IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:29.05.2023

\+ **FAO(OS)(COMM) 59/2023 and CM Nos. 14793/2023 & 14794/2023**

TOMORROW SALES AGENCY PRIVATE LIMITED ..... Appellant

versus

SBS HOLDINGS, INC. AND ORS. ..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Shashank Garg, Mr Aman Gupta, Mr Atharva Koppal and Ms Nishtha Jain, Advocates.

For the Respondents : Mr Gautam Narayan with Ms Asmita Singh, Mr Ranjith Nair, Mr Altamash Qureshi, Ms Akriti Arya and Mr Harshit Goel, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The appellant, Tomorrow Sales Agency Private Limited (hereafter '**TSA**') has filed the present intra-court appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 07.03.2023 (hereafter '**the impugned**

order') passed by the learned Single Judge in a petition filed by respondent no.1, SBS Holdings Inc. (hereafter '**SBS**') under Section 9 of the A&C Act being **OMP(I)(COMM) 71/2023** captioned '***SBS Holding Inc. v. Anant Kumar Choudhary & Others.***'

2. SBS had filed the aforesaid petition, *inter alia*, praying that TSA and respondent nos. 2 to 4 be directed to disclose details of their assets and bank accounts and further furnish a security for a sum of SGD 12,12,838.98 (Singapore Dollars twelve lacs twelve thousand eight hundred and thirty eight and ninety eight cents), USD 2,46,196.96 (United States Dollars two lacs forty six thousand one hundred and ninety six and ninety six cents) and JPY 11,02,612 (Japanese Yen eleven lacs two thousand six hundred and twelve) aggregating to an amount of ₹9,62,08,119/- (Indian Rupees nine crore sixty two lacs eight thousand and one hundred nineteen) as on 10.02.2023 along with interest. In addition, SBS sought an order restraining TSA and respondent nos. 2 to 4 from creating any third-party interest/right/title in respect of unencumbered movable or immovable assets.

3. SBS sought the aforementioned interim measures to secure the amount awarded to SBS in terms of an arbitral award dated 22.12.2022 (hereafter '**the Arbitral Award**') delivered by an arbitral tribunal pursuant to arbitral proceedings conducted under the rules and *aegis* of the Singapore International Arbitration Centre (hereafter '**the SIAC**').

4. Respondent nos. 2 to 5 (hereafter also referred to as '**the Claimants**') had instituted the arbitral proceedings that culminated in

the Arbitral Award. Respondent nos. 2 to 4 are individuals and are promoters of Respondent no. 5, SBS Transpole Logistics Private Limited (hereafter '**Transpole**')

5. SBS has prevailed in securing interim measures in terms of the impugned order. By the impugned order, TSA and respondent nos. 2 to 4 have been directed to disclose on affidavit their fixed assets and bank accounts along with credit balance held by them in India or any other jurisdiction. Further, they have been restrained from creating any third-party interest/right/title in respect of any of their unencumbered immovable assets to the extent of the sum awarded in favour of SBS in terms of the Arbitral Award.

6. TSA was not a party to the arbitral proceedings. TSA had funded the Claimants to pursue the arbitral proceedings but was not a party either to the arbitration agreement or the arbitral proceedings. More importantly, TSA is not a party to the Arbitral Award. It is not directed against TSA and the amount awarded in favour of SBS is not against TSA. TSA, thus, claims that it is not liable to pay any amount to SBS and the impugned order directing it to disclose its assets and restraining it from transferring or alienating any assets, is flawed.

7. According to SBS, TSA is liable to pay the amount awarded. SBS claims that the amount awarded in its favour is in respect of the costs incurred by it in defending the arbitral proceedings instituted by the Claimants. SBS contends that since the arbitral proceedings were instituted with the support of the funds provided by TSA, TSA is also

liable to pay the amount awarded notwithstanding that it was not a party to the arbitral proceedings. In addition, it claims that TSA had full control of the arbitral action and had funded it to derive benefits of the Arbitral Award if the Claimants were successful in their claims.

Factual Context

8. TSA is incorporated under the Companies Act, 1956. It is a non-banking financial company (NBFC) within the meaning of Section 45-1(f) of the Reserve Bank of India Act, 1934 and is registered with the Reserve Bank of India.

9. It is the case of TSA that in December 2018, it was approached by the Claimants (namely, Anant Kumar Choudhary, Vivek Shukla, Pravin Chandra Rai and SBS Transpole Logistics Private Limited), requesting funding for arbitration proceedings before the SIAC.

