OCD 8

ORDER SHEET
AP-COM/523/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

MR AVIRUP TALUKDAR
VS
MR AVISHEK TALUKDAR AND ANR

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 3rd July, 2025.

Appearance:
Ms. Ankita Baid, Adv.
Mr. Siddhartha Roy, Adv.
. . .for the petitioner.

Mr. Siddhartha Banerjee, Adv.
Mr. Sudipta Dasgupta, Adv.
Mr. R. Basu, Adv.
. . .for the respondent no.1.

The Court:

1. Despite service, none appears on behalf of the respondent no.2. Reply of the respondent no.2 to the notice invoking arbitration clearly indicates that the respondent no.2 is agreeable to the dispute being referred to arbitration.

2. This is an application for reference of a dispute between the parties to arbitration on the strength of Clause 33 of the deed of partnership dated September 1, 2000. The deed was entered into between the respondents and Smt. Nandita Talukdar, since deceased. The petitioner is the youngest son of Late Nandita Talukdar. The petitioner relies on Clauses 20, 21 and 25 of the deed to assert that he has become a partner upon the death of his mother along with the respondents and is entitled to participate in the business and enjoy the

shares of profit. According to the petitioner, several properties were purchased out of the said partnership business and the respondent no.1 had acknowledged the petitioner's share by requesting the petitioner to issue a NOC for sale of such property. Reliance has been placed on various e-mails exchanged between the parties in support of the contention that, disputes had arisen in respect of the partnership business and properties of the partners.

3. Reliance is placed on the decision of the Hon'ble Apex Court in the matter of *Rahul Verma & Ors. Versus Rampat Lal Verma & Ors.,* reported at 2025 INSC 296, in support of the contention that Sections 40 and 46 of the Indian Partnership Act read with Section 40 of the Arbitration Act would permit a legal heir of late Nandita Talukdar to seek reference of the disputes. The petitioner contends that the contract clearly provides that the partnership will not stand dissolved on the death of the partner. The heirs shall inherit the share of the deceased partner. The partnership will continue with the heirs.

4. The petitioner's grievance is that, despite such clauses in the deed, the petitioner has not been allowed to participate in the partnership business upon its reconstitution with the petitioner as a partner. Section 40 of the Arbitration Act provides that an Arbitration agreement shall not be discharged by the death of a party thereto and shall be enforceable by or against the legal representative of the deceased. In this case, one of the legal representatives of the deceased is seeking to enforce the arbitration agreement against the other two heirs of the deceased.

5. Mr. Siddhartha Banerjee, learned advocate for the respondent no.1, submits that only disputes between the partners whose names appear in the deed of September 1, 2000, can be referred to Arbitration. Unless the petitioner is

acknowledged as a partner upon reconstitution of the partnership and a deed to that extent is executed which contains an arbitration clause, the petitioner cannot take advantage of the arbitration clause in the present deed. The deed provides that disputes between the parties to the agreement alone, shall be referred to a sole Arbitrator.

6. Considered the rival submission of the respective parties. The deed of partnership was executed between Alok Talukdar, Nandita Talukdar, Avishek Talukdar. The petitioner was not a partner. Nandita Talukdar wife of Alok Talukdar, was referred to as the "partner of the second part" which term and expression (unless excluded by or repugnant to the subject or context) was deemed to mean and include her heirs, executors, administrators, legal representatives and assigns of the second part.

7. Thus, the expression "partner" in the recital of the deed of partnership includes heirs, executors, administrators, legal representatives and assigns. Such recital read with Section 40 of the Arbitration and Conciliation Act, 1996, enables Avirup Talukdar to seek reference of the dispute to arbitration as per the arbitration clause.

8. Moreover, Clauses 20, 21, and 25 of the deed which are set out below, indicate that the partnership did not dissolve on the death of Nandita. Rather, Avirup would have automatically inherited part of her shares in the partnership business, and be substituted in the business. The partnership business would continue with the substituted partner/heir.

> "20. <u>That if any Partner dies during the continuance of the Firm his heirs will be substituted in the place of deceased Partner</u> and he/she/they shall be bound by the terms and conditions stated herein.

> 21. <u>The said legal heir/heirs shall inherit the share of the deceased Partner. The surviving Partner shall continue the Partnership Business with the legal heirs or the heirs of the deceased Partner</u>, if the legal heirs of the deceased Partner does not or do not desire to continue the Partnership Business he/she or they shall be entitled to receive the amount sanding in the credit of the capital account and/or any other account of the deceased partner and they shall be entitled to receive the proportionate share of goodwill as may be valued considering the prevailing market rate of all transactions, Assets and liabilities of the Partnership Business shall be shown according to the general procedure of Accountancy.
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> 25. That upon the death of any of the partner, the Partnership shall not dissolve. <u>Upon the death of any of the Partner, her legal heir or heirs inherit the share of the deceased Partner</u>. The surviving Partners shall continue the partnership Business with the legal heir or heirs of the deceased Partner of the same terms and conditions herein contained or any other terms and conditions as the Partners may mutually agree upon if the legal heir or heirs of the deceased Partner does not or do not desire to continue the Partnership business he/she/they shall be entitled to receive the proportionate share of the goodwill as may be valued consideration at the prevailing market price of the rate of the goodwill of the business similar to the proportionate business but to the making such payment the amount payable by the deceased Partner to the firm shall be adjusted against any loan or advance taken by the deceased Partner but upon unpaid and debit balance in the capital account."

