



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. OF 47 OF 2013
WITH
ARBITRATION APPEAL NO. OF 48 OF 2013
WITH
ARBITRATION APPEAL NO. OF 49 OF 2013

Rajasthan State Co-op Oil Seed Growers ...Appellant
Federation Ltd. (Tilam Sangh)

Versus

B.G. Shirke Construction Technology Pvt. ...Respondents
Ltd. & Anr

Mr. Rajiv Narula *a/w Tarang Jagtiani, i/b Thangiani, Narula & Associates, for the Appellant.*

Mr. Sukand Kulkarni *for Respondent No.1.*

Ms. Archita Gharat *a/w Prabhakar M. Jadhav for Respondent No.2 in ARA/47/2013.*

Mr. Prabhakar M. Jadhav *for Respondent No.2 in ARA/48/2013 & ARA/49/2013.*

CORAM : SOMASEKHAR SUNDARESAN, J.
RESERVED ON : March 11, 2025
PRONOUNCED ON : November 3, 2025

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JUDGEMENT :**Context and Factual Background:**

1. The captioned appeals are filed under Section 37 of the Arbitration and Conciliation Act, 1996 (***“the Act”***) challenging orders passed by the Learned District Court Pune, disposing of challenges to arbitral awards passed by a three-member arbitral tribunal in three separate arbitral awards, in all of which the issues are just the same.

2. In a nutshell, the Appellant, Rajasthan State Co-op Oil Seed Growers Federation Ltd. (***“Tilam Sangh”***) was desirous of setting up silos for storage and process of mustard seeds in three different locations – a 100-tonnes per day facility at Merta City (Nagaur District); a 50-tonnes per day facility at Gangapur City (Sawaimadhopur District); and a 100-tonnes per day facility at Sri Ganganagar (Ganganagar District) – in the State of Rajasthan. Towards this end, Tilam Sangh engaged National Heavy Engineering Co-operative Ltd. (***“NHEC”***) as the Project Management Consultant (***“PMC”***), which in turn engaged Shirke Structural Pvt. Ltd. (***“Shirke”***) to carry out the works involved in each of the aforesaid projects. Shirke underwent a name change later.

3. Work was completed, and payment claims were made by Shirke, which filed civil suits. NHEC filed applications under Section 8

of the Act indicating that the disputes are subject matter of an arbitration agreement. These were allowed and an arbitral tribunal was constituted in each matter, and arbitral awards came to be passed.

4. The Learned Advocates for the parties have consented to take up Appeal No. 47 of 2013 as the representative lead matter, indicating that adjudication of issues in that Appeal would be dispositive of all Appeals. By consent of the parties, all references to facts, dates and the record are made to those contained in Appeal No. 47 of 2013, on the understanding that this judgement would cover all the captioned proceedings.

5. A brief overview of relevant facts is set out below:-

- a) On November 6, 1987, Tilam Sangh executed an agreement with NHEC as the PMC (***PMC Contract***);
- b) PMC executed an agreement dated September 28, 1989 (***Agreement***) appointing Shirke as the contractor to carry out the work. The work was to be commenced by October 5, 1989 and completed by January 20, 1990;

- c) Work was completed and a certificate of completion was issued on October 31, 1993;
- d) On April 4, 1994, Shirke made a claim for a sum of Rs. ~4.83 lakh;
- e) Shirke filed a Special Civil Suit 1734 of 1995 (“*Civil Suit*”) against Tilam Sangh and NHEC, but it was on an application filed by NHEC, the Civil Suit was rejected, referring the parties to arbitration;
- f) On May 20, 2002, Tilam Sangh filed a Written Statement in response to the Statement of Claim and also filed a Counter-claim;
- g) On April 4, 2003, Tilam Sangh claimed to have made a mistake, withdrew the Counter-Claim, and claimed that the Learned Arbitral Tribunal had no jurisdiction since there was no privity of contract between Tilam Sangh and Shirke under the Agreement, and the arbitration clause could not bind Tilam Sangh;
- h) On June 2, 2003, an arbitral award was passed awarding Rs. ~4.83 lakh coupled with interest at 15% per annum from September 4, 1993 and at 12%

per annum from May 1, 2002 until realisation (“*Arbitral Award*”). Both Tilam Sangh and NHEC were made jointly liable to pay the amount to Shirke under the Arbitral Award;

