Dlf Limited vs Pnb Housing Finance Limited & Ors. on 22 March, 2024

Author: Sachin Datta

Bench: Sachin Datta

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
Pronounced on:
+ ARB.P. 1190/2023

DLF LIMITED
Through: Mr. Rajiv Nayar, Sr. Adv., Mr
Wadhwa, Sr. Adv. along with M
Singh Ahuja, Mr. Pravin Bahad
Gaur, Mr. Jappan Preet Hora,
Ms. M. Das Gupta and Ms. Manj

versus

PNB HOUSING FINANCE LIMITED & ORS. ..... Resp
Through: Mr. Akhil Sibal, Sr, Adv. along with
Shalaka Patil, Ms. Paulomi Mehta, Ms.
Srishti Khare, Mr. Kartikeya Jha, Mr.
Titina and Ms. Bahuli Sharma, Advs.
Mr. Arunabh Chaudhary, Sr. Adv. along
with Mr. Ashish Kr. Singh, Ms. Palak
Tyagi, Ms. Muskan Malhotra, Mr. Amit
Singh, Mr. Rishabh Sharma and Mr. Rit
Bhardwaj, Advs. for PNBHFL.
Mr. Parag Tripathi, Sr. Adv. and Mr.
Krishnan, Sr. Adv. along with Mr. Vij
Nair, Mr. Rajat Joneja, Mr. Arpit Dwi
Ms. Sakshi Kapoor, Mr. Anmol Kumar an
Ms. Vasundhara and Ms. Amshi Mishra
Advs. for Omkara.
Mr. Saurabh Kirpal, Sr. Adv. along wi
Nishit D. and Mr. Yash, Advs. for JHL
Mr. Arun Kathpalia, Sr. Adv. and Mr.
Seksariya, Sr. Adv alongwith Mr. Saji
Suvarma, Mr. Nirau Shah, Ms. Aneesha
Cheema, Ms. Shivani Khanwilkar, Mr.
Varun Kalra, Mr. Nikunj Mahajan, and

Rohit Aggarwal Advs. for Hubtow
Mr. Sandeep Sethi, Sr. Adv. alon
Kanika Agnihotri, Mr. Jasmeet Si
Mahinder Singh Hura, Mr.Divjot S
Bhatia, Mr. Saif Ali, Mr. Pushpe
Bhadoriya Ms. Rusheet Saluja, Ms
Mhatre, Mr. Amit Mishra, Mr. Sum
Seth, Ms. Shreya Sethi and Ms. R
Kumar, Advs. for Chinsha.
Mr. Harin P. Raval, Sr. Adv alon
Karan Bharihoke and Mr. Siddhant
and Ms. Shreshtha, Advs. for Twe
South.
Mr. Nakul Dewan, Sr. Adv. along
Aditya Dewan and Mr. Parth Tiwar
for Akruti.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition has been filed by DLF Limited ("DLF" / "petitioner") seeking appointment of a sole arbitrator to adjudicate the disputes between itself and PNB Housing Finance Limited ("PNBHFL" / "respondent no.1"), Omkara Asset Reconstruction Company Limited ("Omkara" / "respondent no.2"), Joyous Housing Limited, ("JHL / "respondent no.3"), Hubtown Limited ("Hubtown" / "respondent no.4"), Chinsha Property Private Limited ("Chinsha / "respondent no.5"), Twenty Five South Realty Limited ("Twenty-Five South" / "respondent no.6") and Akruti Nirman Private Limited ("Akruti / "respondent no.7"). Factual Background

2. DLF alongwith Hubtown and Chinsha have been shareholders in JHL, in the ratio of 37.5% (DLF Ltd.), 37.5% (Chinsha) and 25% (Hubtown). DLF had purchased 37.5% shareholding in JHL vide Memorandum of Understanding dated 15.04.2004.

3. In 2017, JHL had availed a loan of Rs.800 Crores from PNBHFL under a Loan Agreement-cum-Mortgage Deed dated 20.12.2017, later modified vide Supplementary Loan Agreement dated 27.08.2020, for cluster development project/ slum rehabilitation project at Mahalaxmi Racecourse, Tulsiwadi, Mumbai. The said loan was secured by way of a mortgage created in favour of PNBHFL. In addition to the said mortgage, the entire shareholding of JHL was pledged to PNBHFL as additional security. For the said purpose, a Share Pledge Agreement dated 26.12.2017 ("SPA") was executed by the shareholders of JHL i.e., the DLF, Chinsha, Hubtown in favour of PNBHFL. The said SPA contains an arbitration clause as under:

> "17.11 Any and all disputes, claims, difference arising out of or in connection with this Agreement and the Schedule(s) of Term/Repayment Schedule/s attached hereto or the performance of this Agreement shall be settled by arbitration to be referred to a

> sole arbitrator to be appointed by the Lender and the award thereupon shall be binding upon the parties to this Agreement. The place of arbitration shall be in Delhi or any other place as Arbitrator may decide, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory amendments thereof. The proceeding of Arbitration Tribunal shall be conducted in English language. Each party shall bear cost of representing its case before the Arbitrator. Costs and charges of arbitrator to be shared equally unless/otherwise provided for in the award."

4. JHL failed to honour its payment obligations under the loan agreement and was declared as an NPA on 04.01.2022. To recover the loan amount, PNBHFL had initially sought to auction the secured assets and for the said purpose it had taken recourse to mechanism under the SARFAESI Act, 2002; however, to no avail.

5. A Memorandum of Understanding (MOU) dated 27.10.2022 (placed on record by Omkara) was executed between DLF Home Developers Ltd., a subsidiary of DLF and PNBHFL, to purchase the entire shareholding of JHL against complete discharge of dues of PNBHFL.

6. PNBHFL had also issued a default notice dated 02.11.2022 read with letter dated 08.11.2022, in terms of the SPA, whereby PNBHFL sought reconstitution of JHL board and further indicated its intention to invoke the pledge and sell the pledged shares at enterprise value. Vide the said notice, PNBHFL further offered/invited offers from existing shareholders of JHL to purchase 100% pledged shares of JHL, with a reserve price of Rs. 1075 crores.

7. DLF, in response to PNBHFL default notice vide its letter dated 10.11.2022 offered an amount of Rs. 1450 crores for "100% of the legal ownership of the pledged shares and 100% of the control of JHL".

8. Thereafter, for removal of the nominee directors of existing shareholders of JHL and replacing them with the nominee directors of PNBHFL an Extra-ordinary General Meeting ("EGM") was held on 09.03.2023 and a resolution was passed appointing directors nominated by PNBHFL.

9. Consequent to the decisions passed at the aforesaid EGM, Hubtown filed a company petition no. CP/85(MB)2023 in NCLT, Mumbai, under Sections 241 and 242 of the Companies Act, 2013 alleging oppression and mismanagement. In the said petition, vide order dated 14.03.2023 a status quo order to the extent of resolutions passed in the alleged gathering held on 09.03.2023, was passed. PNBHFL was not made a party in the said company petition. The said order was challenged in NCLAT by PNBHFL however, the status quo order was not interfered with and liberty was granted to PNBHFL to approach the NCLT.

10. On 01.08.2023, Omkara submitted its offer to PNBHFL for assignment of the JHL's NPA loan to it.

11. On 03.08.2023, DLF Homes Developers Ltd and PNBHFL mutually terminated the MOU dated 27.10.2022.

12. Thereafter, PNBHFL vide letter dated 05.08.2023 notified JHL and its shareholders that PNBHFL has invited bids for assignment of debt through 'Swiss Challenge Process'. Vide the said letter, PNBHFL simultaneously invoked the pledge in terms of Clause 9 of the SPA. Both DLF and Chinsha objected to the said letter dated 05.08.2023.

13. PNBHFL went ahead with the auction pursuant to its public notice dated 05.08.2023 and assigned its debt alongwith all underlying security interests, pledges and guarantees to Omkara vide assignment deed dated 18.08.2023. Consequently, the SPA also came to be assigned in favour of Omkara.

