a prima facie finding on the validity or existence of an arbitration agreement.

168. In Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar, a two-Judge Bench of this Court held that when a third party is impleaded in a petition under Section 11(6) of the Arbitration Act, the referral court should delete or exclude such third party from the array of parties before referring the matter to the Tribunal. This observation was made prior to the decision of this Court in Chloro Controls and is no longer relevant in light of the current position of law. ***Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement.***

169. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge : first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. ***In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine.*** *The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16.*

H. Conclusions

170 […]

170.12. At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the

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arbitration agreement […]"

After the aforesaid decision of the Constitution Bench, the matter was placed before the regular bench of the Supreme Court for adjudication, and in ***Cox & Kings Ltd. v. SAP India (P) Ltd.,***[22] on the issue of impleadment of non-signatory, it has held as under:

> *"34. Further, on the issue of impleadment of respondent no. 2, which is not a signatory to the arbitration agreement, elaborate submissions have been made on both the sides, placing reliance on terms of the agreements, email exchanges, etc. In view of the complexity involved in the determination of the question as to whether the respondent no. 2 is a party to the arbitration agreement or not, we are of the view that it would be appropriate for the arbitral tribunal to take a call on the question after taking into consideration the evidence adduced before it by the parties and the application of the legal doctrine as elaborated in the decision in Cox and Kings (supra)."*

16. In the present case, the existence of an arbitration agreement in the Third Collaboration Agreement is not in dispute. The petitioners and respondent nos.1 and 2 have also consented to refer the disputes arising between them out of the Third Collaboration Agreement and the Plot Buyers Agreement to arbitration. Consequently, there is no impediment to refer the said parties to arbitration.

17. Respondent nos. 3 to 5 are non-signatories to the Third Collaboration Agreement. The petitioners have to at least demonstrate, *prima facie* that the impleadment of non-signatories parties to arbitration is warranted based on a cognizable legal theory/doctrine.

18. It is well settled now that the definition of "parties" under Section 2(1)(h) read with Section 7 of the A&C Act can include both, signatory as well as non-signatory parties.

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[22]2024 INSC 670

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19. In the present case, the petitioners claim that the respondent nos. 3 to 5 have derived rights from the respondent no.1/developer and are the "assignees" of the rights/ benefits which have accrued in favour of the respondent no.1 under the Third Collaboration Agreement. It is submitted that the definition of "developer" under the Third Collaboration Agreement includes its assigns. It is further submitted that respondent no. 3 to 5 claims title to the Plots on the strength of the Third Collaboration Agreement and thus have impliedly consented to remain bound by the arbitration clause contained in the Third Collaboration Agreement.

20. Apart from the aforesaid aspect, the petitioners have also relied upon other legal basis to implead respondent no.3 to 5 in the arbitration proceedings. It has been pointed out that the judgment of the Supreme Court in ***Chloro Controls India*** (supra) recognizes that the impleadment of non-signatories can be based on non-consensual theories/doctrines, particularly, if the non-signatories are beneficiaries of the rights and obligations created under the principal contract (Collaboration Agreement). In this regard, reliance has been placed on the Paragraph 103.1[23] and 103.2[24] of the judgment of the Supreme Court in ***Chloro Controls India*** (supra).

21. In ***Shapoorji Pallonji*** (supra), it has been expressly noticed that several jurisdictions have drawn heavily on the principle of estoppel to include non-signatories within the sweep of an arbitration agreement. Particularly so, when the rights created in favour of the non-signatories are

[23] "103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities."

[24] 103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law."

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pursuant to the benefits derived under the main agreement containing the arbitration clause. In this regard reference may be made to Paragraph 30 to 32 of the judgment in case of ***Shapoorji Pallonji*** (supra) as under:

> *"30. Courts in several jurisdictions have drawn heavily on the principle of estoppel and have compelled non-signatories to arbitrate.*
>
> *31. In Avila Group Inc. v. Norma J. of California : 426 F. Supp. 537 (S.D.N.Y. 1977) the court found that a party cannot assert the existence of a valid contract to base its claims and at the same time deny the contract's existence to avoid arbitration. The court observed that "to allow [plaintiff] to claim the benefit of [a] contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."*
>
> *32. In Life Techs. Corp. v. AB Sciex Prop. Ltd. : 803 F. Supp. 2d 270, 273-274 (S.D.N.Y. 2011) it was held that "a non-signatory may be estopped from avoiding arbitration where it knowingly accepted the benefits of an agreement with an arbitration clause. The benefits must be direct - which is to say, flowing directly from the agreement"."*