- i) Special Leave Petition filed in the Supreme Court was disposed of giving leave to Tilam Sangh to raise jurisdictional grounds when pursuing a challenge under Section 34;
- j) Each of Tilam Sangh and NHEC filed their respective challenge under Section 34 of the Act. NHEC claimed that it was merely an agent of Tilam Sangh and could not be liable while Tilam Sangh claimed that the arbitral award was entirely without jurisdiction. Tilam Sangh claimed that its participation in the arbitration was under protest; and
- k) On July 18, 2013, the District Court, Pune upheld the Arbitral Award but also ruled that NHEC was merely an agent and that Tilam Sangh would be responsible. Therefore, the Section 34 Petition of

NHEC was allowed while the Section 34 Petition of Tilam Singh was rejected.

Contentions of Parties:

6. I have heard at length Mr. Rajiv Narula, Learned Advocate on behalf of Tilam Sangh, Mr. Sukand Kulkarni, Learned Advocate on behalf of Shirke and Ms. Archita Gharat, and Mr. Prabhakar Jadhav, Learned Advocates on behalf of NHEC.

Tilam Sangh's Contentions:

7. At the heart of Mr. Rajiv Narula's submissions lies the contention that there was no scope for privity of contract between Shirke and Tilam Sangh, and therefore, the Arbitral Award is per se without jurisdiction. Merely because the work was commissioned by Tilam Sangh, it would not follow that Shirke had privity with Tilam Sangh, which had appointed NHEC to take care of the work. The Agreement is an instrument not executed by Tilam Sangh at all but was executed between NHEC and Shirke. Therefore, to direct Tilam Sangh to pay Shirke for the claims under the Agreement to which Tilam Sangh is not even a party, is untenable. That apart, the Section 34 Court having set aside the Arbitral Award in relation to NHEC's challenge

could not have deleted NHEC's liability and maintained the Arbitral Award as against Tilam Sangh – this would constitute modification of the Arbitral Award, which is impermissible.

8. Mr. Narula would also point to the Agreement having been contracted on a principal-to-principal basis, leaving no scope for any agency relationship being inferred. Participating by Tilam Sangh in the process of appointing Shirke as a sub-contractor of NHEC would not lead to privity of contract between Tilam Sangh and Shirke, Mr. Narula would submit. He would also indicate that the PMC Contract made it clear that the work could be withdrawn and any element of liability being owed to NHEC was ruled out.

Shirke's Contentions:

9. Mr. Sukand Kulkarni on behalf of Shirke would contend the PMC Contract led to NHEC being appointed as the PMC by Tilam Sangh. The contract price was set out in Clause 3.1 of the PMC Contract and Tilam Sangh had agreed to pay NHEC in terms of the schedule contained in it. On the strength of the PMC Contract, NHEC was the "Delegated Constituted Purchaser" in the Agreement, which defined the term "Purchaser" as Tilam Sangh. Mr. Kulkarni would point to Clauses

3.1 and 13.2 of the Agreement to indicate that when read with the PMC Contract, it was clear the principal employer was Tilam Sangh and it ought to have made the payments due. The disputes being covered by an arbitration agreement in Clause 24.2, the Arbitral Award has rightly recognised Tilam Sangh's role.

10. Shirke had brought the Civil Suit against both the principal Tilam Sangh, and the PMC agent, NHEC, who jointly and severally owed monies to Shirke, Mr. Kulkarni would contend. It was on NHEC's application under Section 8 of the Act that the disputes under the Civil Suit got referred to arbitration, which too he would submit can be regarded as an act of the agent on behalf of the principal. Tilam Sangh participated in the arbitration and even filed a Counter-Claim, he would contend, to indicate that it could not then pretend to have participated under protest when there was no protest before the Learned Arbitral Tribunal. Mr. Kulkarni would contend that Tilam Sangh participated in the actions taken under the Agreement all along – right from selection of Shirke; authorising NHEC by Tilam Sangh's own resolution to appoint Shirke; participating in meetings relating to the work; overseeing and certifying the work; and even participating in constitution of the Learned Arbitral Tribunal. Mr. Kulkarni would point

to various clauses in the Agreement and in the PMC Contract to indicate that they were interwoven agreements.

