Collectively Labelled Shareholders Acting Individually Do Not Constitute An "Association Or Body Of Individuals" Under Section 2(1)(f)(iii) Of The Arbitration Act: Delhi High Court

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Introduction

In a recent judgment in *KTC India Pvt. Ltd. v. Randhir Brar*[1] the High Court of Delhi ("**High Court**") examined an important issue concerning the jurisdictional bounds of a Court acting under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The moot question was whether the proposed arbitration fell under the definition of "international commercial arbitration" as per Section 2(1)(f) of the Arbitration Act, in which case, an arbitral tribunal could only be appointed by the Chief Justice of India or their nominee. The case revolved around whether the respondents constituted an "association or body of individuals" under the Arbitration Act, or if the nationality and habitual residence of each respondent were the determining factors to decide the petition. This article delves into the decision of the High Court.

Brief Facts

The matter pertains to a petition ("**Petition**") filed under Section 11 of the Arbitration Act whereby the petitioner sought the appointment of an arbitrator to adjudicate disputes that purportedly arose between the parties under a Shareholders Agreement dated 20.07.2018 ("**Agreement**").

There are 15 parties to the Agreement wherein the petitioner is described as an "initial shareholder", and thirteen other individuals are collectively referred to as "subsequent shareholders". A company, namely Destinos India Gurus Private Limited ("**Destinos**"), is also a party to the Agreement but was not impleaded in the Petition. The Agreement was signed to reorganise the shareholding of Destinos so that the petitioner and the respondents hold shares in a ratio of 30:70, respectively.

A preliminary question that arose for the consideration of the High Court was whether the Petition is maintainable in view of the fact that one of the parties to the Agreement, *i.e.*, Respondent No. 5, was admittedly neither a national nor a habitual resident of India. Thus, the moot question in the matter was whether the proposed arbitration would constitute an "international commercial arbitration" within the meaning of Section 2(1)(f) of the Arbitration Act.

In terms of the provisions contained in Section 11(9) of the Arbitration Act, the power to appoint an arbitrator in international commercial arbitration, as defined under Section 2(1)(f), lies with the Chief Justice of India or their nominee.

As disputes arose amongst the parties, the petitioner addressed a letter dated 30.01.2023 to each of the thirteen respondents, invoking arbitration and proposing the name of a sole arbitrator. When the parties failed to agree and appoint an arbitrator mutually, the petitioner approached the High Court by way of the Petition.

[1] Arb. P. 286 of 2023. Delhi High Court neutral citation 2024:DHC:5306.

Arguments of the Parties

The petitioner argued that while it is not disputed that in the case of international commercial arbitration, the power to appoint an arbitrator under Section 11(9) vests with the Chief Justice of India or their nominee. However, the petitioner argued that the instant matter did not fall under the ambit of international commercial arbitration in terms of Section 2(1)(f) of the Arbitration Act.

The petitioner submitted that all the thirteen individuals described as "subsequent shareholders" in the Agreement had entered into a common enterprise to subscribe to the shares of Destinos. Thus, as per the petitioner, these thirteen individuals formed an "association or body of individuals" within the meaning of Section 2(1)(f)(iii) of the Arbitration Act. The petitioner also contended that the central management and control of this association or body of individuals is exercised in India, and the proposed arbitration, therefore, does not fall within the definition of international commercial arbitration. The petitioner placed reliance on the judgment in ***Larsen & Toubro SCOMI Engineering BHD v. Mumbai Metropolitan Region Development Authority***[2] to submit that where a group of individuals can be classified as an association or body of individuals, the question to be answered is whether the central management and control of the association or body of individuals rests in India. If so, the fact that one of the said individuals is a body corporate incorporated outside India, or an individual who is not a citizen or habitual resident of India, would not bring the said arbitration within the definition provided in Section 2(1)(f) of the Arbitration Act. In addition to the above, the petitioner cited several other decisions[3] to support his contentions.

The respondents, on the other hand, submitted that the thirteen individuals were each party to the Agreement in their individual capacity. There is no material on record to suggest that they formed a single association or body of individuals, thereby justifying the application of Section 2(1)(f)(iii) of the Arbitration Act.

