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An arbitral tribunal has the power to implead a non-signatory to arbitration proceedings under Section 16 of Arbitration Act

A single bench of the Bombay High Court (“**Bombay HC**”) has in *Cardinal Energy and Infra Structure Private Limited & Anr. v. Subramanya Construction and Development Co. Limited & Ors.*¹ held that the power to implead a non-signatory to an arbitration proceeding vests in an arbitral tribunal on the basis of the group of companies doctrine laid down in *Cox and Kings Limited v. SAP India Private Limited & Anr*² (“**Cox and Kings**”).

Brief Facts

Subramanya Construction and Development Company Limited (“**SCDCL**”, respondent no. 1) and Prakruthi Infrastructure and Development Company Limited (“**PIDCL**”, respondent no. 2) entered into a memorandum of understanding (“**MoU**”) with Swan Energy Limited (“**Swan**”, respondent no. 3). The MoU contained an arbitration agreement. Disputes arose between the parties leading to the issuance of a notice invoking arbitration by SCDCL and PIDCL against Swan. Pursuant to an application filed by SCDCL and PIDCL against Swan under Section 11 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”), the Bombay HC appointed a sole arbitrator to adjudicate the disputes arising out of the MoU.

The parties filed their respective pleadings before the arbitral tribunal. In the Statement of Defence filed by Swan, a preliminary objection was raised alleging that Cardinal Energy and Infra Structure Private Limited (“**Cardinal**”, petitioner no. 1) and Pegasus Energy and Infrastructure Private Limited (“**Pegasus**”, petitioner no. 2) (together referred to as the “**Petitioners**”) were necessary parties without whom the claim was not maintainable since the Petitioners had performed an aspect of the contract.

Given the averment made in the Statement of Defence, SCDCL and PIDCL filed an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 (“**CPC**”) to implead the Petitioners as respondents to the arbitration proceedings. Swan opposed the application on the ground that the arbitral tribunal did not have the power to direct impleadment of the Petitioners and that this could have only been done by the referring court. The parties, including the Petitioners, were heard by the arbitral tribunal. After considering the submissions made, the arbitral tribunal passed an ‘order’ / ‘award’ allowing the application (“**Impugned Award**”).

Aggrieved by this decision, the Petitioners filed a petition under Section 34 of the Arbitration Act challenging the Impugned Award before the Bombay HC.

¹ Comm Arbitration Petition (L) No. 2603 of 2024

² 2023 INSC 1051

Issue

Whether the arbitral tribunal could have of its own accord allowed the impleadment of the Petitioners who were non-signatories to the arbitration agreement without such a power being expressly endowed upon it by the referral court at the time of reference.

Findings and Analysis

The Bombay HC dismissed the petition and *inter alia* held as follows:

1. In *Cox and Kings*, the Supreme Court has held that when at a referral stage, impleadment of a non-signatory to the arbitration agreement is raised, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement. The Supreme Court has considered the arbitral tribunal to be the appropriate forum to determine the issue as to joinder of a non-signatory to an arbitration agreement.
2. The arbitral tribunal has the power to decide whether the non-signatory is bound by the arbitration agreement and to implead the non-signatory if answered in the affirmative.
3. The applicability of the group of companies doctrine is not excluded merely by there being no prayer for impleadment of a non-signatory in the Section 11 application.
4. Despite the arbitral tribunal not having the specific power to consider an application for impleadment and/or the power of a civil court under Order 1 Rule 10 of the CPC, the *Cox and Kings* judgment has changed the law with respect to impleadment of non-signatories on the basis of the group of companies doctrine and has left the issue to be determined by an arbitral tribunal.
5. The Supreme Court in *National Insurance Company Ltd. v. Boghara Polyfab Private Limited*³ has referred to issues which the Chief Justice or his designate is bound to decide, including whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Arbitration Act is a party to such an agreement. However, the same does not preclude the arbitral tribunal from deciding the issue of impleadment of a non-signatory to an arbitration agreement, particularly when the issue is not before the referral court.
6. In the present case, the Arbitral Tribunal was justified in determining the issue of whether the Petitioners as non-signatories to the arbitration agreement could be impleaded as parties to the arbitration.
7. The decision of the arbitral tribunal in an application under Section 16 of the Arbitration Act can always be challenged in a petition under Section 34 of the Arbitration Act after the final award has been passed. The Impugned Award was not in the nature of a final determination since it would be open to the Petitioners to lead evidence on the issues framed and invite a final adjudication by the arbitral tribunal.

Conclusion

This judgement clarifies the position that an arbitral tribunal has inherent powers under Section 16 of the Arbitration Act to implead a non-signatory / third party to an arbitration proceeding on the basis of the 'group of companies' doctrine. This is even in the absence of a specific prayer for impleadment of a non-signatory before a referral court. The judgment gives effect to the decision of the Supreme Court in *Cox and Kings* to reduce judicial intervention and leave issues including in respect of the impleadment of non-signatory parties to be decided by an arbitral tribunal.

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