11. Defending the Impugned Judgement and thereby the Arbitral Award, Mr. Kulkarni would submit that the Arbitral Award was not modified but was partially set aside insofar as it related to NHEC, which is an eminently plausible view of the Learned District Court, which should not be disturbed. He would invoke multiple judgements on partial setting aside of an arbitral award so long as it does not affect the other portions of the Arbitral Award.

NHEC's Contentions:

12. Ms. Archita Gharat and Mr. Prabhakar Jadhav would invoke the various provisions of the Agreement and read them with the PMC Contract to indicate how the flow of obligations owed to Shirke are relatable to obligations of Tilam Sangh. If the Arbitral Award as a culmination of adjudication has found that amounts are payable to Shirke, it can only be Tilam Sangh that is liable to pay. They would defend the Impugned Judgement in its finding that imposing a joint liability on NHEC is improbable. Shirke always knew that NHEC would facilitate payments by Tilam Sangh and was not personally liable to pay.

No bill raised by Shirke would be paid by NHEC, which would only approve it and Tilam Sangh would pay, they would contend.

13. Ms. Gharat would contend that Tilam Sangh did not raise any objection to the Section 8 Application filed by NHEC when it was considered by the Learned District Court in the Civil Suit. Worse, in the arbitration, the opposition was on merits and even a Counter-Claim was filed and as an afterthought, the objection to jurisdiction was filed with the Counter-Claim being withdrawn. Ms. Gharat would invoke the judgement by the Constitution Bench of the Supreme Court in *Cox and Kings*¹ to indicate that Tilam Sangh's implied consent to the Agreement is writ large and there is no erosion of party autonomy. Participation by a non-signatory in the negotiation of an agreement, the unravelling of commercial arrangements, the common intention and purpose, the implied intention of being bound by the terms of the agreement, estoppel after receiving the benefit of the agreement, and the common subject matter between the PMC Contract and the Agreement, are all points that would inexorably demonstrate that Tilam Sangh is a veritable party.

¹ *Cox and Kings Ltd. Vs/ SAP India (P) Ltd – (2024) 3 SCC 1*

ANALYSIS AND FINDINGS:

14. Having heard the parties at length, and having navigated and reviewed the material on record with the benefit of the written submissions filed by the Learned Advocates before and after judgement was reserved, the following facets become clear:

- a) NHEC was the PMC appointed by Tilam Sangh, which conceptualised the projects for which bids were to be invited;
- b) NHEC's role was that of a consultant and it was to be remunerated on the basis of overseeing and implementing the work through professional engagement of entities such as Shirke to undertake and complete the work. NHEC was incentivised for timely completion and proper oversight;
- c) The very title clause in the Agreement identifies NHEC as the PMC of Tilam Sangh. The term "Delegated Constituted Purchaser" is used to describe NHEC, which is also identified as "PMC", but more importantly, the term "the Purchaser" is defined to mean Tilam Sangh;

d) The Agreement is replete with references to “the Purchaser” and the various rights and action points of Tilam Sangh. Provisions relating to impact of variation in taxes on the “Contract Price” point to implications of Tilam Sangh and not for NHEC. The beneficiary of insurance is of Tilam Sangh and insurance policies were to be sent to Tilam Sangh. Warranties are provided for and warranty claims were to be raised by Tilam Sangh on Shirke;

e) Clause 23 of the Agreement is titled “Purchaser’s Rights and Obligations” and contains a detailed framework of rights enjoyed by Tilam Sangh and duties owed by NHEC to Tilam Sangh; and

f) Clause 23.1.4 of the Agreement provides that NHEC’s discretionary decisions must be taken in a manner fair to both Tilam Sangh and Shirke. It explicitly provides that “*if either party disagrees with the action taken by the Project Management Consultant, it shall be at liberty to refer the matter to arbitration in accordance with the provisions of the Contract*”;