14. On 22.08.2023, Omkara sent a letter to the shareholders of JHL stating that it had executed the aforesaid assignment deed. Subsequently, DLF and Chinsha, vide various letters, objected to the manner in which assignment process was concluded and further purported to highlight anomalies in the transaction between PNBHFL and Omkara. DLF also reiterated its willingness to complete the purchase of the entire shareholding of JHL for an amount of Rs 1450 crore, in terms of its letter dated 10.11.2022. It was also stated by the DLF and Chinsha that any transfer of pledged shares to a third party would be illegal, and that a joint and several liability would devolve on both the PNBHFL and Omkara.

15. On 06.09.2023, Omkara informed DLF and Chinsha that the 75% of the pledged shares (i.e. shares of DLF and Chinsha) have been sold towards realizing the outstanding dues of the JHL, without disclosing the party to whom the shares have been sold. As no further amount remained due to be recovered and payable, JHL was released from its liability including release of securities that were created in respect of the loan account. Notably, 25% of the pledged shares (i.e. shares of Hubtown) were not sold purportedly because the said shares were in physical form and blank transfer deeds for the same were not furnished by Hubtown.

16. Thereafter, petitions under Section 9 of the A&C Act came to be filed by DLF and Chinsha seeking certain interim orders. In the said petitions, vide common order dated 18.09.2023, it was inter alia directed as under:

> "42. Prayer (b) is inchoate in view of Prayer (a) since the identity of the transferee is not known yet, in view of which, no order can be passed against the unknown transferees. However, it would be appropriate if pledged shares sold to a third party by Omkara are kept in a suspended animation by directing JHL not to recognise further sale, if any, undertaken by Omkara transferees. If any request is received by JHL by further transferees the same shall not be acted upon by JHL and further transferees shall not be recorded as members (shareholders) in the record of JHL.
>
> 43. Omkara is further directed to disclose the identity of the transferees to the petitioners, to whom it has sold the pledged shares, within a period of 7 days for the petitioners to take remedies that are available to them in law, against such transferees...."

17. The said order was assailed by PNBHFL, Omkara and Twenty-Five South before a Division Bench of this Court. After the judgement in the present petition was reserved, the said appeals were disposed of vide order dated 11.01.2024 passed in FAO(OS)(COMM) 218/2023 & Ors., as under:

> "17. Accordingly, the above-captioned appeals are disposed of with the following directions:
>
> (i) The impugned judgment is set aside. The learned Single Judge is requested to rehear the Section 9 petitions.
>
> (ii) Twenty Five South will continue to retain 75% equity stake in JHL till the disposal of the Section 9 petitions.
>
> (iii) Since Mr Kirpal says that the optionally-convertible debentures have an unexpired timespan of six (6) months, and therefore, the shareholding pattern would remain unaltered for the next six (6) months, we request the learned Single Judge to dispose of the Section 9 petitions at the earliest, bearing in mind the limiting factor flagged by Mr Kirpal.
>
> (iv) Twenty Five South and JHL will file affidavits of undertaking before this Court, in the backdrop of the statement made before us by Mr Raval and Mr Kirpal.
>
> (v) Liberty is given to DLF and Chinsha Property to move appropriate applications before the learned Single Judge to secure their interest vis-à-

vis Hubtown, as deemed fit."

18. In the meanwhile, vide order dated 13.09.2023, the company petition filed by Hubtown in NCLT was unconditionally withdrawn. On the same date, an EGM was held by JHL wherein its authorised share capital was increased from Rs.1,50,00,000/- (1,50,000 shares) to Rs.51,50,00,000/- (51,50,000 shares).

19. Vide letter dated, 22.09.2023, DLF invoked the arbitration clause contained in the SPA.

20. Pursuant to contempt petition being filed by the DLF alleging contempt of the order dated 18.09.2023 passed by this court, vide letter dated 03.10.2023, Omkara disclosed that the pledged shares have been sold to Twenty-Five South.

21. Furthermore, vide board resolution dated 03.10.2023, JHL approved issuance of preferential allotment on private placement basis of 40,00,000 equity shares having face value of Rs. 100/-, aggregating to Rs.40,00,00,000/- to Akruti. Vide a separate board resolution of the same date, JHL also approved allotment of 200 optionally convertible debentures at face value Rs. 1 crore each to Akruti for a consideration of Rs. 200 crores.

22. Vide letter dated 09.10.2023, Chinsha has invoked the arbitration clause contained in the SPA. A petition [Arb. P. 1191/2023] under Section 11 of the A&C Act also came to be filed by Chinsha, which was heard alongside the present petition, however, the said petition was later withdrawn by Chinsha.

Disputes between the parties

23. The disputes sought to be raised by DLF inter alia include:

a. The legal effect of the DLF's acceptance dated 10.11.2022 of the proposal made by PNBHFL vide letter dated 02.11.2022 read with letter dated 08.11.2022, to sell 100% shares of JHL, at an enterprise value (reserve price) of over Rs. 1075 Crores.

b. The legal effect of PNBHFL proceeding to invoke the pledge and simultaneously seeking to assign the debt without responding to or repudiating DLF's aforesaid acceptance of the proposal of PNBHFL.

c. Legal validity of Omkara's sale of only 75% of the pledged shares belonging to DLF and Chinsha, despite being made expressly aware of DLF's acceptance to purchase 100% of the shares of JHL at a price of Rs.1450 Crores, well above the outstanding debt of PNBHFL/Omkara.

d. Collusion between PNBHFL, Omkara, Hubtown, Twenty-Five South, and Akruti to defeat the rights of the DLF.

e. Declarations, injunctions, losses, damages to which DLF is entitled to.

Submissions of the Parties

24. Learned senior counsel for DLF has submitted that the arbitration clause within the SPA is drafted in expansive terms to encompass the disputes, claims, and differences "arising out of", "in connection with", or "in the performance of'" the agreement (SPA). It is submitted, this clause is not restricted solely to the parties directly involved in the SPA but extends to non-signatories, beneficiaries, and third parties as well. Moreover, the definition of "Parties" within the SPA includes the assignees and successors of each party. It is argued that even a cursory examination of the default notice dated 02.11.2022 reveals that all disputes sought to be referred to arbitration are directly related to the SPA. The offer for the purchase of shares of JHL was evidently made under the SPA, and DLF was the only shareholder to accept PNBHFL's offer by its letter dated 10.11.2022, within the specified timeframe outlined in the default notice. It is contended that the assignment of the SPA to Omkara was executed unlawfully by PNBHFL as part of a collusive scheme, as evidenced by subsequent events. Furthermore, it is alleged that Omkara illegally sold DLF's shares to an entity closely associated with Hubtown, namely, Twenty-Five South, thereby illicitly transferring control of JHL to Hubtown. Subsequently, Hubtown increased the share capital of JHL, diluting DLF's 37.5% shareholding to a mere 1%. Additionally, it is argued that the recipient of the fresh share capital,

namely Akruti, is also closely associated with Hubtown. It is contended that these parties, acting as a single economic entity, collusively manipulated the shareholding and control of JHL, thereby undermining DLF's rights derived from the SPA. Moreover, it is asserted that Twenty-Five South and Akruti are bound by the arbitration agreement as they are an 'alter ego' of Hubtown. It is also asserted that Twenty-Five South, as the successor to the shares and a direct beneficiary of the illegal actions of PNBHFL, Omkara, and Hubtown, is bound by the arbitration clause. Similarly, Akruti, as the ultimate beneficiary of the illegal actions of PNBHFL, Omkara, and Hubtown, is also bound by the arbitration clause. Furthermore, it is emphasized that there is no specific denial of the allegations regarding the interconnection between Hubtown, Twenty-Five South, and Akruti in the replies filed by the said parties. It is argued that DLF is neither a party to the MOU dated 27.10.2022 nor is not aggrieved by it. Therefore, any reliance placed on this MOU by Omkara is misplaced. It is again asserted that the offer to purchase JHL's shares was made in accordance with the provisions of the SPA. It is emphasized that the jurisdiction of the referral court is extremely limited. Once the existence of an arbitration clause is prima facie established, all issues and contentions raised by the parties are to be deferred for determination by the arbitral tribunal. Furthermore, it is argued that the inclusion of non-signatories in arbitration proceedings is contingent upon specific facts and can be justified under various legal theories and doctrines. It is emphasized that the Supreme Court has explicitly stated that the referral court should refrain from deciding whether a non-signatory is indeed a party to the arbitration agreement and should instead leave this determination to the arbitral tribunal. In support of these submissions reliance has been placed on Renusagar Power Co. Ltd. v. General Electric Co.1, Black Law's Dictionary, National Insurance Co. Ltd. v. BogharaPolyfab (P) Ltd. 2 , (1984) 4 SCC 679, (2009) 1 SCC 267 Vidya Drolia v. Durga Trading Corpn. 3 , Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re4, Cox & Kings Ltd. v. SAP India (P) Ltd. 5, Gaurav Dhanuka v. Surya Maintenance Agency (P) Ltd. 6, and Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd.7