10. At the material time, one Advance Cargo Movers (India) Pvt. Ltd. (hereafter '**the Operational Creditor**') had instituted a petition under Section 9 of the Insolvency & Bankruptcy Code, 2016 before the National Company Law Tribunal (hereafter **'NCLT'**) in respect of Transpole. The Operational Creditor claimed that it had provided support to Transpole for the purpose of transporting material from the Mumbai Port (JNPT) to Dahej. The Operational Creditor raised an invoice for the services rendered by it but the same remained unpaid. It claimed that a sum of ₹4,22,820/- inclusive of interest at the rate of 24% per annum was due and payable by Transpole. Initially, Transpole had resisted the said petition, however, at the time of final arguments before

the NCLT, the learned counsel for Transpole admitted its liability, and expressed its inability to liquidate the outstanding liability. Accordingly, by an order dated 04.09.2019 [(IB)-1373(ND)2019], the petition preferred by the Operational Creditor was admitted.

11. Admittedly, the financial condition of Transpole had deteriorated over a period of time. According to the Claimants, Transpole's financial distress was caused by SBS. They contended that Transpole was incorporated in the year 2004 and had over the years grown from strength to strength. Two private equity firms had invested in Transpole during the year 2011-2013 but had exited with substantial returns. The Claimants, *inter alia*, claimed that Transpole had agreed to enter into an alliance with SBS with an understanding that they would integrate their business and by the end of 2017, Transpole would make an Initial Public Offering (IPO). However, SBS breached its obligation to integrate the business of SBS Group and to provide Transpole's Corporate Guarantees. The Claimants alleged that the conduct of SBS had resulted in Transpole's banks to cease lending to Transpole, which had resulted in Transpole's incapacity to carry on its activities.

12. TSA agreed to provide funds to the Claimants to pursue the aforesaid claims before the Arbitral Tribunal. On 20.12.2018, TSA entered into a Bespoke Funding Agreement (hereafter **'the BFA'**), whereby TSA agreed to provide financial assistance to the Claimants for pursuing their claim for recovery of damages of approximately ₹250 crores against SBS and one Global Enterprise Logistics Pte Ltd.,

Singapore (hereafter **'GEL'**) for breach of their contractual undertaking.

13. Thereafter on 25.02.2019, the Claimants issued a notice for arbitration by referring their claims for recovery of damages against SBS. The disputes between the Claimants, GEL and SBS were referred to arbitration (SIAC Arbitration No.105 of 2019), which was conducted under the aegis of the SIAC and in accordance with the Singapore International Arbitration Centre, Arbitration Rules (6th Edition, 2016) (hereafter **'the SIAC Rules'**). The arbitral proceedings were stoutly contested and culminated in the Arbitral Award. The Claimants did not prevail in their claims against SBS and GEL (collectively referred to '**SBS respondents**'). Further, the Arbitral Tribunal awarded costs in favour of SBS respondents.

14. The dispositive part of the Arbitral Award reads as under:

> "863. Having considered all the evidence and submissions placed before it and for the reasons set out above, the Tribunal hereby FINALLY DECLARES and DETERMINES as follows.
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> (a) All the Claimants' claims breach and requests of relief are dismissed;
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> (b) The Claimants are to bear the costs of the arbitration of SGD 887, 714.50, and their own legal and other costs;
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> (c) The Claimants are jointly and severally liable to 1R for, and shall pay to 1R the amount of 8GD 209,782.32 within 21 days of the date of receipt of this Award, after which simple interest on this amount shall run at the rate of 5.33% per annum until the costs ordered are paid in full.
>
> (d) The Claimants are jointly and severally liable to 2R for, and shall pay to 2R the amounts of SGD 1,212,838.98, USD 246,196.96, and JPY 1,102,612 within 21 days of the date of receipt of this Award, after which simple interest

> on this amount shall run at the rate of 5.33% per annum until the costs ordered are paid in full."

15. Prior to the commencement of the arbitral proceedings (SIAC Arbitration No.105 of 2019) which culminated in the Arbitral Award, GEL had disbursed JPY 250,00,00,000 (Japanese Yen Two Hundred and Fifty Crore) to another company referred to as Transpole, Hong-Kong, which belonged to the Claimants' group. Transpole stood as a guarantor for the said amount.

16. Transpole, Hong-Kong defaulted in servicing the said loan. And, this led SBS, Singapore (who was the assignee of GEL) to institute an arbitral proceeding against Transpole and Transpole, Hong-Kong under the SIAC Rules. The said proceedings culminated in an arbitral award dated 25.10.2017 (hereafter **'the Arbitral Award No.114**') in favour of SBS, Singapore. SBS Singapore filed a petition for enforcement of the said the Arbitral Award No.114 against Transpole in this Court[1]. However, SBS, Singapore has been unable to recover the amount awarded in its favour. SBS claims that it discovered that Transpole did not have sufficient assets for satisfying the Arbitral Award No.114, hence, the same has not been discharged.