Scope of Review:

15. The core question to ask is whether the Impugned Judgement calls for any interference. It is now settled law that the scope of jurisdiction under Section 37 of the Act, when sitting in appeal over a decision under Section 34, is identical to the contours of the Section 34 jurisdiction. The question to ask is whether the Section 34 Court adhered to the mandate of Section 34 and conducted itself in line with the jurisdiction or whether it exceeded the jurisdiction or failed to exercise such jurisdiction. Equally, it must be remembered that there has to be due deference to an arbitral award and the Section 34 Court, and indeed the Section 37 Court must not lightly disturb and displace plausible findings contained in arbitral awards. The following passage from ***Konkan Railway***² would be apt to quote in this regard:

14. *Analysis: At the outset, we may state that the jurisdiction of the Court under Section 37 of the Act, as clarified by this Court in MMTC Ltd. v. Vedanta Ltd., is akin to the jurisdiction of the court under Section 34 of the Act. Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act.*

² *Konkan Railway Corporation Ltd. Vs. Chenab Bridge Project Undertaking - (2023) 11 SCR 215*

15. Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal. In Dyna Technologies Private Limited v. Crompton Greaves Limited (2019) 20 SCC 1, this Court held:

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious

and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

[Emphasis Supplied]

16. The challenge in this Appeal filed by Tilam Sangh has to be examined in this light. NHEC has not challenged the Impugned Judgement to support Tilam Sangh on merits, in its capacity as PMC, by claiming that Shirke’s claim was untenable. Shirke has not challenged the Impugned Judgement for letting off NHEC, which was jointly made liable, and that too when Tilam Sangh has been claiming some protections and immunities under State laws of Rajasthan. Therefore, the scope of review is restricted to the challenge mounted by Tilam Sangh, which would claim that the Arbitral Award is untenable on the basic ground of absence of jurisdiction of the Learned Arbitral Tribunal over Tilam Sangh. The objection to modification of the Arbitral Award by Tilam Sangh has to be seen in this light – as an added argument on the implausible conduct by the Learned District Court. Such challenge has to be examined in the light of the scope outlined in ***Konkan Railway*** and extracted above.

Veritable Party Analysis:

17. *First*, on a careful perusal of the PMC Contract and the Agreement, and based on a conjoint reading of the two together, Tilam Sangh's contention of being a disconnected third party by reason of being a non-signatory is an implausible contention. The Agreement is not only dependent on NHEC's role as a PMC as contracted by Tilam Sangh under the PMC Contract but also makes it explicitly clear that if Tilam Sangh or Shirke have any disagreement with NHEC, the disagreement would be amenable to arbitration under the Agreement. Clause 23.1.4 (quoted from above), thereby expands and extrapolates the reach of the jurisdiction of the arbitration agreement contained in the Agreement to Tilam Sangh too. One need not look any further to ascertain privity of Tilam Sangh to the arbitration agreement as a non-signatory who is indeed a veritable party.

18. *Second*, the law declared in Cox and Kings expansively articulates how one must ascertain if a non-signatory to an agreement containing an arbitration clause is a veritable party to the arbitration agreement. While Cox and Kings was rendered in the context of examining if the 'group of companies doctrine' could be invoked to treat parties who are not signatories to an arbitration agreement as veritable

parties to the agreement, it elaborated on the factors and principles to be borne in mind when making such assessment. The following extracts are noteworthy:

37. Over time, this Court has identified certain additional factors for the invocation of the Group of Companies doctrine. In *Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd.* [*Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd.*, (2019) 7 SCC 62 : (2019) 3 SCC (Civ) 453], a two-Judge Bench of this Court was dealing with an application under Section 11(6) of the Arbitration Act seeking the appointment of an arbitrator. This Court *prima facie* observed that the parties belonged to the same group of companies. Subsequently, the issue before this Court was whether there was a clear intention of the parties to bind both the signatory and non-signatory parties based on their participation in the negotiation of the underlying contract. The Court held that the non-signatory party, even though a constituent part of the corporate group, did not have “any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever”. Thus, the participation of the non-signatory party in the negotiation and performance of the underlying contract was held to be the key determinant of the intention of the parties to be bound by an arbitration agreement.

