

## **Introduction**

The Indian Arbitration is chiefly regulated by the Arbitration & Conciliation Act of 1996( hereinafter referred to as “A&C Act”). The act envisages that while entering into a legally binding contract, the parties must include an arbitration clause, that allows them to refer disputes to arbitration. The existence of such a clause is, therefore, a prerequisite to initiating arbitration proceedings, as the same signifies the intention of the signatory parties to submit to arbitration. The clause binds the signatory parties to the agreement. Conversely, there exist certain instances wherein the arbitration agreement is binding on the non-signatory third parties. In Cheran Properties Limited v. Kasturi and Sons Limited and Ors<sup>1</sup>, the Hon’ble Supreme Court of India dealt with this precise issue and elucidated on the binding nature of the arbitration agreement on non-signatory parties. The three-judge bench headed Justice Deepak Mishra also explicated the power of the NCLT to execute arbitral awards pertaining to the transmission of shares by rectification of the register of members.

## **Background**

The share purchase agreement entered into between KC Palanisamy (“KCP”), Kasturi & Sons Limited ( “KSL” ), Sporting Pastime India Limited( “ SPIL”), and Hindcorp Resorts Pvt. Ltd. (Hindcorp) on 19<sup>th</sup> July 2004 was the impugned agreement. Consequent to this agreement SPIL, which was a subsidiary of KSL, was obligated to allot 240 lakh equity shares, fully paid up at par to KSL against the book debts that were due. Additionally, KSL offered to sell 243 lakh equity shares, forming 90% of the total paid-up share capital in SPIL to KCP or his nominees for a consideration of Rs 2,31,50,000. The intention of the contracting parties, as evinced in the agreement, was that subsequent to the transfer of the shares, KCP would assume responsibility for the management of SPIL and would also discharge the outstanding liabilities existing on the date of the said agreement. The agreement essentially recognized the right of

---

\* Mehek Wadhwani, 2<sup>nd</sup> Year, Maharashtra National Law University, Aurangabad.

<sup>1</sup> Cheran Properties Ltd v. Kasturi and Sons Ltd & Ors (2018) 16 SCC 413

KCP and his nominees, including the Appellant Cheran Properties Limited (“Cheran”) to sell or transfer their holding in SPIL. The express condition as mentioned in the agreement was that the transferees would accept the terms and conditions pertaining to the management of SPIL and the related financial aspects. The agreement also contained an arbitration clause. Thereafter, KCP issued a letter dated 17<sup>th</sup> August 2004 and requisitioned that KSL, in accordance with the agreement, transfers the shares to KCP and its nominees. A DD for an amount of Rs 2.43 crores was enclosed with the letter as the share consideration. Notwithstanding the fact that KSL transferred the shares to the KCP and other stipulated parties, KCP failed to comply with certain obligations set out in the agreement. Consequentially, KSL and Hindcorp invoked the arbitration clause and initiated proceedings against KCP and SPIL.

The Arbitral Tribunal passed its award on 16<sup>th</sup> December 2009, the terms of which directed KCP and SPIL to revert the documents of title and the share certificates of SPIL to KSL and Hindcorp. On the other hand, KSL was directed to return the share consideration with interest added to the amount. The appeal by KCP to challenge the award was dismissed by the Madras High Court and subsequently by the Supreme Court. KSL, deciding to exhaust all possible remedies approached the National Company Law Tribunal (“NCLT”) to seek rectification of the register of SPIL under section 111 of the Companies Act, 1956 that provides the right to appeal when a company refuses a bonafide transmission of shares. This was, therefore done to conduce the return of shares from the Appellant (“a nominee of KCP”) to KSL as directed by the award. NCLT accepted the application and the same was upheld by the National Company Law Appellate Tribunal (“NCLAT”) and the Madras High Court on appeal. The position of both the tribunal and the High Court was that the purchase of the shares by the appellant (“Cheran”) was not done as a matter of an independent right but instead as a nominee of KCP, and therefore the Award could be enforced against it. The aggrieved appellant approached the Supreme Court against the order of the NCLAT in the case under discussion.

### **Issues Before the Supreme Court**

The Hon’ble Court Supreme Court was therefore tasked with answering the following significant questions of law. The first issue before the Court was to determine whether an Arbitral award was binding on a non-signatory third party, who was not a party to arbitration proceedings. The second issue before the Court was to decide on the maintainability of proceedings before the NCLT, for the enforcement of the Arbitration Award. The court

essentially had to determine if the NCLT could enforce an arbitral award involving transmission of shares by the rectification of the register of members.

### **Judgment & Analysis**

The three-judge bench of the Supreme Court, after hearing the contentions, gave a detailed judgment, authored by Justice D Y Chandrachud, which culminated in the dismissal of the appeal. The counsel representing Cheran argued that the arbitral award that was issued pursuant to the arbitral proceedings, was not binding on the appellant, as he was non-signatory to the shareholder agreement which contained the arbitration clause. On the second point, the appellant contended that the arbitral award could not be enforced by proceedings before the NCLT, and as such a decree of the civil court was required for the same. The Respondent, conversely, argued that the impugned agreement explicitly stipulated that KCP and his nominees(including Cheran) were obligated to accept the terms and conditions of the agreement, and this also included the arbitration clause. Further, the counsel argued upon the necessity of approaching the NCLT in the case, as it was the appropriate forum to remedy cases relating to the transfer of shares. The Court held that the arbitral award can be enforced against a non-signatory to the arbitration when such person or entity was claiming through or under a party, who was a signatory of the agreement containing the arbitration clause. The court also settled that, in the case, NCLT was the suitable forum for the execution of award for the transmission of shares, and as such the decree of the civil court was not required.