17. The Claimants have also failed to pay the amount awarded against them in terms of the Arbitral Award. In the aforesaid background, SBS sent a letter dated 19.01.2023 calling upon TSA to pay the amounts in terms of the Arbitral Award. TSA responded by a

[1] ***SBS Logistics Singapore Pte. Ltd. v. SBS Transpole Logistics Private Limited*: OMP(EFA)(COMM) No.4/2018**

letter dated 21.01.2023, denying that it had any obligation to pay the costs as imposed on the Claimants. It claimed that since the Claimants had not prevailed in their claims, the BFA stood terminated on 22.12.2022 (the date of the Arbitral Award) and it had no further obligations thereafter.

18. SBS sent a letter dated 15.02.2023 countering the assertions made by TSA in its letter dated 21.01.2023 and claiming that TSA was obliged to satisfy the costs awarded in terms of the Arbitral Award. SBS also called upon TSA to refrain from dissipating or dealing with its assets to frustrate the satisfaction of the Arbitral Award.

19. In the aforesaid circumstances, SBS had filed an application under Section 9 of the A&C Act seeking interim measures to secure the amount awarded in its favour.

Impugned Order

20. It is SBS's case that the Claimants did not have the wherewithal to satisfy the Arbitral Award. They claimed that respondent no.2 was a Director of four companies, out of which two have been struck off while the third (Transpole) is under liquidation. Similarly, respondent no.3 was a Director of three companies out of which two had been struck off and as stated above, Transpole is under liquidation. Thus, Transpole is under liquidation and had no operations or assets.

21. It was also contended on behalf of SBS that TSA had not merely funded the arbitral proceedings but had substantially controlled it. TSA would have benefited from it if the Claimants had prevailed in the

arbitral proceedings. SBS claimed that the BFA clearly indicated that the budget plan could not be exceeded without prior consent of TSA; it had absolute discretion to cease funding the arbitral proceedings if the Arbitral Tribunal found that SBS was not a proper party to the arbitral proceedings; and, no settlement or part settlement could be entered into by the Claimants without informing TSA. Additionally, TSA had an exclusive, unfettered right on the damages recovered and would take precedence over any right of the Claimants.

22. SBS claimed that TSA funded the arbitral proceedings for its own profit and contended that it was a 'real party' to the arbitral proceedings.

23. The learned Single Judge, *prima facie*, accepted the aforesaid contentions advanced by SBS. The Court accepted that SBS had, *prima facie*, established that TSA had a vested interest in the outcome of the arbitral proceedings, having funded the Claimants for benefiting from the arbitral proceedings.

24. The learned Single Judge referred to the decisions in ***Arkin v. Borchard Line Ltd. & Ors.***[2] and ***Excalibur Ventures LLC v. Texas Keystone Inc and Ors.***[3] and expressed his agreement with the observations made in the said judgments. The Court held that a party, having funded the litigation for gain, could not escape the liability in case the result was contrary to its expectations. Further, the learned Single Judge observed that a balance would have to be struck between

[2] **(2005) EWCA Civ 655**
[3] **(2016) EWCA Civ 1144**

the need to ensure access to justice through funding arrangements, and the cost that a defendant would bear in case the litigation fails due to being found meritless, as in the present case. The learned Single Judge held that the defendant could not be made to bear costs for the purpose of defending a litigation, which was found to be without any merit and which may not have been initiated but for being funded by a third party.

25. The learned Single Judge also held that, *prima facie*, the costs levied under the award would be covered by the cost recoverable under the BFA as these were costs of litigation of the Claimants. The learned Single Judge was of the *prima facie* view that the termination of the BFA as a result of the claimants being unsuccessful in their claim would not affect the rights of SBS, as the BFA would continue to be operative till the delivery of the Arbitral Award and the costs recoverable are part of the Arbitral Award. The learned Single Judge accepted that SBS was merely seeking to enforce the Arbitral Award in terms of the BFA.

26. The learned Single Judge referred to the decision of the Supreme Court in ***Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.***[4], and on the strength of the said decision rejected the contention that a foreign award can be executed only against a party to the arbitration.

27. On the basis of the aforesaid reasoning, the learned Single Judge issued the impugned order directing the Claimants and TSA to file an affidavit disclosing their fixed assets and bank accounts along with a

[4] **(2022) 1 SCC 753**

credit balance held in India or any other jurisdiction as on the date of the order and further restrained the Claimants and TSA from creating any third party interest/right/title in respect of any unencumbered immovable assets for a sum as awarded in favour of SBS in terms of the Arbitral Award till further orders.

Analysis

28. At the outset, it is necessary to bear in mind that the arbitration is founded on the agreement between the parties to refer their disputes to arbitration and accept the decision of the Arbitral Tribunal as binding. Consent is the corner stone of arbitration. The Arbitral Tribunal derives its jurisdiction to adjudicate the disputes on the basis of an agreement between the parties that the disputes would be resolved by arbitration and that they would be bound by the award. Absent any agreement to the said effect, any award against a person would be without jurisdiction. However, this principle has been applied expansively and the courts have, in exceptional cases, held non-signatories to be bound by the arbitration.

