MAHANAGAR TELEPHONE NAGAM LIMITED V. CANARA BANK AND OTHERS 2019 SCC ONLINE SC 995

Supreme Court of India; 2-judge bench, **Abhay Manohar Sapre** & **Indu Malhotra** JJ; decided on 08 August 2019

Form of the arbitration agreement; its construction and group of companies doctrine

CANFINA was set up as a subsidiary of Canara Bank. The dispute arose from a transaction of subscription by CANFINA of bonds floated by MTNL which CANFINA later transferred to its holding Company – Canara Bank. MTNL claimed CANFINA did not pay the entire sale consideration and canceled the bonds.

The matter came to the Supreme Court with two issues: – (i) the first was raised by the appellant MTNL, whether an arbitration agreement existed between the three parties; (ii) the second issue was raised by respondent Canara Bank, whether CANFINA, not a party to the arbitration agreement, could be impleaded?

(A) WHAT SHOULD BE THE FORM OF THE ARBITRATION AGREEMENT?

It need not be in any form, and there need not be a formal contract. What is required to be ascertained *prima facie* is that parties were *ad idem* in settling disputes through arbitration expressly or impliedly spelled out from a clause in an agreement, separate agreement, or documents exchanged between the parties. It can be, under Section 7(4)(c) ACA, like in this case, an agreement in the form of exchange of statement of claims and defense, in which the existence of the agreement is asserted by one party and not denied by the other.

(B) HOW SHOULD AN ARBITRATION AGREEMENT BE CONSTRUED?

It should be construed: -

(i) According to the general principles of construction of statutes, statutory instruments, and other contractual documents, the intention must be inferred from the terms, conduct, and correspondence. By adopting a common-sense approach not thwarted by a pedantic and legalistic interpretation.

(ii) To give effect to the intention of the parties, to make it workable, rather than to invalidate it on technicalities.

(C) WHEN CAN A NON-SIGNATORY BE BOUND BY AN ARBITRATION AGREEMENT BASED ON THE "GROUP OF COMPANIES" DOCTRINE?

Where: –

(i) Conduct establishes a clear intention (even if implied) of the parties to bind the non-signatory. For example, where the non-signatory entity among the group-company has been engaged in the negotiation or performance of the commercial contract or made statements indicating its intention to be bound by the contract.

(ii) The non-signatory was, by reference to the common intention of the parties, a necessary party to the contract.

(iii) There is a direct relationship with the signatory, direct commonality of the subject matter, and a transaction of composite or inter-linked nature.

(iv) The group structure with strong organizational and financial links constitutes a single economic unit or a single economic reality. For example, particularly when funds of one company are used to financially support or re-structure other members of the group.

The court also referred to examples where the group of companies doctrine has been applied:

(i) By the Supreme Court in international arbitration–*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*,(2013) 1 SCC 641

(ii) By the Supreme Court in a domestic arbitration– *Ameet Lal Chand Shah* v. *Rishabh Enterprises*,(2018) 15 SCC 678

(iii) By the Madras High Court in a foreign seated arbitration– *SEI Adhavan Power Pvt. Ltd.* v. *Jinneng Clean Energy Technology Ltd.*, 2018 (4) CTC 46.

In the facts, the court held CANFINA is a necessary and proper party to the arbitration proceedings.[6] Given the tripartite nature of the transaction, there can be a final resolution of the disputes, the court said, only if all three parties are joined in the arbitration proceedings.

6 CANFINA participated in several proceedings earlier. In a draft arbitration agreement circulated CANFINA was joined as respondent. The court said there was a clear intention of the parties to bind both Canara Bank, and its subsidiary – CANFINA to the proceedings.