50. In Swiss law, the consent of the parties to be bound by an arbitration agreement may be express or implied by conduct. In a 2008 decision, the Swiss Federal Court held that certain behaviour or conduct may substitute compliance with a formal requirement of an arbitration agreement. [Decision 4A_376/2008 of 5-12-2008.] To determine the implied consent, it was held that the Courts or tribunals may take into consideration the fact whether the non-signatory party was involved in the negotiation and performance of the contract, and

thereby expressed its willingness to be bound by the arbitration agreement. [X v. Y Engg. S.p.A. & Y S.p.A. 4A_450/2013, ASA Bull., 160 (2015).] Thus, the subjective element of willingness to be bound by an arbitration agreement ought to be expressed through an objective element in the form of negotiation or performance of the contract.

[Emphasis Supplied]

19. Applying this principle to the facts of the case, not only did Tilam Sangh conceive and commission the project covered by the Agreement, it appointed NHEC as the PMC to oversee it on its behalf and yet retained control even in the provisions of the Agreement that it permitted NHEC to execute, and even more importantly, oversaw the insertion of Clause 23.1.4 to provide for arbitration over disputes in terms of the arbitration clause in the Agreement. It is arguable that the scope of arbitration under Clause 23.1.4 is relatable to situations where the PMC has exercised discretion and not to other situations. However, it is equally arguable that the existence of a provision of this nature would point to Tilam Sangh necessarily being a veritable party to the Agreement.

20. *Third*, the common objective and purpose of the parties is also writ large. The subject matter of the PMC Contract and the

Agreement is the works commissioned by Tilam Sangh. NHEC was engaged as a consultant i.e. a service provider. NHEC was not meant to taken on the risk and reward of the project. It was paid a commission as a percentage of the project cost with an incentive structure to enable speedy and timely commissioning of the work. It is quite clear that Tilam Sangh has not signed the Agreement is not expressly a party to the arbitration agreement, although the very Agreement refers to Tilam Sangh.

21. Therefore, the question to examine is whether Tilam Sangh is an implied party to the arbitration agreement i.e. a “veritable party”. Towards this end, the following discussion from *Cox and Kings* would be noteworthy:

(ii) Parties to arbitration agreement

70. The general method to figure out the parties to an arbitration agreement is to look for the entities who are named in the recitals and have signed the agreement. The signature of a party on the agreement is the most profound expression of the consent of a person or entity to submit to the jurisdiction of an Arbitral Tribunal. However, the corollary that persons or entities who have not signed the agreement are not bound by it may not always be correct. A written contract does not necessarily require that parties put their signatures to the document embodying the terms of the agreement. [Pollock and Mulla, The Indian Contract and Specific Reliefs Act (14th Edn., 2016) 235.] Therefore, the term “non-signatories”, instead of the traditional

“third parties”, seems the most suitable to describe situations where consent to arbitration is expressed through means other than signature. A non-signatory is a person or entity that is implicated in a dispute which is the subject-matter of an arbitration, although it has not formally entered into an arbitration agreement. [Stavros Brekoulakis, “Rethinking Consent in International Commercial Arbitration : A General Theory for Non-signatories” (2017) 8 Journal of International Dispute Settlement 610.] The important determination is whether such a non-signatory intended to effect legal relations with the signatory parties and be bound by the arbitration agreement. There may arise situations where persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may intend to be bound by the terms of the agreement. In other words, the issue of who is a “party” to an arbitration agreement is primarily an issue of consent.

72. Chitty on Contracts explains the difference between express and implied contracts as follows:

“Contracts may either be express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus : from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination.[...] Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often

implied, it follows that the distinction between express and implied contracts has little importance.” [Chitty on Contracts, Hugh Beale (Ed.), (32nd Edn., Sweet and Maxwell, 2015) para 1-104.]