The Bench, in the first issue, relied on the ratio of its earlier judgment in *Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification Inc.*,<sup>2</sup> (“Chloro Controls”) to determine whether the appellant could be considered as a ‘person claiming under’, with respect to the provisions under section 35 of the A&C Act. The said provision envisages that the arbitral award is “binding on the parties and persons claiming under them.” Here, the expression “persons claiming under them” is considered to widen the scope of the binding nature of an arbitral award. By virtue of this provision, the award could therefore be made binding on the non-signatory parties, including the appellant in this case. To determine the required ingredients for the non-signatory to the agreement to be considered as a party claiming under, the court elucidated the categories of relationships as mentioned in Chloro Controls. The first category of relationships, wherein

---

<sup>2</sup> *Chloro Controls v. Severn Trent* (2013) 1 SCC 641.

the non-signatory could be considered as the party claiming under, involved ‘third-party beneficiaries, guarantors, assignment’, and the relation was based on implied consent and good faith. The second category involved agent and principal, apparent authority, piercing of the veil, joint venture relations, succession, and estoppel, the basis of which was the force of the applicable law. The third category involved the ‘Group of Companies Doctrine’. Before analysing the applicability of the said doctrine in this case, it is pertinent to note that the Indian Courts have used this English doctrine to bind the non-signatories to the arbitration agreement and have gradually broadened the scope of the same in the Indian Arbitration. This doctrine finds application in cases where there are agreements between multiple parties. Accordingly, the agreement entered into by a company within a group of companies would bind non-signatory affiliates, if the circumstances of the case demonstrate the existence of a mutual intention of the parties to bind both signatories and non-signatories, as held in Chloro Controls. This mutual intention plays a crucial role and forms the legal basis to connect an arbitration agreement entered by a company within a group of companies. The factors such as the relationship of a third party to the signatory party, a ‘direct commonality’ of the subject matter, and the composite nature of the transaction must be taken into account to determine the mutual intention.

Applying the law to the facts, it was held that Cheran was a ‘party claiming under’ KCP, and accordingly, section 35 of the Act made the award binding on the appellant. The Court noted that the original shareholder agreement dated 19<sup>th</sup> July 2004 which obligated the allotment of equity shares of KSL to KCP, explicitly included the stipulation that KCP would take over the management and financial liabilities of SPIL, and the parties shared a common intention in this regard. Further, KCP could transfer his shares, subject to the condition that the transferee would accept the conditions of the agreement. The Appellant Cheran being a nominee and transferee accepted the terms of the agreement, which was specifically mentioned in KCP’s letter dated 17<sup>th</sup> August 2004. KCP as authorized signatory of the appellant indicated that his group of companies had agreed to purchase the shares in SPIL in the letter. This displayed a mutual intention of the parties to be bound by the arbitral award.

In summary, it can thus be noted that the court applying the ‘group of companies doctrine’ and Section 35 of the Arbitration and Conciliation Act, 1996 ascertained that the appellant came under the purview who “persons claiming under them” for binding to the arbitral award.

On the second question of law, the court progressively noted that the execution of arbitral award through the NCLT by seeking the remedy under section 111 of the Companies Act, 1956 was appropriate in the case. As noted previously, the arbitral award passed 16<sup>th</sup> December 2009, directed that KSL was entitled to the transfer of share certificates, on tendering the share consideration back, along with interest. The Court cited its judgment in *Sundaram Finance Limited v. Abdul Samad*<sup>3</sup> to turn down the appellant's contentions that the Respondent could only enforce the Award in Madras High Court. In the aforementioned case, the Court had noted that section 42 did not apply to execution proceedings and that such proceedings can be initiated in the 'most apposite court having jurisdiction over the assets.' The Bench in Cheran Properties used this principle to conclude that the most appropriate forum that could effectuate the transmission of the shares was the NCLT and accordingly, the remedy available to KSL effecting the Award was through an application under section 111 of the Companies Act, 1956 for the rectification of the register. Thus, the proceedings before the NCLT were held to be maintainable.

The Supreme Court's approach of making the execution of arbitral awards convenient by recognizing that the competent fora, other than civil courts, can execute arbitral awards was a progressive step in the Arbitration setup. Nevertheless, it is also observed that the remedy of approaching the NCLT for the execution of the award and the power of the forum to execute such awards is limited.

## **Conclusion**

The difficulty to enforce an Arbitration award is an inherent drawback of this alternate dispute resolution mechanism that seeks to work as an efficient alternative to the traditional litigation system, primarily to reduce the burden of the said system. Thus, it is appropriate to conclude that the Supreme Court of India in Cheran Properties, took a positive step toward making the remedy of Arbitration effective by facilitating the execution of the award binding a non-signatory, who was a party under the company entering the arbitration agreement; and deeming NCLT to be the appropriate forum to effectuate the arbitral award pertaining to the transmission of shares. The modern business transactions are often complex and involving multiple parties and in light of the applicability of the 'Group of Companies' doctrine is desirable. However, a blind approach of binding non-signatories, without appreciating the facts of the individual case

---

<sup>3</sup>Sundaram Finance Limited v. Abdul Samad (2018) SCC 121.

while dealing with arbitrations involving multiple contracts between a group of companies is not advantageous. It is worth noting that in a later judgment,<sup>4</sup> the Supreme Court while referencing this case observed the importance of the intention of the non-signatory to determine if he can be bound by the arbitration agreement.

---

<sup>4</sup> Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited & Ors