Mahanagar Telephone Nigam Ltd vs Canara Bank on 8 August, 2019

Author: Hon'Ble Ms. Malhotra
Bench: Abhay Manohar Sapre, Hon'Ble Ms. Malhotra

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 6202-6205 OF 2019
(Arising out of SLP (Civil) No. 13573-13576 of 2014)

Mahanagar Telephone Nigam Ltd. …Appellant

Versus

Canara Bank & Ors. …Respondents

JUDGMENT

INDU MALHOTRA, J.

Leave granted.

1. The present Special Leave Petitions have been filed to challenge Order dated 16.09.2011 passed in W.P. (C) No. 560 of 1995, Order dated 21.10.2011 passed in C.M. No. 12230 of 2011, Order dated 05.07.2013 passed in C.M. No. 8100 of 2012, and Order dated 10.01.2014 passed in C.M. No. 324 and 325 of 2014 by the Delhi High Court.

2. The background facts of the case are as follows : 2.1. In 1992, MTNL floated 17% Non-Cumulative Secured Redeemable Bonds described as the VI Series (Private Placement) worth Rs. 425 crores. On 10.02.1992, MTNL placed bonds worth Rs.200 crores with Can Bank Financial Services Ltd. (hereinafter referred to as "CANFINA") under an MOU agreement. The bond amount of Rs. 200 cores was placed as fixed deposit by

MTNL with CANFINA. CANFINA paid back Rs. 50 crores of the fixed deposit in 1992. The balance fixed deposit amount of Rs. 150 crores along with interest was not paid by CANFINA to MTNL. As a consequence, MTNL did not service the interest on bonds. MTNL was of the view that since it did not receive the entire bond amount of Rs. 200 crores, the entire deal did not go through. Against payment of Rs. 50 crores received from CANFINA, MTNL serviced the bonds of approximately Rs. 31 crores to the public. MTNL was of the view that only a sum of Rs.5.41 crores was payable to CANFINA, which was not accepted by CANFINA.

2.2. As per Canara Bank, soon after the bonds were subscribed, there was an out-break of a security scam which led to a collapse of the secondary market in shares, security and bonds. There were very few buyers in the secondary market. Even such buyers were offering very low prices for these bonds. In these circumstances, CANFINA was faced with a severe liquidity crunch.

2.3. In these circumstances, Respondent No. 1 – Canara Bank purchased the Bonds issued by MTNL, of the face value of Rs. 80 crores, from Respondent No. 2 – CANFINA which is its wholly owned subsidiary.

2.4. Canara Bank requested for registration of these Bonds with MTNL, and lodged letters of allotment for purchase of the bonds from CANFINA.

2.5. MTNL vide letter dated 14.10.1992 addressed to Canara Bank, refused to transfer the Bonds, on the various grounds mentioned in the letter.

2.6. MTNL by a subsequent letter dated 16.02.1993, informed Canara Bank that it had registered a part of the face value of Rs. 40 crores, in favour of CANFINA. The bond instruments were however retained on the ground that CANFINA had failed to pay the deposit money of Rs. 150 crores, which was payable to MTNL with an accrued interest of 12% p.a. 2.7. MTNL vide letter dated 20.10.1993, cancelled all the Bonds inter alia on the ground that letters of consideration remained with CANFINA.

2.8. Canara Bank vide its reply dated 13.01.1994 contended that it is the holder in due course, and is entitled to have the shares registered in its name, and receive the interest as and when it fell due.

2.9. MTNL sent a statement of accounts by adjusting the proceeds of the cancellation of bonds towards the dues of CANFINA. It was stated that the bonds and interest accrued thereon cannot be refunded. MTNL with its letter dated 13.01.1994, attached a cheque for Rs. 5,41,17,463 as the amount payable to Canara Bank.

2.10. Canara Bank, however, returned the cheque vide letter dated 10.02.1994, demanding the restoration and registration of the bonds.

2.11. Canara Bank filed W.P. (Civil) No. 560 of 1995 before the Delhi High Court to challenge the cancellation of the Bonds, and a direction to pay the Interest accrued.