25. Learned senior counsel for Chinsha supported the case of DLF during arguments. He also submitted in favour of referring the parties to arbitration in the Section 11 petition filed by Chinsha. However, after judgement was reserved in the present matter an application 8 came to be filed by Chinsha seeking unconditional withdrawal of its Section 11 petition. Vide order dated 11.03.2024 passed in ARB.P. 1191/2023 the said application was allowed. Consequently, ARB.P. 1191/2023 was dismissed as withdrawn.

26. Learned senior counsel for PNBHFL disputes that any "offer" was made by PNBHFL to the shareholders of JHL; consequently there could have been no "acceptance" by DLF, resulting in any concluded contract with DLF for sale of 100% of JHL's shareholding to it. It is submitted that, in any case, disputes are not arbitrable inasmuch as they are not relatable to any dispute arising out of or in connection with the SPA and rather relates to a new purported contract, independent thereof. It is also submitted that assignment comes under the scheme of SARFAESI Act and RBI Master Directions, 2021 and any purported violation thereof is non-arbitrable. It is submitted that allegations of collusion are bare, speculative allegations. It is (2021) 2 SCC 1 2023 SCC OnLine SC 1666 : 2023 INSC 1066 2023 SCC OnLine SC 1634 : 2023 INSC 1051 2023 SCC OnLine Del 2178 : (2023) 303 DLT 41 2021 SCC OnLine Del 3688 : (2021) 281 DLT 246 I.A.5323/2024 in ARB.P. 1191/2023 also submitted that the submission of DLF to the effect that the assignment of debt to

Omkara was an undervalued transaction, is factually incorrect. Furthermore, it is submitted that, both under the terms of the SPA as well as in terms of provisions of SARFAESI Act and RBI Master Directions, upon assignment of JHL's debt to Omkara, PNBHFL is no longer a party either to the SPA or the arbitration agreement contained therein. Therefore, on the date of the invocation no arbitration agreement existed between PNBHFL and DLF. It is submitted that both assignor and assignee cannot co-exist as parties in the proposed arbitration since an assignee becomes successor to the signatory party's interests under the arbitration agreement and derives a derivative right to arbitrate and not an independent right to arbitrate. It is submitted that all claims therefore, whatever be their merits, are to be pursued against the assignee, post the assignment. In support of these submissions reliance has been placed on Cox & Kings (supra), Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re (supra), R.N. Gosain v. Yashpal Dhir, 9 Union of India v. N. Murugesan and Ors. 10 , Gurmeet Singh v. Essel Finance Business Loans Ltd. and Ors. 11 , BXH v. BXI 12 , and Montedipe S.p.A and Anr. v. JTP-RO Jugotanker (The "Jordan Nikolov")13.

27. Learned senior counsel for Omkara has submitted that DLF has concealed the MOU dated 27.10.2022 executed between the subsidiary of DLF and PNBHFL, which incorporated an alleged understanding to (1992) 4 SCC 683 (2022) 2 SCC 25 2020 SCC Online Bom 6369 [2020] SGCA 28 [1990] 2 Lloyd's Rep 11 purchase the shareholding of the JHL by the subsidiary of DLF. It is submitted that disputes, if any, that have arisen between DLF and PNBHFL are under the letters dated 02.11.2022 and 10.11.2022, which letters, it is submitted, have been issued in pursuance of the MOU dated 27.10.2022. It is submitted that DLF have failed to disclose any provision of the SPA that has been breached / violated by PNBHFL or Omkara, and it is ex facie clear that no disputes have arisen under the SPA. It is submitted that DLF and Chinsha despite having received the notice of invocation of pledge dated 05.08.2023, did not come forward to redeem the pledged shares by offering to pay the entire loan amount and therefore, there cannot be any arbitrable dispute under the SPA. Furthermore, it is submitted that bare allegations have been made regarding collusion between the PNBHFL, Omkara and Hubtown. DLF/Chinsha, it is submitted, cannot challenge the assignment deed, and thus the aspect of collusion does not arise. It is further submitted that there was no impropriety in selling 75% of the pledged shares of DLF and Chinsha, resulting in the discharge of the outstanding dues of Omkara. It is submitted that it is the sole prerogative of the secured creditor to elect to sell secured assets. Further, financial institutions can only exercise security interest over assets that lead to the satisfaction of its debt and cannot, in law, seek to enforce security interest exceeding the debt amount. It is also submitted that 25% of the pledged shares of Hubtown were not sold since the same were in physical form and blank transfer deeds for the same were not furnished by Hubtown. It is further submitted that the submission of DLF to the effect that the sale of pledged shares by Omkarra was an undervalued transaction is factually incorrect. It is also submitted that claims even if maintainable would be subject to exclusive jurisdiction of courts at Delhi as per Clause 17.12 of SPA. In support of these submissions reliance has been placed on Sidha Neelkanth Paper Industries (P) Ltd. v. RBI14, Ravi Development v. Shree Krishna Prathistha 15 , PTC India Financial Services Ltd. v. Venkateswarlu Kari and Anr.16, Magic Eye Developers (P) Ltd. v. Green Edge Infrastructure (P) Ltd. 17 and Cox and Kings (supra).

28. Learned senior counsel for JHL has submitted that JHL is in no manner concerned with the disputes raised by DLF in present Section 11 petition. It is submitted that no allegation has been made against JHL in the present petition, and no dispute arises between JHL either with DLF or Chinsha which is required to be referred to arbitration. It is submitted that JHL was merely a confirming party to the SPA and had neither any right nor any obligation under the said agreement. It is submitted that disputes if any between JHL and DLF/Chinsha would arise under the Memorandum of Understanding and Shareholders Agreement both dated 15.04.2004, in respect of which DLF has already invoked arbitration. It is further submitted that under the SPA, DLF could have only redeemed its 37.5% pledged shares by paying the outstanding dues under the loan account. The SPA does not, and could not have contemplated a sale / purchase of shareholding of JHL and therefore the allegation of breach of alleged contract arrived at between PNBHFL and DLF under letters dated 02.11.2022 and 10.11.1022, does not result in any dispute under the SPA.