22. In ***ONGC Ltd. v. Discovery Enterprises (P) Ltd.,***[25] the Supreme Court has taken note of the fact that there are at least two distinct estoppel doctrines that apply in the non-signatories context, that is, 'the direct benefits' estoppel theory and the 'intertwined' estoppel theory. It is noticed that 'intertwined estoppel theory' looks at the nature of the disputes between the signatories and the non-signatories and in particular whether "issues the non-signatories seeking to resolve in arbitration are intertwined with the agreement with estoppel (signatory party) signed". The relevant observations of the Supreme Court in ***ONGC Ltd.*** (supra) are reproduced as under:-

> *"37. Gary B. Born in his treatise on International Commercial Arbitration indicates that:*

[25](2022) 8 SCC 42

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> *"The principal legal basis for holding that a non-signatory is bound (and benefited) by an arbitration agreement … include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego)."*

38. Explaining the application of the alter ego principle in arbitration, Born also notes:

> *"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 group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories."*

39. Recently, John Fellas elaborated on the principle of binding a non-signatory to an arbitration agreement from the lens of the doctrine of estoppel. He situated the rationale behind the application of the principle of direct estoppel against competing considerations of party autonomy and consent in interpreting arbitration agreements. Fellas observed that non-signatory parties can be bound by the principle of direct estoppel to prohibit such a party from deriving the benefits of a contract while disavowing the obligations to arbitrate under the same:

> *"There are at least two distinct types of estoppel doctrine that apply in the non-signatory context: "the direct benefits" estoppel theory and the "intertwined" estoppel theory. The direct benefits theory bears the hallmark of any estoppel doctrine-prohibiting a party from taking inconsistent positions or seeking to "have it both ways" by "rely[ing] on the contract when it works to its advantage and ignor[ing] it when it works to its disadvantage." Tepper Realty Co. v. Mosaic Tile Co. The direct benefits doctrine reflects that core principle by preventing a party from claiming rights under a contract but, at the same time, disavowing the obligation to arbitrate in the same contract.*
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> *By contrast, the intertwined estoppel theory looks not to whether any benefit was received by the non-signatory, but rather at the nature of the dispute between the signatory and the non-signatory, and, in particular whether "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estoppel [signatory party] has signed….the intertwined estoppel theory has as its central aim the perseveration of the efficacy of the arbitration process is clear when one looks at the typical fact pattern of an intertwined estoppel case."*

23. In the present case, it has been brought out that the subject matter of the Third Collaboration Agreement and also all the subsequent agreements entered into *inter se* the respondents is the very same land parcel. All the agreements are stated to be in pursuance of each other. As such, it is contended that the necessary parameters/requirements for impleadment of respondent no.3 to 5 are satisfied despite the said respondents being non-signatories.

24. In ***Cox & Kings (5J)*** (supra), a Five Judge Bench of the Supreme Court while taking note of the observations in ***ONGC Ltd.*** (supra) has also observed that *"the doctrine of arbitral estoppel suggests that a party is estopped from denying its obligation to arbitrate when it received a "direct benefit" from a contract containing an arbitration agreement"*.(Paragraph 59)

25. ***Cox & Kings (5J)*** (supra) also clearly acknowledges that *"the issue of binding a non-signatory to an arbitration agreement is more of a fact-specific aspect"* (para 60) and in this light, has clearly laid down that once existence of an arbitration agreement is established, the referral court can leave it to the Arbitral Tribunal to decide whether impleadment of non-signatory parties is warranted on application of the parameters laid down in ***Chloro Control India*** (supra), ***ONGC Ltd.***(supra) & ***Cox & Kings (5J)***

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(supra).

