

Non-Signatories To Arbitration Agreement Beyond The Group Companies Can Also Be Included In The Arbitration Based On Contractual Links: Delhi High Court

Authors: *Vasanth Rajasekaran and Harshvardhan Korada*

Introduction

In a recent decision, in ***RBCL Piletech Infra v. Bholasingh Jaiprakash Construction Limited***¹ the High Court of Delhi ("**High Court**") decided a petition ("**Petition**") under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). By way of the Petition, the petitioner sought the initiation of arbitral proceedings against two entities that were neither signatory to the arbitral agreement nor group companies of the signatory company. This article delves into the facts of the matter, and findings of the High Court.

Brief Facts

The disputes, as per the petitioner, arose in the context of a work order dated 4 April 2022 ("**Work Order**"). The second respondent, National Thermal Power Corporation ("**NTPC**"), is the owner of a site where certain project works were being undertaken by Bharat Heavy Electrical Ltd. ("**BHEL**"). BHEL, in turn, sub-contracted part of the works to the first respondent ("**BJCL**"). BJCL ultimately sub-contracted a portion of its works to the petitioner.

Before the High Court, the petitioner claimed that it incurred idling charges, damages, and other costs which, according to it, should be compensated by the respondents (*i.e.*, BJCL, BHEL, and NTPC). In this regard, the petitioner addressed a notice ("**Arbitration Notice**") under Section 21 of the Arbitration Act invoking arbitration to the respondents on 15 July 2023. By way of the Arbitration Notice, the respondents were called upon to appoint a sole arbitrator to arbitrate on the disputes. The Arbitration Notice came to be opposed by BJCL and BHEL, though NTPC did not issue a response to the same. It is in this background that the petitioner approached the High Court with the Petition.

The relevant clauses of the Work Order are culled out below:

"12. Water for construction shall be tapped from NTPC water supply as located by NTPC. Water meter shall be installed and charges of water shall be paid by M/s RBCL Piletech Infra.

...

21. Payment shall be released within 3 days of receipt of payment from BHEL for the portion /scope of works carried out by you and the quantities accepted /certified and paid by BHEL to BJCL, for your portion /scope of work. The payment shall be released to you after carrying out all deductions as per the work order/ contract conditions.

...

28. Any amount put on hold/retained by BHEL due to any reason attributable to M/s RBCL Piletech Infra shall also be held back / retained back by BJCL. This held back amount shall be released M/ s RBCL Piletech Infra after the release of the same from BHEL to BJCL.

...

¹ Arb. P. 1108 of 2024. Delhi High Court neutral citation: 2024:DHC:5415.

33. All other terms and conditions mentioned in the contract between BJCL and BHEL for the entire work shall be applicable to M/s RBCL Piletech Infra. Technical specification, the technical condition of the contract, GCC and SCC, and other documents as per the signed agreement between BJCL and BHEL shall form an integral part of this work order."

Clause 36 of the Work Order envisaged the resolution of disputes by arbitration by a sole arbitrator, to be appointed by mutual consent of parties at dispute.

BJCL agreed that some disputes existed between the petitioner and BJCL. However, BHEL, and NTPC opposed their inclusion in the arbitration, arguing they had no direct contractual relationship (privity of contract) with the petitioner and that the Work Order was strictly bilateral between the petitioner and BJCL.

The moot question in the matter was whether the High Court would be justified in including BHEL and NTPC in the proposed arbitral proceedings.

The petitioner placed reliance on Clauses 21, 28, and 33 of the Work Order to justify the inclusion of BHEL in the arbitral proceedings. Further, the petitioner also placed reliance on the decision in **Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.**² to argue that a non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Courts will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction.

Besides all this, the Courts would have to examine whether a composite reference from such parties would serve the ends of justice. Once this exercise is completed and a Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the above exception.

Decision of the High Court

The High Court observed that the issue of when a third-party non-signatory to an arbitration agreement can be included in the arbitral proceedings is fairly settled. One of the circumstances in which a non-signatory can be included in an arbitral proceeding is where the said non-signatory and one of the signatories to the arbitration agreement are part of one "group of companies".³ However, the High Court observed that the group of companies doctrine had no role to play in the present matter as it was nobody's case that BHEL, or NTPC, and BJCL are part of one group of companies.