29. Learned senior counsel for Hubtown has submitted that even when an 2018 SCC OnLine Del 13502 (2009) 7 SCC 462 (2022) 9 SCC 704 (2023) 8 SCC 50 arbitration agreement exists, it does not prevent the court from declining a prayer for reference if the dispute in question does not correlate to the agreement. It is submitted that disputes that are sought to be referred to arbitration do not in any manner arise out of any defined legal relationship between DLF on the one hand and Hubtown, JHL, Chinsha, Twenty-Five South, Akruti on the other hand. The disputes are at best only between DLF and PNB / Omkara. It is further submitted that no live disputes remain which can be subjected to arbitration under the SPA. It is further submitted that Clause 17.11 i.e., the arbitration clause has to be read along with Clause 17.12 of the SPA, which, it is submitted, is a proviso and/or an exception to Clause 17.11. It is submitted that all claims, differences and disputes, arising out of or in relation to dealings / transactions made pursuant to SPA are subject to the exclusive jurisdiction of the Courts at Delhi, and the remedy of arbitration is consequently not available. It is further submitted that the reason why pledged shares of Hubtown were not sold by Omkara was that at the time of execution of SPA, only the physical share certificates were provided by Hubtown without execution of any transfer forms. It is submitted that the shares of DLF and Chinsha were sold since the same were in dematerialized form and were thus available for sale. In support of these submissions reliance has been placed on Vidya Drolia (supra), DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd.18, Emaar India Ltd. v. Tarun Aggarwal Projects LLP 19, Cox & Kings (supra), ICICI Bank Limited v. Official Liquidator of APS Star Industries and Ors. 20, Damodar Valley (2021) 16 SCC 743 2022 SCC OnLine SC 1328 (2010) 10 SCC 1 Corporation v. K.K. Kar 21 , PTC India (supra), Sri Raja Kakarklhpudi Venkata Sudarsana Sundara Narasayamma Garu v. Andhra Bank Ltd. Vijayawada 22 , Celir LLP v. Bafna Motors (Mumbai) and Ors. 23 , Jai Kumar Arya & Ors. v. Chhaya Devi &Anr. 24, Invesco Developing Markets Fund v. Zee Entertainment Enterprises Limited and Anr. 25 , Umesh Cimechel Consortium v. IIC Limited and Anr.26, NN Global Mercantile Pvt. Ltd.v. Indo Unique Flame Limited and Ors.27, and Jaswantrai Manilal Akhaney v. State of Bombay. 28

30. Learned senior counsel for the Twenty-Five South has submitted that there exists no legal relationship or agreement between Twenty-Five South and DLF/Chinsha, and consequently, there is no arbitration agreement between them. It is contended that Twenty-Five South's acquisition of 75% shares of JHL from Omkara stands as an independent transaction entirely separate and unrelated to

the SPA. Additionally, it is asserted that DLF/Chinsha's right to redeem pledged shares is extinguished upon the actual sale. It is asserted that the criteria set forth by the Supreme Court to bind non-signatories to an arbitration agreement are not fulfilled in this case, as Twenty-Five South was not envisioned as a party to the arbitration agreement when SPA was executed. Furthermore, Twenty-Five South was not involved in the original negotiations, execution, or termination of the SPA, nor did it express any consent to be bound by the arbitration agreement (1974) 1 SCC 141 1959 SCC OnLine AP 114 2023 SCC Online SC 1209 2017 SCC OnLine Del 11436 2022 SCC OnLine Bom 630 2022 SCC Online Del 4128 2023 7 SCC 1 1956 SCC OnLine SC 46 at the time of entering into the SPA. It is further submitted that the assertion made by DLF/Chinsha regarding the interconnectedness of Hubtown, Twenty-Five South, and Akruti, and their portrayal as a single economic entity, is entirely baseless and misconceived. In support of these submissions reliance has been placed on PTC India (supra), Amit Jain v. Canara Bank 29 , Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re (supra) and Cox & Kings (supra).

31. Learned senior counsel for the Akruti has submitted that Akruti is a non-signatory which has no connection with the SPA. It is argued that DLF has failed to present any legal or factual grounds justifying Akruti's joinder and has instead relied on selectively chosen and self-interpreted excerpts from legal precedents to support their arguments. It is emphasized that Akruti's involvement in JHL solely pertains to investment through the acquisition of shares and optionally convertible debentures, transactions that are distinct from those involving shares previously held by DLF and Chinsha. These investments were made independently by JHL to raise capital and do not fall under the purview of the SPA in any manner. It is submitted that the principle of third-party beneficiary is deemed inapplicable as Akruti has not directly or indirectly benefited from any clauses of the SPA invoked for arbitration. Similarly, the 'Group of Companies' doctrine cannot be invoked to bind Akruti to the arbitration clause within the SPA, as Akruti has not demonstrated any implied consent to be a party to said arbitration agreement. It is submitted that the existence of financial and organisational ties between a signatory and non-signatory is not by itself 2022 SCC OnLine Del 3771 sufficient to join a non-signatory. Moreover, it is asserted that Akruti and Hubtown are distinct economic entities. It is further submitted that the issue of joinder of Akruti has to be decided in present proceedings and it cannot be left to be decided by the arbitrator. In support of these submissions reliance has been placed on Gaurav Dhanuka (supra), ONGC Ltd. v. Discovery Enterprises (P) Ltd. 30 , Article: John Fellas, "Compelling Signatories to Arbitrate with Non-Signatories" 31, MAG Portfolio Consult, GMBH v. Merlin Biomed Grp. LLP 32 , Cox & Kings (supra), Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., 33, PTC India (supra), NTPC Ltd. v. SPML Infra Ltd. 34, Magic Eye Developers (supra) Deloitte Noraudit AIS v. Deloitte Haskins & Sells 35, Thomson CSF v. American Arbitration Association36, Duro Felguera, SA v. Gangavaram Port Ltd. 37, Ameet Lalchand Shah & Ors. v. Rishabh Enterprises &Ors.38, Cheran Properties Ltd. v. Kasturi & Sons Ltd., 39 Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd.40, MTNL v. Canara Bank 41, and Sudhir Gopi v. Indira Gandhi National Open University & Anr. 42 Analysis and Findings The scope of the examination in these proceedings (2022) 8 SCC 42 New York Law Journal (28-3-2022) 268 F.3d 58 (2d Cir. 2001) (2013) 1 SCC 641 (2023) 9 SCC 385 MANU/FESC/0481/1993 MANU/FESC/0094/1995 (2017) 9 SCC 729 (2018) 15 SCC 678 (2018) 16 SCC 413 (2019) 7 SCC 62 (2020) 12 SCC 767 2017 SCC Online Del 8345

32. At the outset, it is noticed that the scope of inquiry by a referral court in a petition under Section 11 of the A&C Act is confined to examination of the existence of an arbitration agreement. The referral proceedings are preliminary and summary and not in the nature of a mini-trial. Rarely as a demurrer, the referral court may decline reference when there is not even a vestige of doubt that the claim is non-arbitrable. If there is a slightest doubt, the rule is to refer the dispute/s to arbitration. Further, when contentions relating to non-arbitrability are plainly arguable, or when facts are contested, the court by default would refer the parties to arbitration. 43

33. Recently, in Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re (supra), a seven-judge bench of the Supreme Court, has held as under:

> "162. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In DuroFelguera (supra), this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia (supra) in the context of Section 8 and Section 11 of the Arbitration Act.
>
> See: Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, NTPC Ltd. v. SPML Infra Ltd., (2023) 9 SCC 385
>
> 163. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence- competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the referral court. The referral court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute.

> 164. Section 11(6A) uses the expression "examination of the existence of an arbitration agreement." The purport of using the word "examination"

connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in Shin-Etsu Chemical Co. Ltd. v. AkshOptifibre Ltd.

xxx xxx xxx

166. When the referral court renders a prima facie opinion, neither the arbitral tribunal, nor the court enforcing the arbitral award will be bound by such a prima facie view. If a prima facie view as to the existence of an arbitration agreement is taken by the referral court, it still allows the arbitral tribunal to examine the issue in-depth. Such a legal approach will help the referral court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the arbitral tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement"

> 34. Further, in context of a situation where non-signatories are sought to be impleaded in arbitration, the standard of determination has been set out by a five-judge bench of the Supreme Court in Cox & Kings (supra), wherein it has been held as under:
>
> "G. The standard of determination at the referral stage - Sections 8 and 11 ...
>
> 164. When deciding the referral issue, the scope of reference under both Sections 8 and 11 is limited. Where Section 8 requires the referral court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the existence of the examination of an arbitration agreement.
>
> 165. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the arbitral tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The doctrine of competence-competence is intended to minimize judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the

jurisdictional competence of the arbitral tribunal

166. In Vidya Drolia (supra), Justice N.V. Ramana (as the learned Chief Justice then was) held that the amendment to Section 8 rectified the shortcomings pointed out in Chloro Controls (supra) 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:

"239. [...] Jurisdictional issues concerning whether certain parties 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."