The respondents argued that Section 2(1)(f)(i) of the Arbitration Act, which refers to the nationality or habitual residence of individuals, is squarely applicable to the present case. In relation to the decision in ***Larsen & Toubro (supra)***[4], the respondents argued that the contracting parties in that case were a consortium of an Indian company and a Malaysian company, wherein the Indian company was designated as the lead partner of the consortium. The consortium filed a petition under Section 11 of the Arbitration Act before the Supreme Court on the ground that one of the parties to the Agreement was a body corporate incorporated in Malaysia. Upon examining the underlying documents, the Supreme Court concluded that the consortium in that case was to be viewed as a single and the only contracting party, leaving its individual constituents without any locus to agitate the claims independently. In such circumstances, the Supreme Court held that the consortium was an unincorporated association, of which the Indian company was the lead partner and had the determining voice, *i.e.*, the central management and control of the

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[2] (2019) 2 SCC 271.

[3] *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760; *Amway (India) Enterprises (P) Ltd. v. Ravindranath Rao Sindhia*, (2021) 8 SCC 465, *SAIL v. Tata Projects Ltd.*, 2021 SCC OnLine Del 4170; *Meera and Co. v. CIT*, (1997) 4 SCC 677, *Ramanlal Bhailal Patel v. State of Gujarat*, (1997) 4 SCC 677; and *Mansarovar Commercial (P) Ltd. v. CIT*, 2023 SCC OnLine SC 386.

[4] (2019) 2 SCC 271.

consortium was exercised in India. The Supreme Court, therefore, dismissed the petition under Section 11 of the Arbitration Act in ***Larsen & Toubro (supra)***[5].

Similarly, the respondents referred to the decision in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***[6], wherein one of the contracting parties was a consortium comprising of a New York-based entity and an Indian entity. As disputes arose under the contract, the consortium approached the Supreme Court for the appointment of an arbitrator. The maintainability of the petition was contested on the ground that the proposed arbitration was not an international commercial arbitration at all. The Supreme Court allowed the petition, holding that the lead member of the consortium was a foreign entity and the requirements of Section 2(1)(f) of the Arbitration Act were therefore satisfied.

Decision of the High Court

Upon hearing both sides and examining the relevant judicial pronouncements, the High Court was of the view that the question of whether a particular group of individuals or entities fall within the scope of an association or body of individuals is dependent upon the specific facts and circumstances of the case.

In the present case, on examining the terms of the Agreement, the High Court was of the view that the respondents could not be held to constitute an association or a body of individuals so as to fall within Section 2(1)(f)(iii) of the Arbitration Act.

As such, the High Court observed that the Agreement contained no indication other than a collective reference to the thirteen individuals (the respondents herein) as "subsequent shareholders". The High Court observed that it is not the case that the thirteen individuals in the present matter formed a consortium or a partnership of any sort. These thirteen individuals were listed separately in the Agreement, and their individual addresses were also stated.

In fact, the High Court observed that the Agreement itself provided that the group of these thirteen individuals was referred to as "subsequent shareholders" only for convenience, and the same did not diminish their status as independent and individual contracting parties. Similarly, the High Court noted that some of the clauses in the Agreement also indicated that the individual constituents of the group of shareholders could take independent decisions under the Agreement. Each of the aforesaid shareholders was to subscribe to a defined quantity of shares, had the right to exit the company individually on the conditions set forth in the Agreement, and was subject to individual rights and obligations. The status of these individuals with regard to voting rights also varied. Lastly, the Agreement specifically required notices to be issued to each of the individual parties (as was done in the instant matter).

Consequently, the High Court was of the view that the subsequent shareholders in the Agreement did not constitute a single entity, so as to attract the applicability of Section 2(1)(f)(iii) of the Arbitration Act. The High Court concluded that the inevitable consequence of the above finding was that since Respondent No. 5 was a foreign national, the proposed arbitration would fall under the definition of international commercial arbitration within the meaning of Section 2(1)(f)(i) of the Arbitration Act. Therefore, the High Court had no

[5] (2019) 2 SCC 271.
[6] (2020) 20 SCC 760.

jurisdiction to entertain the instant petition. The Petition was dismissed, leaving the petitioner with the liberty to take the remedies available in law.

Comment

The High Court correctly determined that merely labelling parties collectively in an agreement does not suffice to classify them as an association or body of individuals. Instead, a comprehensive review of the agreement's terms and the roles of the parties is essential. Given that one of the respondents - a foreign national was clearly acting in an individual capacity, the power to appoint an arbitral tribunal fell under the jurisdiction of the Chief Justice of India or their nominee.

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