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Case Comment

India: power of courts to refer non-signatories to arbitration

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Case:

Ameet Lalchand Shah v Rishabh Enterprises unreported 2018 (Sup Ct (Ind))

***Int. A.L.R. N-15 Summary**

The courts may refer parties to a single arbitration, if all the agreements are interconnected and composite, with a similar underlying commercial purpose even though parties to the agreements may not be common or all agreements may not have an arbitration clause.

Introduction

In the context of foreign-seated arbitrations, the Supreme Court of India (Supreme Court) has clarified that non-signatories to an agreement may be referred arbitration under s.45 of the Act¹ in certain circumstances such as in case of interconnected agreements meeting certain criteria.² In case of domestic arbitrations, the question of reference of non-signatories under s.8 of the Act came up before the Supreme Court in Ameet Lalchand Shah v Rishabh Enterprises.³

This gained significance subsequent to the amendments to the Act vide the Arbitration and Conciliation (Amendment) Act 2015 (Amendment Act). The Amendment Act provided that a "party to the arbitration agreement" as well as "any person claiming through and under" such a party to the arbitration agreement could apply to a court under s.8 of the Act for reference of disputes to arbitration.

Facts

Rishabh Enterprises (Rishabh Enterprises) entered into four agreements for the commissioning of a Photovoltaic Solar Plant in Dongri, Uttar Pradesh:

a contract to purchase power generating equipment (dated 1 February 2012) with M/s Juwi India Renewable Energies Pvt Ltd (Juwi India);

a contract for Engineering, Installation and Commissioning of the Plant (dated 5 March 2012) with Juwi India;

a contract for purchasing CIS Photovoltaic products (dated 5 March 2012) with Astonfield Renewable Pvt Ltd (Astonfield); and

a contract for leasing out the above-mentioned CIS Photovoltaic products (dated 14 March 2012) with M/s Dante Energy Pvt Ltd (Dante).

Notably, the first, second and fourth agreements had an arbitration clause, but the third agreement did not.

Subsequently, it was alleged by Rishabh Enterprises that it had been induced by Astonfield to purchase the products at an inflated value. Thereafter, a criminal complaint was filed alleging fraud, misrepresentation and

criminal breach of trust. The respondents (i.e. Rishabh Enterprises and its sole proprietor) filed a civil suit against the appellants, alleging fraud and misrepresentation, inter alia seeking a declaration that the agreements are vitiated by serious fraud by the appellants and were therefore void. Thereafter, on receipt of notice, the appellants pressed the court to refer the **Int. A.L.R. N-16* disputes to arbitration under s.8 of the Act. The respondents objected to such a reference, contending that there was (a) no agreement to arbitrate between the parties since the third agreement referred to above did not have an arbitration clause, and (b) an allegation of fraud and misrepresentation ought to be tried by the courts and not by an arbitral tribunal.

Held

Allowing the appeal, the Supreme Court held as below:

i. The parties to all four agreements are to be referred to arbitration

The Supreme Court examined the agreements and found that they were interconnected inasmuch as they were for the same project, i.e. the commissioning of the Photovoltaic Solar Plant project. After perusing 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 Enterprises and Astonfield did not contain an arbitration clause, it was integrally connected with the commissioning of the solar plant. Further, all the agreements contained clauses referring to the main agreement.

The Court referred to the "facts and intentions of the parties" and found that though there were different agreements, they were all for a single commercial project and any dispute arising therefrom could only be settled by referring all agreements together to arbitration.

The Amendment Act, in consonance with the recommendations of the 246th Law Commission Report, provides that a prima facie existence of an arbitration agreement would be sufficient to refer the parties to arbitration unless it is null and void.

ii. The allegations of fraud and misrepresentation are, in the facts and circumstances of the case, not sufficient to preclude the reference of parties to arbitration

The jurisprudence on whether matters involving fraud and misrepresentation could be arbitrated, has largely been settled by the Supreme Court. The Supreme Court has taken the view that cases alleging fraud and misrepresentation (in order to avoid a reference to arbitration) could be divided into two types—cases where there is a *mere allegation of fraud* and cases where there is a *serious allegation of fraud*.⁴ It has clarified that a mere allegation of fraud simpliciter would not nullify the effect of an arbitration agreement between the parties and an exception would only be made for serious allegations.⁵

The Supreme Court relied on these decisions and held that an allegation by the respondent, made as a rebuttable averment in the plaint, does not by itself absolve the parties of their obligation to execute their commercial understanding to have disputes adjudicated by an arbitrator. Reiterating its duty to "impart a sense of business efficacy" to the understanding between the parties, the Supreme Court held that as there was no serious allegations of fraud, the parties must be referred to the arbitrator. **Int. A.L.R. N-17*

Comments

In holding that, not just a party to the arbitration agreement but also persons claiming through and under him can now seek a reference to arbitration (assuming that a valid arbitration agreement exists), the Supreme Court appears to have placed this at par with the law in India as it exists for referring parties to foreign seated arbitrations. Thus, "persons claiming through and under" can be referred to arbitration if they are able to show the existence of a composite contract.

Accordingly, parties may now be referred to arbitration even if only the principal agreement contained an arbitration clause and ancillary agreements did not, even in domestic arbitrations. If the parties' intention is to 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. One may also specifically record within an agreement that disputes arising out of that agreement is not subject to arbitration agreement present in the connected agreements. However, this is likely to create issues in delineating disputes between different agreements, considering that the agreements are all for a connected purpose.

Lastly, while the Supreme Court has held that only cases involving serious allegations of fraud may not be arbitrable, it is likely that parties may often resort to such an argument to delay arbitrations, particularly considering that arguments of intentional misrepresentation may often be made in contractual disputes.

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Int. A.L.R. 2018, 21(4), N15-N17

1. "A judicial authority when seized of an action in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through and under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."
2. Chloro Controls India Private Ltd v Severn Trent Water Purification Inc (2013) 1 SCC 641.
3. 2018 SCCOnline SC 487.
4. N. Radhakrishnan v Maestro Engineers (2010) 1 SCC 72.
5. A. Ayyasamy v A. Pramasivam (2016) 10 SCC 386.

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