167. In Pravin Electricals Pvt Ltd. v. Galaxy Infra and Engineering Pvt 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.

168. 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 arbitration 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. Aksh Optifibre 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:

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 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 proceedings to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration."

169. In Chloro Controls (supra), 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 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 (supra) 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.

170. 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 (supra) 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 nonsignatory is bound by the arbitration agreement.

171. 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 nonsignatory 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 arbitral tribunal under Section 16.

H. Conclusions

172. In view of the discussion above, we arrive at the following conclusions:

> ...
>
> l. At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement."
>
> Existence of the Arbitration Agreement

35. The relevant arbitration agreement, incorporated in the SPA, that is sought to be invoked by the DLF is in the following terms:

> "17.11 Any and all disputes, claims, difference arising out of or in connection with this Agreement and the Schedule(s) of Term/Repayment Schedule/s attached hereto or the performance of this Agreement shall be settled by arbitration to be referred to a sole arbitrator to be appointed by the Lender and the award thereupon shall be binding upon the parties to this Agreement. The place of arbitration shall be in Delhi or any other place as Arbitrator may decide, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory amendments thereof. The proceeding of Arbitration Tribunal shall be conducted in English language. Each party shall bear cost of representing its case before the Arbitrator. Costs and charges of arbitrator to be shared equally unless/otherwise provided for in the award."

36. It can be seen that the arbitration clause is widely worded and any dispute "arising out of" or "in connection with" or "the performance of" the SPA is to be referred to arbitration thereunder. Given the width of the arbitration agreement, it cannot be said that the various facets with regard to which DLF has sought to raise disputes are unconnected with the SPA.

37. At this stage, this Court is not required to conduct an in-depth inquiry as to whether the disputes sought to be raised by the petitioner/DLF afford any valid cause of action to the petitioner on the basis of the provision of SPA or not. This is an aspect which necessarily requires an in-depth examination on merits and necessarily required to be gone into by a duly constituted arbitral tribunal.

38. The contention of the learned senior counsel for the Hubtown and Omkara that clause 17.12 of the SPA has the effect of whittling down or denuding the scope of the arbitration clause is misconceived. Clause 17.12 reads as under:

> "17.12 The Pledgors further agree that all claims, difference and disputes, arising out of or in relation to dealings/transaction made in pursuant to this Agreement including any question of whether such dealing, transaction have been entered into or not, shall be subject to the exclusive jurisdiction of the Courts at Delhi only for the purpose of clause 17.11 of the Agreement."

39. Clause 17.11 of the SPA is the arbitration clause. The said clause provides that the place of arbitration shall be Delhi. Clause 17.12 merely underscores that, for the purposes of Clause 17.11, disputes arising out of or in relation to dealings made pursuant to SPA, shall be subject to the exclusive jurisdiction of courts at Delhi. Prima facie, Clause 17.12 of the SPA only recognises the supervisory jurisdiction of courts at Delhi over the arbitral proceedings contemplated under Clause 17.11. In any case, it is well settled that if there is any contractual stipulation which undermines the scope of arbitration clause contained in any contract, the same will be accorded an interpretation which gives full effect to the arbitration agreement between the parties. In this regard reference may be made to a decision of this court in Sunita Garg v. Scraft Product (P) Ltd.44, wherein it has been

held as under:

> "21. Regarding the ostensible dichotomy between Clauses 25 and 27, it is well settled that if there is any contractual stipulation which undermines the scope of arbitration clause contained in any contract, the same will be accorded an interpretation which gives full effect to the arbitration agreement between the parties. In this regard, it has been observed by the Supreme Court in the case of Chloro Controls India Private Limited v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, as under:--
>
> "96. Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers."

22. Also, in MTNL v. Canara Bank, (2020) 12 SCC 767, it was observed as under:

> "9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An "arbitration agreement" is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities."

23. In A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386, Dr. D.Y. Chandrachud, J. in his separate opinion observed that:

> "53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying (2023) 297 DLT 717 its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution.
>
> Minimising the intervention of courts is again a recognition of the same principle."

24. In Govind Rubber Ltd. v. Louids Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477, it has been held as under:--

> "17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned author also said

> that the agreement has to be interpreted "in order to effectuate the immediate intention of the parties". Similarly, Russell on Arbitration (21st Edn.) opined, relying on Astro VencedorCompania Naviera S.A. v. Mabanaft GmbH [((1970) 2 Lloyd's Rep 267], that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed. The learned author has also referred to another judgment in Paul Smith Ltd. v. H and S International Holdings Inc. [(1991) 2 Lloyd's Rep 127] in order to emphasise that in construing an arbitration agreement the court should seek to "give effect to the intentions of the parties".

25. The same approach to interpretation of arbitration agreements has been followed across jurisdictions. For instance, the United States Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614 (1985), 626 (U.S. S.Ct. 1985), has affirmed as under:--

> "... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

26. Similarly, in the United Kingdom, in Premium Nafta Products Ltd. v. Fili Shipping Company Ltd., [2007] UKHL 40 (House of Lords), it was held as under:--

> "The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to face issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressively. Otherwise, they will be taken to have agreed on a single tribunal for the resolution of all such disputes."

27. With regard to the view taken in some older authorities to the effect that the arbitration clauses must be interpreted restrictively, it is stated by Gary B. Born in International Arbitration : Law and Practice, Third Edition as under:

> "The "restrictive" presumption is generally explained on the grounds that arbitration is a derogation from otherwise available access to civil justice and the "natural judge" of the contract, and that such derogations must be construed narrowly. Thus, in an older decision, a French appellate court declared that "[t]he arbitration agreement must be strictly interpreted as it departs from the norm - and in particular from the usual rules as to the jurisdiction of the courts." 'This restrictive interpretative presumption is archaic and out of step with the ordinary intentions of commercial parties; it is generally not applied in contemporary decisions."

40. As such, the existence of a valid arbitration agreement, of sufficient width and amplitude, is not in doubt. As held in Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, (supra) "the scope of examination under Section

11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing."

Signatories to Arbitration Agreement

41. Admittedly, the petitioner/DLF alongwith PNBHFL, JHL Hubtown and Chinsha i.e., respondent no(s). 1, 3, 4 and 5 respectively are the signatories to the arbitration agreement.

42. As such, there is no impediment to the impleadment of the aforesaid signatory parties in the proposed arbitration. The same would necessarily be subject to rights of the said parties to raise appropriate objections as regards jurisdiction of the arbitral tribunal, and/or maintainability of the claims sought to be raised. The adjudication of these aspects, particularly in the context of the facts of the present case, requires an in-depth examination which is best left to be done by a duly constituted arbitral tribunal.

43. The contention of PNBHFL to the effect that upon assignment, it can no longer be a party to any proposed arbitration is liable to be rejected. Firstly, the contention of DLF that the assignment itself was illegal/ not in accordance with law is an aspect that cannot be adjudicated without the joinder of PNBHFL. Secondly, even after assigning a contract containing an arbitration clause, the assignor can be compelled to arbitrate in certain situations. Gary B. Born in his book "International Commercial Arbitration"45, has stated as under:

> "If an assignment of an arbitration clause is validly effected, then the assignee will have rights (and obligations) under the clause. In addition, the original assignor may also retain such rights (either as to pre- assignment events or genreally, depending on the terms of the assignment and any restrictions on assignability)."

44. In Montedipe S.p.A. v. JTP-RO Jugotanker (supra), relied upon by PNBHFL itself, it has been held as under:

> "... An assignment, in contrast to a transfer or novation, does not relieve the assignor of his liabilities not does it, anyway as regards matters Second Edition, S 10.02[1], p. 1470 preceding the notice of assignment, affect the rights of the other party or parties against the assignor..."