29. In cases where the real beneficiaries are not parties to the contract or the agreement, the courts in given cases have held that the non-signatories may either invoke the arbitration agreement, being the beneficiaries of the contract, or otherwise be bound by the same.

30. Gary B. Born, has explained that the legal basis for holding that a non-signatory is bound by an arbitration agreement includes *"both*

purely consensual theories (e.g. agency, assumption, assignment) and non-consensual theories (e.g. estoppels, alter ego)".[5]

31. In the given facts, where it is apposite, the courts have held that non-signatories are bound by the arbitration agreement by imputing their consent to the said agreement. These include cases where it is found that the benefit of the contract has been assigned and accepted by the assignee. In certain cases, where it is found that a non-signatory has actively participated in negotiation and is involved in the contract, the courts have held that "*where a party conducts itself as it were a party to a commercial contract, by playing a substantial role in negotiations and / or performance of the contract, it may be held to have the impliedly consented to be bound by the contract*."[6]

32. The Supreme Court of India has in various cases accepted that a non-signatory can be bound by the arbitration agreement.

33. In ***Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc.***[7], the Supreme Court applied the Group of Companies doctrine to compel a non-signatory to be bound by the arbitration agreement. The Supreme Court noted that the "*Group of Companies*" doctrine "*has developed in international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns*". Under the said principle "*a non-signatory party could*

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[5] **International Commercial Arbitration, Volume I, (Third Edition), p. 1531**
[6] ***Gvozdenovic v United Air Lines, Inc.*: 933 F.2d 1100**
[7] **(2013) 1 SCC 641**

be subjected to arbitration provided these transactions were within group of companies and there was a clear intention of the parties to bind both, the signatories as well as non-signatory parties"

34. In the given cases, the courts have held non-signatories to be bound by arbitration where there are grounds to lift the corporate veil. In such cases, the courts may bind non-signatories to the arbitration agreement by imputing the agreement entered into by an entity on the ground that the non-signatory is the person behind the corporate façade of a signatory or is an alter-ego of the signatory. In ***Cheran Properties Ltd. v. Kasturi & Sons Ltd.***[8], the Supreme Court had observed that "*while the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intention of parties and does not disturb the legal personality of the entities in question*".

35. Mr. Gautam Narayan, learned counsel appearing for the respondents, referred to Gary B. Born, International Commercial Arbitration, Volume I, (Third Edition) and relied upon the contents of Chapter-10. In particular, Mr. Narayan relied upon Section 10.02 captioned "*Legal Basis for Binding Non-Signatories to International Arbitration Agreement*" and submitted that in certain circumstances where a third party claims the benefits of the contract, it may invoke or be bound by the arbitration clause. Clearly, the said chapter has no

[8] (2018) 16 SCC 413

application to the point in issue. The point in issue is not whether, in a given circumstance, a non-signatory can be bound by the arbitration agreement; it is whether a person who is not a party to the arbitral proceedings or the award, rendered in respect of disputes inter-se the parties to the arbitration, can be forced to pay the amount awarded against a party to the arbitration. This is not a case where SBS seeks to bind the third party (TSA) to the arbitration clause and compels it to arbitrate; SBS seeks to enforce the Arbitral Award against TSA, notwithstanding that it was not joined as a party to the arbitral proceedings or compelled to arbitrate. The text referred to by Mr. Narayan does not further his case.

36. We are also unable to accept that it is a logical sequitur that a third-party beneficiary, who may be bound by an arbitration agreement, would necessarily be bound by the arbitral award, and obliged to discharge the same as if it was the party against whom the award is made. A third party may be bound by the arbitral award only if it has been compelled to arbitrate and is a party to the arbitration proceedings.

37. Indisputably, even a signatory to an arbitration agreement against whom an arbitration agreement is not invoked and is not joined as a party to the arbitral proceedings, would not be bound by the arbitral award rendered pursuant to the said proceedings. Thus, there is no question of enforcing an arbitral award against a non-signatory, who is not a party to the arbitral proceedings.

38. We find that the reliance on the principle of binding non-signatories to an arbitration, is not well founded. In addition, there is yet another reason why the principles cannot be invoked in this case. Consent is fundamental to arbitration. Thus, the principles on which non-signatories may be held bound by the arbitration agreement, have no application where the signatories to an arbitration agreement have expressly agreed to the contrary.