Another set of circumstances where a non-signatory of an arbitration agreement may be impleaded in an arbitration is when the non-signatory was a party to an inter-connected agreement, executed to achieve a common goal. In this regard, the High Court placed reliance on the decision in **Ameet Lalchand Shah v. Rishabh Enterprises**.⁴

Equally, the High Court observed that one of the circumstances that would justify the inclusion of a non-signatory to an arbitration agreement in arbitral proceedings is a

² (2013) 1 SCC 641.

³ *Cox and Kings v. SAP India Pvt. Ltd.*, (2024) 4 SCC 1.

⁴ (2018) 15 SCC 678.

contractual relationship, which also makes a non-signatory responsible to a certain extent for the obligations towards the claimant.

The High Court then referred to the decision in ***O.N.G.C. v. Discovery Enterprises Pvt. Ltd.***⁵ to reiterate the Supreme Court's observations that "*a non-signatory may be bound by the operation of the group of companies doctrine as well as by the operation of the principles of assignment, agency and succession*".

The High Court referred to the following relevant clauses to gather the true import of the Work Order:

- (i) Clause 21: It mandates that BJCL releases payments to the petitioner within three days of receiving payments from BHEL for the works accepted and certified by BHEL. This essentially ties the petitioner's payment to BHEL's certification and subsequent payment to BJCL. The clause implies the petitioner's direct financial dependency on BHEL's approval and payment processes.
- (ii) Clause 28: This clause further states that BJCL is indemnified from releasing payments to the petitioner for any amount that BHEL holds or retains due to reasons attributable to the petitioner. This clause emphasises BHEL's control and influence over the financial transactions between BJCL and the petitioner, thus indicating BHEL's supervisory role over the petitioner's work.

Based on the review of Clauses 21 and 28 of the Work Order, the High Court held that there existed a *prima facie* case for including BHEL in the arbitral proceedings. The clauses together showed that without BHEL's approval and payment, BJCL could not make payments to the petitioner. This interdependency, as per the High Court, justified BHEL's involvement in arbitration to address any disputes concerning payment and certification of work.

The High Court, however, clarified that its observations are not meant to affirm the petitioner's right to any specific payment or BHEL's right to withhold payments. Instead, these observations are intended to highlight the significant role BHEL played in the petitioner's payment process as per the contractual terms.

Given the contractual conditions, the High Court opined that the petitioner's decision to include BHEL in the arbitration was justified. However, the High Court left room for BHEL to contest its involvement at a later stage before the arbitral tribunal.

As regards the inclusion of NTPC in the arbitral proceedings, the High Court noted that the petitioner candidly acknowledged that NTPC does not have a direct contractual responsibility towards the petitioner, except for a specific clause (Clause 12) regarding the supply of tap water for construction. The petitioner also argued that NTPC's role in issuing gate passes, which enabled the petitioner to access the project site and perform the contracted work, is significant.

The High Court examined the arguments and evidence presented and concluded that the petitioner failed to sufficiently establish a contractual basis to include NTPC in the proposed

⁵ (2022) 8 SCC 42.

arbitral proceedings. The High Court emphasised that there is no direct contractual obligation between NTPC and the petitioner that would justify NTPC's inclusion in arbitration at this stage. Accordingly, the High Court disposed of the Petition permitting the parties to contest their inclusion/ non-inclusion as parties in the arbitration before the arbitral tribunal.

Comment

The High Court's decision brings back the focus on a critical aspect of arbitration, *i.e.*, the precise delineation of roles and responsibilities of the parties named in a contract. The decision reaffirms that under Indian arbitration law, a clear contractual nexus to the arbitration agreement or a significant role in the underlying transaction must be demonstrated for a non-signatory third party to be included in the arbitral proceedings. A careful drafting of construction contracts involving multiple tiers of vendors is thus essential to avoid unwarranted complications and ensure that only those directly bound by the arbitration agreement are subjected to arbitral proceedings.

Contact

For any query, help or assistance, please reach out at info@trinitychambers.in or visit us at www.trinitychambers.in.

Authors

	
Vasanth Rajasekaran Founder & Head vasanth@trinitychambers.in	Harshvardhan Korada Counsel harshvardhan@trinitychambers.in