45. A Constitution Bench of the Supreme Court in Khardah Co. Ltd. v. Raymon& Co. (India) (P) Ltd., 46 has held as under:

> "...There was considerable argument before us on the question as to assignability of a contract. The law on the subject is well settled and might be stated in simple terms. An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned

> except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties."

46. Prima facie, despite assignment of the SPA to Omkara, PNBHFL would be a necessary party as regards pre-assignment disputes, including dispute/s relating to non-acceptance of the offer of DLF and/or dispute/s concerning purported irregularities in the assignment of debt.

47. The judgment of Singapore Court of Appeal in BXH vs BXI (supra), relied upon by the PNBHFL is clearly distinguishable inasmuch as the said judgment was rendered in a challenge to an award passed by the arbitral tribunal and not at the referral stage. Furthermore, in the said case, it was the assignor who had invoked the arbitration clause after having assigned the right to a debt and right to arbitrate in relation to that particular debt to the assignee. It was in the said context the court held that the assignor could no longer arbitrate in relation to the said debt. In the present case, it is neither the assignor nor the assignee but the pledgors who have invoked the (1963) 3 SCR 183 arbitration clause being aggrieved by the alleged actions/omissions on the part of the assignor and assignee.

48. Reliance placed on judgements of R.N. Gosain v. Yashpal Dhir (supra) and Union of India v. N. Murugesan (supra), to contend that DLF cannot reject the assignment deed for the purpose of proceeding against PNBHFL and then accept the very same assignment deed for the purpose of proceeding against Omkara, is misconceived. As already noted above, in case of an assignment of a contract, unlike novation, the assignor is not discharged of its obligation under the contract assigned. Therefore, prima- facie, it cannot be said that PNBHFL is not a necessary party in the proposed arbitration proceedings.

Impleadment/joinder of assignee/Omkara in the proposed arbitration proceedings

49. PNBHFL in its written submissions has contended as under:

> "8. The Share Pledge Agreement dated December 26, 2017, which was one of the agreements ancillary to the Loan Agreement dated December 20, 2017, was expressly made assignable by PNBHFL, at its sole discretion (Clause M of the Loan Agreement). Whereas all other parties to the SPA are referred to as including "permitted assigns", PNBHFL is referred to as including "assigns". (Share Pledge Agreement - PNBHFL Reply - Document 5 @ pg. - 150-160 and Loan Agreement -PNBHFL Reply - Document 2 @ pg. -89-129)
>
> 9. Further, clause 14 of the SPA, expressly provides PNBHFL with "an absolute and unrestricted right to assign" the Agreement "without being required to take any consent of the Pledgors." (Clause 14 of Share Pledge Agreement - PNBHFL Reply - Document 5 @pg. - 157)

> 10. By virtue of the Assignment Agreement dated August 18, 2023, PNBHFL has assigned the SPA to Omkara on "as is where is, and whatever there is basis without any recourse to the Assignor" (clause 2.1(b) r/w definition of "Financing Document") (Assignment Agreement
>
> - PNBHFL Reply - Document 26 @pg.- 373-429)

50. By virtue of the fact that Omkara is admittedly an assignee of PNBHFL and since by virtue of the definition 47 accorded in the SPA itself, it is a party to the arbitration agreement contained in the SPA. There is no impediment to the impleadment of Omkara in the proposed arbitration proceedings.

51. The law is also well settled that where there is an assignment of a contract containing an arbitration agreement, the assignee will be bound by the arbitration agreement. The assignee would take both the benefit and burden of the arbitration agreement i.e., the assignee can invoke the arbitration agreement to pursue a claim and can be compelled to arbitrate a dispute raised by another party. Therefore, Omkara would be bound by the arbitration clause contained in the SPA. In Cox & Kings (supra), it has been inter alia held as under:

> "135. The Arbitration Act does not define the phrase "person claiming through or under" a party. A person "claiming through or under" a party is not a signatory to the contract or agreement, but can assert a right through or under the signatory party. Russel on Arbitration states that an assignee can invoke the arbitration agreement as a person "claiming through or under" a party to the arbitration agreement. An assignee takes the assigned right under a contract with both the benefit and burden of the arbitration clause. Similarly, the English courts have held that a transferee or subrogate can claim through or under a party to the arbitration agreement. Under the English law, the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation, and novation. In these situations, the assignees or representatives become successors to the signatory party's interests under the arbitration agreement. They step into the shoes of the signatory party, from whom they derive the right to arbitrate, rather than claiming an independent right under the arbitration agreement.
>
> xxx xxx xxx PNBHFL has been defined in the SPA as "PNB Housing Finance Limited, ... (hereinafter referred to as the "Lender", which expression shall unless repugnant to the context or meaning thereof include its successors assigns)."

141. An analysis of the cases cited above establishes the following propositions of law : first, the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation, and novation; second, a person "claiming through or under" can assert a right in a derivative capacity, that is through the party to the arbitration agreement, to participate in the agreement; third, the persons claiming through or under do not possess an independent right to stand as parties to an arbitration agreement, but as successors to the signatory parties' interest; and

fourth, mere legal or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party."

Impleadment/joinder of the non-signatories in the proposed arbitration proceedings

52. It has been strenuously contended on behalf of the respondent no.6/Twenty-Five South that title to the pledged shares acquired by the respondent no.6 is independent of the underlying rights and obligations under SPA. In the written submissions filed on behalf of the respondent no.6, it has been contended as under:

> "4. .....
>
> a. .....
> b. Once the shares (75%) were held in dematerialized
>
> invocation of the Pledge by PNB, the same came to be recorded in the beneficial ownership of PNB, and hence the right to transfer/sell/assign the same vested in PNB in terms of Section 10(3) of the Depositories Act, 1996.
>
> c. Upon assignment of the loan to Omkara by PNB, the aforesaid right vested in Omkara, and therefore beneficial ownership of the shares was recorded under the Depositories Act in the name of Omkara.
>
> d. The transaction of purchase of shares by 25 South is therefore an independent transaction between the beneficial owner of the demat securities and 25 South and that too for valuable consideration of Rs.894 Crores."

53. It is further contended that even if it be assumed that disputes exist in respect of assignment of debt together with the underlying security, the same would be in relation to the loan agreement entered into between respondent no.3/JHL and respondent no.1/PNBHFL or its assignee. Further, it is contended that even for the purpose of invoking the doctrine of group of companies, as explained by the Constitution Bench in the case of Cox & Kings (supra), the non-signatories in the context of the transaction in the present case, must be a group company of the assignee i.e. Omkara, which is not the case here.

54. Likewise, it has been submitted on behalf of respondent no.7/Akruti that the legal test for binding non-signatories, is not satisfied in the case of respondent no.7. It is contended that the "direct benefit estoppel theory" has no applicability to respondent no.7 as the same applies only where a third party invokes specific terms/clauses of the main contract (SPA) to its direct benefit and does not apply when the third party merely benefits out of the situation created by a contract. Further, it is contended that the group of companies doctrine cannot be invoked against the respondent no.7 inasmuch it cannot be said that the respondent no.7 had impliedly consented to be a party to the concerned arbitration agreement under the SPA. It is further contended that the respondent no.7 cannot be said to be a veritable party to the SPA inasmuch as the petitioner has failed to demonstrate that it created an impression, "through conduct such as participation in the

negotiation, performance and termination of the subject agreement, that it had assumed the obligations and performance of the agreement."

55. On a prima facie conspectus, I am of the view that there is no impediment to impleadment of respondent no.6 and respondent no.7 in the proposed arbitration.

56. In Chloro Controls (supra), it has been recognized that various legal theories may be applied to bind non-signatories to an arbitration agreement. It has been observed therein as under:-

> "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.
>
> 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."

57. In the present case, the petitioner/DLF has sought to invoke non- consensual theories as enumerated in para 103.2 of the Chloro Controls (supra), for seeking impleadment of respondent nos. 6 and 7 in the proposed arbitration.