39. In the present case, SBS and the Claimants had agreed that the arbitration proceedings would be conducted under the SIAC Rules. SBS is bound by the said SIAC Rules and it is impermissible for SBS now to claim to the contrary. Rule 7 of the SIAC Rules contains provisions regarding joinder of additional parties. Rule 7.1 of the SIAC Rules expressly provides for joinder of non-parties to an arbitration if certain conditions are satisfied. Rule 7.8 of the SIAC Rules provides for adding parties to arbitral proceedings. Rules 7.1 and 7.8 of SIAC Rules are set out below:

> "**Joinder of Additional Parties**
>
> 7.1 Prior to the constitution of the Tribunal, a party or non-party to the arbitration may file an application with the Registrar for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or a Respondent, provided that any of the following criteria is satisfied:
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> a. the additional party to be joined is *prima facie* bound by the arbitration agreement; or
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> b. all parties, including the additional party to be joined, have consented to the joinder of the additional party."

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> 7.8 After the constitution of the Tribunal, a party or non-party to the arbitration may apply to the Tribunal for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or a Respondent, provided that any of the following criteria is satisfied:
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> a. the additional party to be joined is *prima facie* bound by the arbitration agreement; or
>
> b. all parties, including the additional party to be joined, have consented to the joinder of the additional party.
>
> Where appropriate, an application to the Tribunal under this Rule 7.8 may be filed with the Registrar."

40. The fact that TSA was funding the Claimants to pursue the arbitral proceedings against SBS and GEL was duly disclosed. SBS, on becoming aware of the financial condition of Transpole, made an application to the SIAC for security and for costs on 18.09.2020. The Arbitral Tribunal did not accede to the said request at that stage, *inter alia*, for the reasons that respondent nos.1 to 3 (claimant nos.1 to 3 before the Arbitral Tribunal) were individuals who were not protected by corporate façade, and SBS had not furnished any persuasive evidence to suggest that individual claimants would be unable to satisfy any adverse costs order made against them. SBS did not take any steps to include TSA as a party to the arbitral proceedings nor made any attempt securing any order against TSA.

41. Mr. Gautam Narayan appearing for SBS contended – in our view rightly so – that under the SIAC Rules, it was not open for SBS to add TSA as a party. TSA was neither bound by the arbitration agreement nor agreed to be included as an additional party to the arbitration. It also follows that none of the principles under which a non-signatory

could be compelled to arbitrate can be applied in this case. This is because SBS having agreed to be bound by the SIAC Rules, which concededly do not permit joining of TSA as a party to the arbitration, cannot now seek to compel it to be bound by it.

42. It is relevant to refer to the Practice Note dated 31.03.2017[9] issued by SIAC. The relevant extract of the said Practice Note regarding 'Disclosure' and 'Costs' is reproduced below:

> "**Disclosure**
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> 5. Unless otherwise agreed by the Disputant Parties, the Tribunal shall have the power to conduct such enquiries as may appear to the Tribunal to be necessary or expedient, which shall include ordering the disclosure of the existence of any funding relationship with an External Funder and / or the identity of the External Funder and, where appropriate, details of the External Funder's interest in the outcome of the proceedings, and / or whether or not the External Funder has committed to undertake adverse costs liability.
>
> 6. An arbitrator shall immediately disclose to the Disputant Parties, to the other arbitrators and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence, including any relationship whether direct or indirect, with an External Funder, that may be discovered or arise during the arbitration proceedings.
>
> 7. The Tribunal may request that the Disputant Parties agree to inform the Tribunal and the Registrar, at the earliest opportunity, of the involvement of an External Funder in the arbitration proceedings or any withdrawal or change of External Funder.
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> 8. The Tribunal shall inform the Disputant Parties of their continuing obligation to inform the Tribunal and the Registrar, at the earliest opportunity, of the involvement of

[9] **PN – 01/17/(31 March 2017)**

> an External Funder in the arbitration proceedings or any withdrawal or change of External Funder.
>
> **Costs**
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> 9. The involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder in an order for security for legal and other costs.
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> 10. The Tribunal may take into account the existence of any External Funder in apportioning the costs of the arbitration.
>
> 11. The Tribunal may take into account the involvement of an External Funder in ordering in its award that all or a part of the legal or other costs of a Disputant Party be paid by another Disputant Party."

43. It is apparent from the above that funding arrangements are required to be disclosed to the Arbitral Tribunal. The Arbitral Tribunal also has the power under the SIAC Rules to order disclosure regarding existence of any funding relationship. This is to enable the Arbitral Tribunal to consider the same while awarding costs. Although, the Arbitral Tribunal may allocate costs amongst the parties; it cannot award costs against a third-party funder. Undoubtedly, the fact that the Claimants were funded by TSA was a relevant factor for the purpose of considering SBS's request for security for costs. However, as noted above that request was denied.