26. In view of the extensive adjudicatory exercise involved in determination of the above aspects, and in view of decision of the Supreme Court in ***Cox & Kings (5J)*** (supra), all these issues are best left to be decided by a duly constituted arbitral tribunal. It is neither apposite nor permissible for this Court to virtually conduct a mini trial for adjudication of these issues.

27. I have also considered the judgments cited by the respondents nos.3 to 5, the same do not advance their case in view of the recent authoritative pronouncements of the Supreme Court in ***In Re: Interplay*** (supra) and ***Cox and Kings (5J)*** (supra).

28. In the aforesaid circumstances, at this stage, this Court is inclined to refer respondent nos. 3 to 5 to arbitration, however, granting liberty to the said respondents to raise appropriate jurisdictional objections as regards substantive existence of the arbitration agreement *qua* the said respondents, all contentions of the said respondents in this regard shall be duly considered by the arbitral tribunal, and only if the said objections are rejected, the tribunal shall proceed to adjudicate the claims of the petitioners against the respondent nos.3 to 5.

29. Accordingly, the ARB.P. 721/2022 is allowed, Justice (Retd.) D.K Jain, former Judge, Supreme Court of India (Mob.: 9999922288) is appointed as the sole arbitrator to adjudicate the disputes between the parties.

30. All other issues raised by the respondent nos.3 to 5 *viz.* (i) the disputes, if any, arising out of Plot Buyer Agreements and not the Third Collaboration Agreement; (ii) the disputes raised against the said

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respondents are beyond the scope of the arbitration clause;(iii) the said respondents are *bonafide* purchasers of the Plots and are protected under the Transfer of Property Act; (iv) the respondent no. 1 had transferred ownership of the Plots to respondent no. 3 in accordance with law, shall also be considered by the learned sole arbitrator in accordance with law.

31. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

32. The learned Sole Arbitrator shall fix his fees in consultation with the parties.

33. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

ARB. P. 722/2022

34. This is a petition under Section 11 of the A&C Act seeking appointment of a sole arbitrator to adjudicate the disputes between the parties. This petition was heard alongside ARB. P. 721/2022.

Factual Background

35. The factual background of the present case is identical to that in ARB.P No. 721/2022. This petition is concerned with the First Collaboration Agreement dated 14.10.2010 (hereafter '**First Collaboration Agreement'**).The First Collaboration Agreement has been executed between petitioner no.1 and respondent no.1 in respect of land admeasuring 6 Kanal, 9 Marla (0.8062 Acre) situated in the Revenue Estate of Village Badshahpur, Sector 67, Gurgaon. The purport of the said agreement was that the respondent no.1 would develop on the said land and construct a

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Residential/Group Housing/Commercial Colony thereon. Clause 7 of the said agreement mentions that the petitioner/owner's share in the said project shall be an area of 1169 Sq Yd. of developed residential plot/s and the respondent no.1/developer's share shall be balance area of the residential plots and the entire community, commercial and other sites including sites for EWS/LIG categories.

36. Pursuant to execution of the aforesaid First Collaboration Agreement on 14.10.2010, a Nomination and Assignment Letter dated 20.12.2010 was issued by petitioner no.1 in favour of petitioner no.2 thereby transferring all his rights in respect of First Collaboration Agreement to the petitioner no.2. In furtherance of the First Collaboration Agreement, Plot Buyers Agreements dated 23.12.2010 came to be executed between the petitioner no.2, respondent no. l and a group company of respondent no. l i.e. M/s Ansal Townships & Infrastructure Ltd., (the respondent no.2 herein), as a Confirming Party, whereby specific plots i.e. plot No(s). C-1204 and A-0018, Esencia, Sector-67, Gurugram, Haryana were allotted to the petitioner no.2. Plot No. C-1204 was transferred by petitioner no.2 to Mr. Mahesh Kumar Raghav through an Agreement to Sell dated 10.04.2012. However, neither the possession of the plot No. A-0018 was handed over to the petitioner nor the sale deed was executed.

37. Certain disputes also arose between the parties in relation to land admeasuring 9 Kanal& 1 Marla (1.1312 acres) situated in revenue estate of village Badshahpur, Tehsil & Distt. Gurgaon in Sector 67, Gurgaon, purportedly forming part of the Fourth Collaboration Agreement. Consequently, *vide* letter dated 29.11.2018 the respondent no.1 froze/suspended the allotment and handing over of possession of the

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aforesaid plot No. A-0018 to the petitioners.