58. Reliance placed by counsels of the respondent nos. 6 and 7 on observations made in Cox & Kings (supra), to contend that neither of the said parties had shown any intent or implied consent towards being a party to the arbitration agreement under the SPA, is misplaced. In Cox & Kings (supra), the Supreme Court was considering the "Group of Companies Doctrine", which doctrine forms part of the consent-based theories. For the purpose of consent-based theories, it is necessary to ascertain whether the non-signatory evinces intention or consent to be bound by the arbitration agreement. In Cox & Kings (supra), the Supreme Court has itself made it clear that "any authoritative determination given by this Court pertaining to the group of companies doctrine should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement." Furthermore, in Cox & Kings (supra), it has been specifically held as under:

> "91. In case of group companies, there may arise situations where a holding company completely dominates the affairs of the subsidiary company, to the extent of misusing its control, to avoid or conceal liability. In such situations, the courts apply the doctrine of "alter ego" or piercing the corporate veil to disregard the corporate separateness between the two companies and treat them as a single entity. In LIC v. Escorts Ltd., a Constitution Bench of this Court noted that the principle of distinct legal personality may be ignored where the associate companies are inextricably connected as to be, in reality, part of one concern. Speaking for the Bench, Justice O Chinnappa Reddy observed:

> "90. [...] Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud, or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricable connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."

92. The application of the doctrine of lifting the corporate veil rests on the overriding considerations of justice and equity. Often, the courts pierce the corporate veil when maintaining the separateness of corporate personality is found opposed to justice, convenience, and public interests. In Balwant Rai Saluja v. Air India, this Court cautioned that the principle of piercing the corporate veil should be applied in a restrictive manner and only in scenarios where it is evident that the subsidiary company was a mere camouflage deliberately created by the holding company for the purpose of avoiding liability. It was further observed that the intent of piercing the corporate veil must be such that would seek to remedy a wrong done by the holding company. In the context of arbitration, the principle of piercing the corporate veil has been sparingly used because it disregards the intention of the parties by emphasizing on the overriding considerations of good faith and equity to bind the non- signatories to an arbitration agreement.

93. Moreover, since the companies in a group have separate legal personality, the presence of common shareholders or directors cannot lead to the conclusion that the subsidiary company will be bound by the acts of the holding company. The statements or representations made by promoters or directors in their personal capacity would not bind a company. Similarly, the mere fact that the two companies have common shareholders or a common Board of Directors will not constitute a sufficient ground to conclude that they are a single economic entity. The single economic entity or the single economic unit theory imposes general enterprise liability on the corporate group. In D H N Food Distributors Ltd. v. Tower Hamlets London Borough Council, Lord Denning held that a group of three companies should be treated as a single economic entity on the basis of two factors : first, the parent company owned all the shares of the subsidiary companies to the extent that it controlled every movement of the given subsidiary companies; and second, all the three companies in the group virtually acted as partners and could not be treated separately. Thus, the determination of whether two or more companies constitute a single economic entity depends upon the concerted efforts of the companies to act in pursuance of a common endeavour or enterprise.

94. From the above discussion, we can infer that entities within a corporate group have separate legal personality, which cannot be ignored save in exceptional circumstances such as fraud. The distinction between a parent company and its subsidiary is fundamental, and cannot be easily abridged by taking recourse to economic convenience. Legally, the rights and liabilities of a parent company cannot be transferred to the subsidiary company, and vice versa, unless, there is a strong legal basis for doing so."

59. Therefore, the ambit of non-consensual theories like "alter ego", "estoppel", or "single economic entity" is materially different from the ambit of consent-based theories. The non-consensual theories place emphasis on the overriding considerations of good faith and equity to bind non-signatories to an arbitration agreement, whereas consent-based theories place emphasis on mutual intent of the parties to arbitrate a dispute. P.S Narasimha J. in his concurring opinion in Cox & Kings (supra), has also held as under:

> "194. The legal bases for making a non-signatory a party can be classified as consensual and non-consensual. The consensual theories that are focused on determining the mutual intent of the parties include agency, implied consent, and assignment and transfer of contractual rights, and the non-consensual theories that are based on equity considerations include alter ego/piercing the corporate veil, estoppel, succession, and apparent authority. The formulation of these principles, whether consensual or non-consensual, is not new. They are derived from general principles of contractual law and corporate law."

60. Theoretically, in a given case non-signatories may be bound with the arbitration agreement on the basis of both the consensual and non- consensual theories. After piercing the corporate veil of a company, it may be found that the shareholder or parent corporation had in fact impliedly consented to the arbitration agreement. The decision to join a non-signatory oft rests on more than one factor.

61. In Shapoorji Pallonji (supra), this court has reviewed the case laws where the courts have compelled non-signatories to arbitrate by disregarding their corporate facade or where the courts have found the signatory to be an alter ego of the non-signatory or vice versa. Relevant extracts of the said decision are as under:

> "28. There exists another set of cases where the Courts have compelled non-signatories to arbitrate by disregarding their corporate facade or where the Courts have found the signatory to be an alter ego of the non- signatory or vice versa. In Barcelona Traction, Light and Power Company Ltd. : (1970) ICJ Rep. 3, the International Courts of Justice had explained the doctrine of piercing the corporate veil in the following words:
>
> "the process of lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."

29. Gary B. Born in his book, International Commercial Arbitration, Volume I, (Third Edition), p. 1546, had explained the concept of alter ego as under:

"Definitions of "alter ego" vary materially in different legal systems, and are applied in a number of different contexts. Nonetheless, the essential theory of the "alter ego" doctrine in most jurisdictions is that one party so thoroughly dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity. In the context of arbitration agreements, demonstrating an "alter ego" relationship under most developed legal systems requires convincing evidence that one entity dominated the day-to-day actions of another and/or that it exercised this power to work fraud or other injustice or inequality on a third party or to evade statutory or other legal obligations.

The "alter ego" doctrine differs from principles of agency or implied consent in that the parties' intentions are not decisive; rather, the doctrine rests on overriding considerations of equity and fairness, which mandate disregarding an entity's separate legal identity in specified circumstances."

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61. In Fisser v. Int'l Bank : 282 F.2d 231, 238 (2nd Cir. 1960), the Court analysed the situation in which a claimant alleged that the respondent is just an alter ego of its mother company. It held that, if there is a valid arbitration agreement between the claimant and respondent, but respondent is a mere puppet of the mother company, such corporate mother must be bound by arbitration as well.

62. Similarly, in Builders Federal (Hong Kong) v. Turner Const. : 655 F. Supp. 1400, 1406 (S.D.N.Y. 1987), the court considered a construction case involving a foreign project where the sub-contractors sought to compel the American corporate parents to enter arbitration abroad of a dispute involving claims against the main contractor. The Court considered that the allegations that the parent corporation exercised dominance and control over the main contractor were sufficient to "state a claim for alter ego liability" even in the absence of any allegation of fraud. The relevant extract of the said decision is set out below:

"The petition is replete with allegations that defendants exercised dominance and control over TEA, and that TEA was under- capitalized. Those allegations are not sufficient of themselves to "pierce a corporate veil" so as to visit upon parent corporations the obligations of a subsidiary. Walkovszky v. Carlton, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6 (1966). But the petition alleges more than that. It alleges that the subcontract between plaintiffs and TEA obligated TEA to make certain payments to plaintiffs upon termination of the main contract; and that defendants decided that TEA would breach those obligations, sending implementing instructions to TEA. Petition, ¶ 38. These allegations, even in the absence of allegations of fraud requiring Rule 9(b) particularity, are sufficient to state a claim for alter ego liability. Gorrill v. Iceland Air/Flugleidir, 761 F.2d 847, 853 (2d Cir. 1985)

(construing New York law)."

63. In Thomson-CSF, S.A. v. American Arbitration Association : 64 F.3d 773 (2d Cir. 1995), it was held that the corporate parent must exert a degree of control over the subsidiary that there is abandonment of separate corporate structures, intermingling of corporate finances and directorship and in essence, the subsidiary must cease to function as a distinct entity. A similar view was expressed in Craig v. Lake Asbestos of Quebec Ltd. : 843 F.2d 145 (3rd Cir. 1988).