44. It is not necessary for us to further delve into the question whether TSA, being a non-signatory, could be compelled to join the arbitral proceedings or be bound by the arbitration agreement. Suffice it is to state that TSA could not be joined as a party to the arbitral proceedings

under the SIAC Rules and that SBS had made no attempt to compel TSA to join the arbitral proceedings.

45. TSA has no obligation to pay any amount under the Arbitral Award. The Arbitral Tribunal has awarded the costs in favour of SBS and against the Claimants and not TSA. Section 9 of the A&C Act provides for interim measures of protection. Section 9(1) of the A&C Act enables a party "*to apply to a Court for such interim measures before or during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36*" of the A&C Act for interim measures including for securing the amount in dispute in arbitration[10].

46. Section 36(1) of the A&C Act provides that the arbitral award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 in the same manner as if it was a decree of the court. It is trite law that a decree is to be executed in its term and it is not open for the executing court to go behind the decree. TSA is not a party to the Arbitral Award. It cannot be treated as a judgment-debtor under the Arbitral Award if it is enforced as a decree, as required under Section 36(1) of the A&C Act.

47. As noted above, Section 9 of the A&C Act provides for interim measures and recourse to Section 9 of the A&C Act is available in aid of enforcement of the arbitral award. However, the Arbitral Award in this case is not against TSA and therefore, cannot be enforced against

[10] [Sub-clause (b) of Clause (ii) of Sub-section (1) of Section 9]

TSA under Section 36(1) of the A&C Act. Although it may not be material, but SBS has also not instituted any action for determining the liability of TSA. In the given circumstances, an application under Section 9 of the A&C Act, for securing the amount in dispute against TSA, is not maintainable.

48. We are unable to agree with the view of the learned Single Judge that TSA is obliged to pay costs according to the BFA. First of all, TSA disputes the aforesaid view and denies any liability to make any further payment under the BFA. TSA does not accept that it is indebted to the Claimants and the same represents any assets of the Claimants, which can be attached in enforcement proceedings. The said dispute has not been adjudicated.

49. Secondly, a plain reading of the BFA does not support the said view. Article 1 of the BFA, which sets out its purpose and the scope of funding, is set out below:

> **"1) PURPOSE OF THE BFA**
>
> a) The purpose of the BFA is for the Fund, which is a licensed Non Banking Financial Company (NBFC) bearing registration no:B-0506835 and is the principal business of litigation funding amongst others. The fund vide a Board Resolution dated 10.12.2018 has agreed to provide funding to the buyers on behalf of the Claimants under the Funding Agreement and in accordance with the requirement for the pursuit of a claim and recovery of Damages of approximately of INR 250 crores against SBS Holdings Inc. (Japan) and Global Enterprise Logistic Pte. Ltd. (Singapore) (the "Respondents") for breach of commercial undertakings in respect of the sale and purpose of Transpole India, and subject to variation from time to time as agreed

with the Fund in writing (the "Claim"). The Arbitration is under the rules of Singapore International Arbitration Centre ("SIAC") at Singapore.

b) The BFA defines the terms and conditions under which the Claimants and the appointed lawyers use the financial assistance of the Fund in pursuit of the Claim against the Respondents recovery of Damages and about how the entire Recovered Damages will be distributed between the Parties.

c) The fund provides financial assistance in pursuit of the Claim in accordance with the Budget Plan on a non-recourse basis. In the event that the Claim is not successful the Fund will not seek financial recourse from either the Lawyers or the Claimants for its lost investment."

50. A plain reading of Clause (a) of Article 1 of the BFA indicates that TSA had agreed to provide funding to the lawyers on behalf of the Claimants for pursuing the claims and recovery of the damages against SBS and GEL. Clause (c) of Article 1 of the BFA expressly provided that TSA would provide financial assistance in pursuit of the claim in accordance with the budget plan on a non-recourse basis. Thus, if the Claimants are unsuccessful, TSA would not have any recourse for recovery of the amount financed either against the lawyers or the Claimants.

51. Article 2 of the BFA provides for the budget and the budget plans. TSA had agreed to fund the arbitration and the agreed fees for lawyers on behalf of the Claimants, in pursuit of its claim in accordance with the budget plan agreed between the parties. The said budget plan could not be increased without TSA's prior written approval.

52. Article 3 of the BFA provides for the funding procedure. The parties had agreed that lawyers engaged for pursuing the claims would be required to open a client account for receipt of the monies from TSA. Clause (b) of Article 3 of the BFA provides that the invoices for the work performed by lawyers, Singapore legal counsel and the experts and the expenses for all fees, costs and disbursements as per the budget plan would be raised on TSA. Article 3 also provides for distribution of any amount or assets that may be recovered in the event the claims were a success.