73. The above exposition gives rise to the inference that in case of an implied contract, the question revolves around the determination of the consent of the parties to be bound by the terms of the contract. Such determination is manifested through the acts or conduct. The theory of implied contract by conduct has also been accepted by this Court. In *Haji Mohd. Ishaq v. Mohd. Iqbal & Mohd. Ali & Co.* [Haji Mohd. Ishaq v. Mohd. Iqbal & Mohd. Ali & Co., (1978) 2 SCC 493] , the plaintiff supplied tobacco to the defendant. Although there was no express agreement between the parties, the defendant accepted the goods, but allegedly failed to clear the outstanding dues despite repeated demands raised by the plaintiff. A Bench of three Judges of this Court observed that the conduct of the defendants in accepting the goods and not repudiating any of the demand letters raised by the plaintiff “clearly showed that a direct contract which in law is called an implied contract by conduct was brought about between them”. Under the Indian contract law, it is posited that actions or conduct can be an indicator of consent of a party to be bound by a contract. This also applies to an arbitration agreement considering the fact that it is a creature of contract. However, an arbitration agreement also has to meet the requirements laid down under the Arbitration Act to be valid and enforceable.

83. Reading Section 7 of the Arbitration Act in view of the above discussion gives rise to the following conclusions : first, arbitration agreements arise out of a legal relationship between or among persons or entities which may be contractual or otherwise; second, in situations where the legal relationship is contractual in nature, the nature of relationship can be determined on the basis of general contract law principles; third, it is not necessary for the persons or

entities to be signatories to the arbitration agreement to be bound by it; fourth, in case of non-signatory parties, the important determination for the Courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct; fifth, the requirement of a written arbitration agreement has to be adhered to strictly, but the form in which such agreement is recorded is irrelevant; sixth, the requirement of a written arbitration agreement does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties; and seventh, once the validity of an arbitration agreement is established, the Court or tribunal can determine the issue of which parties are bound by such agreement.

84. It is presumed that the formal signatories to an arbitration agreement are parties who will be bound by it. However, in exceptional cases persons or entities who have not signed or formally assented to a written arbitration agreement or the underlying contract containing the arbitration agreement may be held to be bound by such agreement. As mentioned in the preceding paragraphs, the doctrine of privity limits the imposition of rights and liabilities on third parties to a contract. Generally, only the parties to an arbitration agreement can be subject to the full effects of the agreement in terms of the reliefs and remedies because they consented to be bound by the arbitration agreement. Therefore, the decisive question before the Courts or tribunals is whether a non-signatory consented to be bound by the arbitration agreement. To determine whether a non-signatory is bound by an arbitration agreement, the Courts and tribunals apply typical principles of contract law and corporate law. The legal doctrines provide a framework for evaluating the specific contractual language and the factual settings to determine the intentions of the parties to be bound by the arbitration agreement. [Gary Born, International Arbitration Law and Practice, (3rd Edn., 2021) at p. 1531.]

(ii) Adopting a pragmatic approach to consent

96. An arbitration agreement encapsulates the commercial understanding of business entities as regards to the mode and manner of settlement of disputes that may arise between them in respect of their legal relationship. In most situations, the language of the contract is only suggestive of the intention of the signatories to such contract and not the non-signatories. However, there may arise situations where a person or entity may not sign an arbitration agreement, yet give the appearance of being a veritable party to such arbitration agreement due to their legal relationship with the signatory parties and involvement in the performance of the underlying contract. Especially in cases involving complex transactions involving multiple parties and contracts, a non-signatory may be substantially involved in the negotiation or performance of the contractual obligations without formally consenting to be bound by the ensuing burdens, including arbitration.

97. Modern commercial reality suggests that there often arise situations where a company which has signed the contract containing the arbitration clause is not always the one to negotiate or perform the underlying contractual obligations. In such situations, emphasis on formal consent will lead to the exclusion of such non-signatories from the ambit of the arbitration agreement, leading to multiplicity of proceedings and fragmentation of disputes. In *A. Ayyasamy v. A. Paramasivam* [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79], this Court observed that it is the duty of the Courts “to impart to that commercial understanding a sense of business efficacy”. The Courts must interpret contracts in a manner that would give them a sense of efficacy rather than invalidating the commercial interests of the parties. The meaning of the contract must be gathered by adopting a common sense approach, which should “not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation”. [Union of India v. D.N. Revri & Co., (1976) 4 SCC

147] Therefore, there is a need to adopt a modern approach to consent, which takes into consideration the circumstances, apparent conduct, and commercial facets of business transactions.