9. The dispute arose upon violation of the above clauses by the respondent No. 1, as alleged by the petitioner. The issue as to whether a non signatory can seek reference of the dispute to arbitration has to be gathered from the agreement, circumstances and conduct. The law is also well settled that the referral Court is to, prima facie, assess whether the parties are intrinsically connected to the arbitration agreement or the contract out of which the disputes arose. Connection between the parties is, prima facie, available. Ultimately, the issue will be addressed by the learned arbitrator. The clauses in the deed provide that the heir of the deceased shall inherit the share and the partnership will continue.

10. Reference is made to the decision of "***ASF Buildtech Private Limited vs. Shapoorji Pallonji and Company Private Limited*** reported in ***2025 SCC OnLine SC 1016***.

> "115. The case of Ajay Madhusudhan (supra) also recognizes that the legal relationship between the signatory and non-signatory assumes significance in determining whether the non-signatory can be taken to be bound by the Arbitration Agreement. This Court also issued a caveat that the 'courts and tribunals should not adopt a conservative approach to exclude all persons or entities who are otherwise bound by the underlying contract containing the arbitration agreement through their conduct and their relationship with the signatory parties. <u>The mutual intent of the parties, relationship of a non- signatory with a signatory, commonality of the subject matter, the composite nature of the transactions and performance of the contract are all factors that signify the intention of the non-signatory to be bound by the arbitration agreement</u>'.
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> 116. Recently, a coordinate bench of this Court in Adavya Projects Pvt. Ltd. v. Vishal Strcturals Pvt. Ltd., 2025 INSC 507, also held that an arbitral tribunal under Section 16 of the Act, 1996 has the power to implead the parties to an arbitration agreement, irrespective of whether they are signatories or non-signatories, to the arbitration proceedings. This Court speaking through. P.S. Narasimha J. observed that since an arbitral tribunal's jurisdiction is derived from the consent of the parties to refer their disputes to arbitration, any person or entity who is found to be a party to the arbitration agreement can be made a part of the arbitral proceedings, and the tribunal can exercise jurisdiction over him. <u>Section 16 of the Act, 1996 which empowers the arbitral tribunal to determine its own jurisdiction, is an inclusive provision that covers all jurisdiction question including the determination of who is a party to the arbitration agreement, and thus, such a question would be one which falls within the domain of the arbitral tribunal. It further observed that, although most national legislations do not expressly provide for joinder of parties by the arbitral tribunal, yet an arbitral tribunal can direct the joinder of a person or entity, even if no such provision exists in the statute, as long as such person or entity is a party to the arbitration agreement</u>. Accordingly, this Court held that since the respondents therein were parties to the underlying contract and the arbitration agreement, the arbitral tribunal would have the power to implead them as parties to the arbitration proceedings in exercise of its jurisdiction under Section 16 of the Act, 1996. The relevant observations read as under: -
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> "24. <u>As briefly stated above, the determination of who is a party to the arbitration agreement falls within the domain of the arbitral tribunal as per Section 16 of the ACA</u>. Section 16 embodies the doctrine of kompetenz-kompetenz, i.e., that the arbitral tribunal can determine its own jurisdiction. The provision is inclusive and covers all jurisdictional

questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement. and the scope of disputes referrable to arbitration under the agreement. Considering that the arbitral tribunal's power to make an award that binds the parties is derived from the arbitration agreement, these jurisdictional issues must necessarily be decided through an interpretation of the arbitration agreement itself. Therefore, the arbitral tribunal's jurisdiction must be determined against the touchstone of the arbitration agreement."

11. In the matter of ***Ajay Madhusudan Patel v. Jyotrindra S. Patel,*** reported in ***(2025) 2 SCC 147,*** the Hon'ble Apex Court held as follows:-

"82. An important factor to be considered by the courts and tribunals is the participation of the non-signatory in the performance of the underlying contract. In this regard, it was observed in Cox & Kings [Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Case 680] as follows : (SCC pp. 75-77, paras 123 & 126-27)

"123. … <u>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</u>. The Unidroit Principle of International Commercial Contract, 2016 [Unidroit Principles of International Commercial Contracts, 2016, Article 4.3.] provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned; and

(f) usages.

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126. Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a number of reasons. First, by being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement; second, the conduct of the non-signatory may be in harmony with the conduct of the other members of the group, leading

the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other party has legitimate reasons to rely on the appearance created by the non-signatory party so as to bind it to the arbitration agreement.

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127. ... The nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence."

12. In the matter of ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.,*** reported in***(2013) 1 SCC 641,*** the Hon'ble Apex Court held as follows:-

"**70.** Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (*sic* underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England* (2ndEdn.) by Sir Michael J. Mustill:

'1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.

> 4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

13. In the matter of ***Cox & Kings Ltd. v. SAP (India) (P) Ltd.,*** reported in ***(2025) 1 SCC 611,*** the Hon'ble Apex Court held as follows:-

> **"31.**
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> 169. 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 non-signatory 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 the Arbitral Tribunal under Section 16."

14. Under such circumstances, the application is allowed. The Court appoints Justice Ranjit Kumar Bag, former Judge of this court, as the Arbitrator, to arbitrate upon the dispute between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

15. The learned Arbitrator shall fix his/her own remuneration as per the Schedule of the Act.

16. It is well settled that the Arbitrator can rule on his own jurisdiction which includes the issue of non-arbitrability of the dispute. Thus, all questions are left open.

17. AP-COM/523/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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