53. None of the clauses of the BFA provide any obligation for TSA to fund an adverse award. Article 7 of the BFA provides for the duration and termination of the BFA. The said Article reads as under:

> "7) **DURATION AND TERMINATION**
>
> a) This BFA shall become effective upon signing and shall remain in effect until the earliest of the following occur:
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> i) The Recovered Damages are distributed to the Parties in accordance with the BFA; or
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> ii) The Fund thinks or believes that winning of the Claim is no longer realistically achievable;
>
> iii) SBS Japan is no longer a party to the Arbitration; or
>
> iv) The Claim is not a Success."

54. The BFA had ceased to be in effect as the Claimants had not prevailed in the arbitration proceedings. The award of costs in favour of SBS is a relief granted on account of the Claimants failing in their claim.

55. In terms of Article 9 of the BFA, any dispute arising out of the BFA is required to be referred to arbitration. It is also expressly provided that the place of arbitration would be Kolkata and the courts at Kolkata would have exclusive jurisdiction in respect of any interim relief.

56. The decisions in the case of ***Arkin v. Borchard Line Ltd. & Ors.***[2] and in ***Excalibur Ventures LLC v. Texas Keystone Inc and Ors.***[3] relied upon by the learned counsel for SBS and also referred to by the learned Single Judge in the impugned order are wholly inapplicable. The said decisions were in exercise of powers conferred under Section 51(1) and (3) of the Supreme Court Act, 1981, which expressly empowers certain courts in the United Kingdom to determine by whom and to what extent the costs are to be paid.

57. The Supreme Court Act, 1981 is now called the Senior Courts Act, 1981. Sub-sections (1), (2) and (3) of Section 51 of the Senior Court Act, 1981 read as under:

> "**51 Costs in civil division of Court of Appeal, High Court and county courts**.
>
> (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
>
> (a) the civil division of the Court of Appeal;
>
> (b) the High Court; and
>
> (ba) the family court;
>
> (c) the county court,

> shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

58. In ***Aiden Shipping Co. Ltd. v. Interbulk Ltd., The Vimeria***[11], the House of Lords held that the aforesaid power was in wide terms and left it to the rule making authority to control its exercise by rules of court and for the appellate courts to establish principles for its exercise. It was held that the court's power was not limited to awarding the costs only against a party to the litigation.

59. The Civil Procedure Rules (CPR) were introduced in 1997 by the Civil Procedure Act, 1997 for proceedings in the courts in the United Kingdom. Part 48 (captioned 'Costs - Special Cases') of the CPR relate to the procedure framed for awarding costs in special cases. Rule 48.2 of the CPR, re-termed as Rule 46.2, expressly provides for the procedure for costs orders in favour or against non-parties.

60. Rule 46.2 of Section A of Civil Procedure Rules, 1998 as currently in force in United Kingdom, reads as under:

> "**Costs orders in favour of or against non-parties**

[11] [1986] 2 All ER 409

> 46.2–(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –
>
> (a) be added as a party to the proceedings for the purposes of costs only; and
>
> (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.
>
> (2) This rule does not apply –
>
> (a) where the court is considering whether to –
>
> (i) make an order against the Lord Chancellor in proceedings in which the Lord Chancellor has provided legal aid to party to the proceedings;
>
> (ii) make a wasted costs order (as defined in rule 46.8); and
>
> (b) in proceedings to which rule 46.1 applies (pre-commencement disclosure and orders for disclosure against a person who is not a party)."

61. Thus, the CPR have been enacted for exercise of the power under Section 51 of the Senior Courts Act 1981. In cases where the court proposes to exercise the powers under Section 51 of the Senior Courts Act, 1981, to make an order of costs against a person who was not a party, it is essential, in terms of CPR 46.2, that the said person is added as a party *albeit* for the purpose of determination of the question of costs. The third party is required to be afforded reasonable opportunity to attend a hearing at which the court would consider the matter.

62. The order of costs against non-party(ies) is required to be made in exceptional circumstances. Further, the award of costs against a non-party is not a mechanical exercise. The questions relating to whether the costs are required to be imposed; what is the quantum of costs; who are the parties that are required to bear the costs; and in what proportion,

are matters that are required to be determined by the trial court. These questions cannot be determined without hearing the person affected by such determination.

63. One of the general principles accepted in the United Kingdom, in the context of awarding costs against non-party(ies) is that "*A non-party should not ordinarily be liable for costs which would in any event have been incurred without the non-party's involvement in the proceedings, although the position may be different where a number of non-parties have acted in concert.*"[12].

64. In ***Symphony Group Plc v. Hodgson***[13], the Court of Appeal of the United Kingdom had suggested guidelines as orders for costs against non-party(ies). One of the guiding principles is that "*the Judge should be alert to the possibility that an application for costs against a non-party was motivated by a resentment of an inability to obtain an effective order for costs against a legally aided litigant*."