100. Arbitration law is an autonomous legal field. While the main purpose of corporate law and contract law is imputation of substantive legal liability, the main purpose behind the law of arbitration is to determine whether an Arbitral Tribunal has jurisdiction over the dispute arising between parties to an arbitration agreement. On the one hand, the Courts and tribunals cannot lightly brush aside the decision of the parties to not make a person or entity a party to the arbitration agreement. The fact that the non-signatory did not put pen to paper may be an indicator of its intention to not assume any rights or responsibilities under the arbitration agreement. On the other hand, courts and tribunals cannot adopt a rigid approach to exclude all persons or entities who, through their conduct and relationship with the signatory parties, intended to be bound by the underlying contract containing the arbitration agreement. The area of arbitration law not only concerns domestic law, but it also encompasses the international law, particularly when it pertains to the enforcement of international arbitral awards. Therefore, this Court ought to adopt a balanced approach without comprising (quaere compromising) on the basic principles of arbitration law, contract law, and company law to ensure that the resultant legal framework is consistent with internationally accepted practices and principles.

101. A formalistic construction of an arbitration agreement would suggest that the decision of a party to not sign an arbitration agreement should be construed to mean that the mutual intention of the parties was to exclude that party from the ambit of the arbitration agreement. Indeed, corporate entities have the commercial and contractual freedom to structure their businesses in a manner to limit their liability. However, there have been situations where a corporate entity deliberately made an effort to be not bound by the underlying

contract containing the arbitration agreement, but was actively involved in the negotiation and performance of the contract. The level of the non-signatory party's involvement was to the extent of making the other party believe that it was a veritable party to the contract, and the arbitration agreement contained under it. Therefore, the Group of Companies doctrine is applied to ascertain the intentions of the parties by analysing the factual circumstances surrounding the contractual arrangements. [Gary Born, International Arbitration Law and Practice, (3rd Edn., 2021) at p. 1568.]

[Emphasis Supplied]

22. A prolix reproduction became necessary since the aforesaid extracts speak for themselves in their relevance to the matter at hand. The role of Tilam Sangh looming large over the Agreement and the commonality of subject matter of the PMC Contract and the Agreement, and the inter-connected nature of the two contracts and the bundle of rights and obligations contained therein cannot be ignored. In the application of the aforesaid principles, the following further extracts from **Cox and Kings** would complete the framework in which the matter at hand must be examined:-

120. In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator. An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject-matter. Commonality of the subject-matter indicates that the conduct of the non-signatory party must be related to the subject-matter of the arbitration agreement. For instance, if the subject-matter of the contract underlying the arbitration agreement pertains to distribution

of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject-matter.

121. In case of a composite transaction involving multiple agreements, it would be incumbent for the Courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in Canara Bank [MTNL v. Canara Bank, (2020) 12 SCC 767] observed that a composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.

122. The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences “in connection with” the main agreement and also disputes “connected with” the subject-matter of the principal agreement. [Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651] In Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , this Court clarified that the principle of “composite performance” would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the signatory and non-signatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement. Thus, the application of the Group of

Companies doctrine in case of composite transactions ensures accountability of all parties who have materially participated in the negotiation and performance of the transaction and by doing so have evinced a mutual intent to be bound by the agreement to arbitrate.

123. The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the Courts and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement. *The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement.....*

[Emphasis Supplied]

23. The law declared by the Supreme Court is clear. A conjoint reading is necessary in the situation at hand. The PMC Contract and the Agreement have a common subject matter. The PMC is but a consultant of Tilam Sangh. The PMC was authorised by Tilam Sangh to appoint Shirke. The Agreement was authorised by Tilam Sangh. The Agreement being on a principal-to-principal basis can only mean that Shirke is not an agent of NHEC. The PMC Contract is purely to enable NHEC to carry out the specific tasks assigned to NHEC by Tilam Sangh. The risk and reward from the project work flowed to Tilam Singh. The only reward for NHEC is the fees and the incentive for timely completion.