38. Disputes having arisen between the parties, the petitioners sent a notice invoking arbitration dated 14.04.2022 to the respondent no.1 and 2, invoking the arbitration clause contained in the First Collaboration Agreement dated 14.10.2010. The arbitration clause reads as under:

> *"29. That the dispute, if any, arising out of this agreement, the same shall be referred for arbitration to a sole arbitrator. The proceeding of arbitration shall be in accordance with Arbitration and Conciliation Act, the language of arbitration shall be English and the venue shall be New Delhi/Delhi only. The Courts having jurisdiction at Delhi/New Delhi shall be competent to entertain and dispose any issue arising out of this indenture."*

39. After filing of the present petition, it has emerged that *vide* sale deed dated 15.01.2019, the said Plot No. A-0018 has been sold by respondent no.1 to Mrs. Anjali Bhasin And Mr. Tejendra Mohan Bhasin. The said parties have been arrayed as respondent no.3 & 4 respectively in the present petition. The petitioners have sent a notice invoking arbitration to respondent no. 3 & 4 on 11.10.2023.

Submissions of the parties

40. The submissions made by learned counsel for the petitioner are completely identical to the submissions made in ARB.P No. 721/2022.

41. Learned senior counsel for the respondent nos.1 and 2 had initially opposed the appointment of an arbitrator. However, as recorded in order dated 03.10.2023, learned senior counsel submitted that the said respondents have no objection to the constitution of an arbitral tribunal to comprehensively adjudicate the disputes between the parties.

42. Learned counsel for the respondent no.3 and 4 has submitted that the said respondents are *bonafide* purchasers of Plot No. A-0018 having

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purchased it from respondent no.1, without any knowledge of the First Collaboration Agreement or the existence of disputes between the petitioners and respondent no.1. It is submitted that *sine qua non* for any arbitration is the existence of an arbitration agreement in writing between the parties which is absent in the present case, as respondent nos. 3 and 4, are not signatories to the First Collaboration Agreements dated 14.10.2010. It is submitted that the present petitions are not maintainable against the respondent no.3 and 4. It is emphasised that the said respondents have not by any act, explicitly or impliedly, agreed to be parties to the arbitration agreement.

Findings

43. As noticed, the factual conspectus of this petition, is identical in all respects with the factual conspectus in ARB.P. No. 721/2022. The submissions of respective counsel are also identical. Accordingly, the reasoning set out while disposing of ARB. P. 721/2022 squarely applies to the present case as well.

44. There is no controversy about the existence of the arbitration agreement in the concerned Collaboration Agreement.

45. In the aforesaid circumstances, at this stage, this Court is inclined to refer the parties, including respondent nos. 3 and 4 to arbitration, however, granting liberty to the respondent nos. 3 and 4 to raise appropriate jurisdictional objections as regards substantive existence of the arbitration agreement qua the said respondents. All contentions of the said respondents in this regard shall be duly considered by the arbitral tribunal, and only if the said objections are rejected, the tribunal shall proceed to adjudicate the claims of the petitioners against the respondent nos.3 and 4.

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46. Accordingly, the ARB.P. 722/2022 is allowed and Justice (Retd.) D.K Jain, former Judge, Supreme Court of India (Mob.: 9999922288) is appointed as the sole arbitrator to adjudicate the disputes between the parties.

47. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

48. The learned Sole Arbitrator shall fix his fees in consultation with the parties.

49. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

O.M.P.(I) (COMM.) 14/2022 and O.M.P.(I) (COMM.) 15/2022

50. These petitions under Section 9 of the A&C Act are directed to be treated as applications under Section 17 of the A&C Act to be decided by learned sole arbitrator, in accordance with law. The subsisting interim orders shall continue to operate till the matter is considered by the learned sole arbitrator.

51. Needless to say, nothing in this order shall be construed as an expression of opinion of this court on the merits of the case.

52. The present petitions stand disposed of in the above terms. Pending applications also stand disposed of.

SACHIN DATTA, J

OCTOBER 29, 2024/*hg*

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