65. There are no rules applicable to proceedings in this court for awarding costs against third parties. There is no procedure for impleading third parties for the limited purpose of determining the costs. If a person proposes to pursue any claim against another person, it would be necessary for the said claimant to institute a substantive action in that regard. The necessary averments in support of the claim

[12] Civil Procedure (Volume I) The White Book Service 2018 Page 1470
[13] (1994) Q.B. 179

are required to be pleaded. If the claim is disputed and raises a triable issue, the same is required to be tried.

66. Order XXA of the Code of Civil Procedure, 1908 contains provisions for costs. Rule 2 of Order XXA provides that the costs shall be in accordance with the rules as the High Court may make in that behalf. This Court has not framed any rule which contemplates recovery of costs from persons who are not parties to the suit/action.

67. In the circumstances, it is difficult to accept that the procedure contemplated under Civil Procedure Rules, 1998 in the United Kingdom, for the purpose of imposing costs on non-party(ies), is applicable to civil proceedings in India.

68. Reliance on the decisions in ***Arkin v. Borchard Line Ltd. & Ors.***[2] and ***Excalibur Ventures LLC v. Texas Keystone Inc and Ors.***[3] are also inapposite as the said cases related to award of costs by trial courts and not the arbitral tribunal. Rule 46.2 of the CPR is not applicable to arbitral proceedings. Mr Narayan has fairly stated that he has been unable to find any precedent where Rule 46.2 of the CPR has been pressed into service in arbitration.

69. It is important to bear in mind that SBS seeks interim measures in aid of enforcement of the Arbitral Award and not costs against third parties in a suit. Thus, the powers of the courts to award costs in a trial would have no relevance for determining whether the awarded amount can be recovered from a person who is not a party to the arbitral proceedings or the arbitral award.

70. We are of the view that the learned Single Judge has erred in proceeding on the basis that the decisions in ***Arkin v. Borchard Line Ltd. & Ors.***[2] and ***Excalibur Ventures LLC v. Texas Keystone Inc and Ors.***[3] are authorities for the proposition that the cost awarded in arbitral proceedings can be enforced against a third-party funder, who is not a party to the arbitral proceedings.

71. The learned Single Judge's reference to the case of ***Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.***[4] is also misplaced. In the said case, the non-signatory who had sought to resist the enforcement of an arbitral award, was a party to the arbitral proceedings and the arbitral award in that case was directed against the said non-signatory. The question whether a foreign award against a non-signatory can be enforced without the court examining whether the non-signatory was bound by the arbitration agreement was the subject matter of controversy in the said case. The decision in ***Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.***[4] has no application where an award is sought to be enforced against a person who is not a party to the arbitral proceedings and has not been imposed with any liability in terms of the award.

72. Before concluding, it is also relevant to consider Mr. Narayan's contention that it is necessary to evolve jurisprudence whereby, third-party funders can be held accountable for funding impecunious persons, if they are unsuccessful. Extending financial support to such persons to pursue their claims would result in non-claimants incurring costs which they cannot recover in the event the claimants fail. He submitted that

third-party funders fund litigation to derive the benefits of the claimants succeeding in their claims; thus they should also be liable to pay the costs where such claims fail. He submitted that it would thus be apposite in this case to hold TSA liable for payment of costs awarded in favour of SBS.

73. We are unable to accept the said view. Third-party funding is essential to ensure access to justice. In absence of third-party funding, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due. In many cases, the claimants become impecunious on account of the very cause for which they seek redressal. The cost for pursuing claims in arbitration are significant; the same not only include fees paid to arbitrators and institution, but also professional fees for legal counsels and experts and other attendant expenses. A person without the necessary means would have no recourse, in the absence of third party funders. Third party funders play a vital role in ensuring access to justice.

74. It is essential for the third-party funders to be fully aware of their exposure. They cannot be mulcted with liability, which they have neither undertaken nor are aware of. Any uncertainty in this regard, would dissuade third party funders to fund litigation.

75. Having stated the above, it is also necessary to ensure that there is transparency and that the party funding is not exploitative. The fact that a party is funded by a third party is a relevant fact in considering whether an order for securing the other party needs to be made.

However, permitting enforcement of an arbitral award against a non-party which has not accepted any such risk, is neither desirable nor permissible. Whilst, there is no cavil that certain rules are required to be formulated for transparency and disclosure in respect of funding arrangements in arbitration proceedings, it would be counterproductive to introduce an element of uncertainty by mulcting third party funders with a liability which they have not agreed to bear.

Conclusion

76. The impugned order, to the extent it is directed against TSA – that is, requires TSA to disclose its assets, directs it to furnish security for the amount awarded in terms of the Arbitral Award, and restrains it from alienating or encumbering its assets – is set aside.

77. The appeal is allowed in the aforesaid terms. All pending applications are disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MAY 29, 2023
GSR/RK