24. Therefore, to my mind, the objection on the ground of Tilam Sangh having no implied privity to the Agreement and thereby the Learned Arbitral Tribunal having no jurisdiction over Tilam Singh are implausible propositions.

Making NHEC Pay is Implausible:

25. Moreover, it is totally implausible that a PMC is made to pay on the primary payment obligations owed by the principal employer. To that extent, making NHEC jointly and severally liable to Shirke is indeed implausible. Therefore, the intervention by the Learned District Court in severing and excising that portion of the Arbitral Award that makes NHEC jointly liable to discharge duties owed to Shirke cannot be faulted. It is only where a finding is implausible such that no reasonable person could take that view that an intervention can be made. The Learned District Court's limited intervention cannot be faulted.

26. When this matter was argued, the case law cited on partial setting aside of awards were all rendered prior to the Constitution Bench judgement of the Supreme Court in *Gayatri Balasamy*³, which has clearly declared the law on partial setting aside of arbitral awards. Without meaning to add more length to this judgement by extracting

³ *Gayatri Balasamy vs. M/s ISG Novasoft Technologies Limited* – 2025 INSC 605

from it, it would be only apt to say that by now it is trite law that if any portion of an arbitral award deserves to be set aside, the Section 34 Court could do so if it is completely severable and its contents are not inseparably intertwined to the other components of the arbitral award found to be valid and legal. Part II of the majority judgement (*Per. Sanjiv Khanna, CJI* – paragraphs 33 to 36) and in the concurring contents of the separate judgement (*Per. K.V. Vishwanathan J* – paragraphs 142 to 152), clearly lay down the law. I have examined the Arbitral Award from this perspective, and I note that excising the portion that makes NHEC liable for what is payable by Tilam Sangh to sustain the Arbitral Award in its material substance and removing the vulnerability posed by NHEC's challenge under Section 34, does not undermine the Arbitral Award. There is nothing inextricably interwoven and interconnected about NHEC being jointly liable with Tilam Sangh that makes its excision undermine anything in the rest of the Arbitral Award. In fact, it is because this element is out of sync with the rest of the Arbitral Award, that the excision of this offending portion is found to be a meritorious means of sustaining the Arbitral Award.

27. There are other facets contended – about Tilam Sangh not having filed an application under Section 16 of the Act, and in fact

having participated in the arbitration. On the other hand, the Supreme Court has indeed given liberty to raise contentions on jurisdiction in the Section 34 Petition and thereby in this Section 37 Appeal. To my mind, it is unnecessary to deal with this strand of submissions and counter-submissions since, for the reasons set out above, I do not think this Appeal has merit and, in any case, even assuming the liberty granted permits making these submissions, I have examined the substance and dealt with the same.

Summary of Conclusions:

28. To summarize:

- a) Tilam Sangh is a veritable party to the Agreement. Therefore, the Arbitral Award is not without jurisdiction over Tilam Sangh;
- b) The obligation to pay, which is a determination on merits, cannot be visited upon NHEC, which was merely a PMC;

c) The Agreement has to be interpreted in accordance with its terms as well as customs and usages. It cannot be contended that it is customary for a project management consultant to undertake the liability owed by the principal employer owed to sub-contractors. To this extent, the Arbitral Award had returned an implausible finding of joint liability of NHEC;

d) The excision of the joint liability fastened on NHEC is permissible and is well covered by the law declared in *Gayatri Balsamy*. Such partial setting aside is not an impermissible modification and in fact, removes the vulnerability to the Arbitral Award;

e) Therefore, there is nothing in the Impugned Judgement that warrants interference by this Court in exercise of jurisdiction under Section 37 of the Act.

29. In the result, the captioned Appeal would fail. The Appeal is *dismissed*. Interim Applications, if any, shall stand *disposed of* accordingly. Amounts, if any, lying in the Registry of this Court shall be

released within a week of the expiry of four weeks from the upload of this judgement on this Court's website.

30. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]