64. In Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc. :

> 933 F.2d 131, 32 Fed R. Evid Serv. 1218 (2d Cir. 1991), the Court listed some grounds on which piercing the corporate veil would be justified, such as, where the parent and subsidiary are run by common officers, do not deal at arm's length with each other, are not treated as separate profit centres and share common office space. The law in this regard has been summarised in ARW Exploration Corp. v. Aguirre : 45 F.3d 1455 (10th Cir, 1995), where the Court held that "a corporation will be bound to arbitrate when it is merely the "alter ego" of an individual or previously established corporation that has entered into the arbitration agreement.

65. Given the facts and circumstances of the case, this Court is of the view that it would be apposite to compel Indiabulls to arbitrate as there is sufficient material to show that Elena is its alter ego. This is evident from the fact that Elena's name has been mentioned in parenthesis against the name of Indiabulls in the LoA. The shareholding pattern confirms that Indiabulls does exercise complete control as a shareholder over Elena. The fact that the officials of Indiabulls acted on behalf of Elena also indicate that Indiabulls exercises substantial and dominant direct control over the affairs of Elena."

62. In the present case, it has been contended on behalf of the petitioner that the assignment in favour of Omkara was not bona fide but only an elaborate collusive device contrived by Hubtown to takeover 100% shareholding of the JHL, through companies closely linked to Hubtown, which were its proxy/alter ego, and which virtually constituted a single economic entity with Hubtown. It is contended that in pursuance of such collusion, Omkara, without rejecting DLF's acceptance of PNBHFL's offer in the SPA default notice dated 02.11.2022 (despite being put to notice of the same vide DLF's letter dated 25.08.2023 and 10.09.2023), proceeded to transfer 75% shares of JHL to the respondent no.6. It is further contended that issuance of board resolution of respondent no.3 on 02.10.2023, with a view to allocate certain shares/issue of optionally convertible debentures to respondent no.7, resulted in respondent no.7 acquiring 97% of shareholding in respondent no.3; was also in pursuance of an elaborate collusive device contrived by Hubtown to put its proxy/alter ego in charge of respondent no.3.

63. From the aforesaid pleas of the petitioner, it is evident that:

> a. The DLF/petitioner has invoked non-consensual "alter ego theory" referred to in para 103.2 of Chloro Controls (supra), b. It also invoked "direct benefits estoppel

> theory" and "third- party beneficiary theory" inasmuch as acquisition of the substantial shareholding by respondent nos.6 and 7 in respondent no.3 was pursuant to the alleged illegal invocation of the pledge and the collusive sale of shares by Omkara.
>
> c. The petitioner also invoked the "intertwined estoppel theory"
>
> inasmuch as the acquisition of shareholding by respondent no.6 and respondent no.7 is inextricably linked to the legality of the first limb of the transaction viz. invocation of the pledge and the legality of the assignment. The intertwined estoppel theory which can be used to bind a non-signatory has been expressly recognized in ONGC v. Discovery Enterprises (supra) and Gaurav Dhanuka (supra).

64. No doubt, the theories sought to be asserted by the petitioner for the purpose of impleading the respondent nos.6 and 7 are required to be tested and merit a more thorough factual inquiry. As held in Cox & Kings (supra), in these proceedings, it is neither incumbent nor desirable for this Court to embark upon a detailed and an elaborate fact-finding exercise, which requires evidence to be adduced by the parties to come to a conclusive finding as regards above aspects.

65. In Cox & Kings (supra), the Supreme Court has gone to the extent of holding that "if the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal". Reference may once again be made to the observations in para 168 and 171 of the said judgment, wherein it is stated as under:-

> "168. 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 arbitration 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:
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> 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 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 proceedings to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration."

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> 171. 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 nonsignatory 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 arbitral tribunal under Section 16."

66. In case the petitioner is right in its assertions as regards the collusive nature of the transaction/s, certainly the arbitration mechanism cannot be allowed to be frustrated on account thereof. However, the same would require an intricate factual inquiry, which can only be done in the proposed arbitration proceedings.

67. Further, on a prima facie conspectus, for the purpose of these proceedings, the various transactions with which the petitioner is aggrieved viz alleged illegal invocation of the pledge, alleged assignment of the SPA, alleged illegal sale of pledged shares by Omkara and the consequent issuance of shares to respondent no.7 on the strength of the shareholding acquired from Omkara, can be said to be all intertwined transactions/inter-

related transactions entitling the petitioner to invoke the direct benefit/intertwined estoppel theory. However, while referring the parties to arbitration, this Court is not rendering any conclusive finding with regard thereto and instead finds it apposite to leave it to the arbitral tribunal to make the final determination on this issue. This is mandated not only in view of the observations made in Cox & Kings (supra) but also in view of the observations made in Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, (supra) wherein it has been held as under:-

> "164. Section 11(6A) uses the expression "examination of the existence of an arbitration agreement." The purport of using the word "examination"

connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression

"examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in Shin-Etsu Chemical Co. Ltd. v. AkshOptifibre Ltd.

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166. When the referral court renders a prima facie opinion, neither the arbitral tribunal, nor the court enforcing the arbitral award will be bound by such a prima facie view. If a prima facie view as to the existence of an arbitration agreement is taken by the referral court, it still allows the arbitral tribunal to examine the issue in-depth. Such a legal approach will help the referral court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the arbitral tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement"

> 68. Further, in Vidya Drolia (supra), it has been held as under:
>
> "239...Jurisdictional issues concerning whether certain parties 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."

69. In these circumstances, at this stage, this Court is inclined to refer respondent nos.6 and 7 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.

Other issues raised by the Respondents

70. Apart from the aforesaid aspects, learned senior counsel for the respondents have raised various other extremely germane and relevant issues as regards the merits of the disputes sought to be raised by the petitioner. In particular, it has been contended that:

> (i) At no point did DLF sought to exercise any rights to redeem its pledged shares; the offer to purchase 100% shareholding of the JHL by DLF, cannot tantamount in law to redemption.

(ii) The assignment in favour of Omkara cannot be questioned by virtue of Section 5(3) of the SARFAESI Act.

(iii) The petitioner's right to the pledged shares is lost and extinguished upon actual sale i.e., when the beneficial owner (Omkara) sold the pledged shares to respondent no.6, prior to the pledged shares being redeemed.

(iv) Without a proper tender of the amount due on the pledge, the only right of the pawnor/DLF in respect of even an unlawful or unauthorized sale is in tort for damages actually sustained by him.

(v) DLF cannot as a pledgor challenge assignment of debt by a creditor as an assignment is an independent contract between the PNBHFL and assignee (Omkara).

(vi) The SPA cannot be read to confer a right on the petitioner to seek transfer of all the pledged shares of all the pledgors to it, even on discharge of the entire debt. In law a pledgee does not possess a title to the pledged shares, as a beneficial owner, unless the pledge is invoked. Therefore, even in case the debt was discharged in full, by one of the pledgors, the effect would be to discharge the respective pledges in favour of the respective pledgors and no more.

71. The above aspects are, no doubt, extremely relevant and impinge upon merits of the case sought to be set up by the petitioner against the respondents. However, these are aspects that are necessarily required to be gone into by a duly constituted arbitral tribunal.

Conclusion

72. In view of the aforesaid, there is no impediment in appointing an independent sole arbitrator to adjudicate the disputes between the parties as contemplated in Perkins Eastman Architects DPC v. HSCC (India) Ltd.48

73. Accordingly, the present petition is allowed and Mr. Justice (Retd.) V. Ramasubramanian, Former Judge, Supreme Court of India, (Mob. No.:

9318456789) is appointed as the sole arbitrator to adjudicate the disputes between the parties.

74. The respondents shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

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75. 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.

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

77. Parties shall share the arbitrator's fee and arbitral costs, equally.

78. 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.

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

80. The present petition stands disposed of in the above terms.

SACHIN DATTA, J MARCH 22, 2024/hg