It is relevant to note that CANFINA was joined as a proforma party in the Writ Petition filed by Canara Bank. 2.12. The Delhi High Court vide Order dated 09.09.1996 directed the Union of India to decide the issues between the parties in light of this Court's judgment in O.N.G.C. v. Commissioner of Central Excise1.

The Writ Petition was dismissed on the ground of availability of an alternative and efficacious remedy before the Company Law Board under Section 111 of the Companies Act, 1956. 1 (1995) Supp. 4 SCC 541.

2.13. The proceedings before the Company Law Board came to be dismissed vide Order dated 26.02.1998, since the remedy was no longer available, as per the amendment of Section 111 by the Depositories Act, 1996.

2.14. Canara Bank filed an application for Restoration of the Writ Petition, which was restored vide Order dated 12.05.1999.

2.15. Canara Bank made a representation to the Cabinet Secretary.

On 27.03.2001, a meeting was convened by the Cabinet Secretariat, Litigation Cell which was presided by the Cabinet Secretary, and attended by the representatives of MTNL, Canara Bank, and CANFINA. The Committee directed Canara Bank, CANFINA and MTNL to settle the disputes through arbitration by making an appropriate reference to the Permanent Machinery of Arbitration, functioning in the Department of Public Enterprises. The Committee did not permit Canara Bank, CANFINA and MTNL to pursue the litigation in Court.

2.16. The Delhi High Court vide Order dated 30.05.2008 referred the disputes between the parties to the Committee on Disputes. The Writ Petition was adjourned sine die. Canara Bank was granted liberty to revive the Petition in the event that the Committee on Disputes was unable to resolve the disputes between the parties.

2.17. The Committee of Disputes held a meeting on 16.12.2008, which was attended by the representatives of MTNL, Canara Bank and CANFINA. The Committee, after hearing the parties, expressed the view that all the three parties should take recourse to arbitration in view of the different inter-linked transactions between them.

The representatives of Canara Bank expressed the apprehension that arbitration by the Permanent Machinery of Arbitration would take much longer than judicial recourse.

The Committee observed that to expedite arbitration, the parties should expeditiously enter into an arbitration agreement under the Arbitration and Conciliation Act, 1996.

2.18. Pursuant to the meeting held on 16.12.2008, Canara Bank vide its letter dated 05.03.2009 sent a draft arbitration agreement to the Chairman and Managing Director of MTNL. The draft arbitration agreement sent by Canara Bank was between Canara Bank and CANFINA on the one side, with MTNL on the other.

2.19. By letter dated 17.03.2010, Canara Bank requested the Deputy Secretary, Cabinet Secretariat to advise MTNL to execute the arbitration agreement in accordance with the direction of the Ministry of Law and Justice.

2.20. The Delhi High Court vide Order dated 01.10.2010 disposed of the pending Writ Petition with the observation that the matter should be resolved by the Committee on Disputes expeditiously so that the arbitration agreement between the parties is signed as soon as possible.

2.21. The decision in O.N.G.C. v. Commissioner of Central Excise (supra) came to be overruled by a Constitution Bench in Electronics Corporation of India Ltd. v. Union of India & Ors.2 Accordingly, Canara Bank moved the Delhi High Court u/S. 151, CPC for restoration of the disposed of Writ Petition.

2.22. The Delhi High Court restored the Writ Petition, and vide Order dated 16.09.2011 noted that the two principal issues which arise for consideration are:

(i) Whether Canara Bank is liable for the acts or omissions of CANFINA; and

(ii) Whether Canara Bank should take over the liabilities and admit them in the arbitration agreement itself. During the course of the proceedings, the parties before the Delhi High Court agreed that these issues may be referred to arbitration. The parties were requested to 2 (2011) 3 SCC 404. suggest the name of a sole arbitrator to be appointed on the next date of hearing.

2.23. On 21.10.2011, the name of Mr. Justice A.P. Shah (Retd.) was suggested by the Counsel for Canara Bank, which was accepted by the Counsel for MTNL.

Accordingly, Mr. Justice A.P. Shah (Retd.) came to be appointed as the Sole Arbitrator.

2.24. On 05.01.2012, the Sole Arbitrator issued notice to all the three parties i.e. MTNL, Canara Bank, and CANFINA.

2.25. Canara Bank raised an objection to joining CANFINA as a party to the arbitration. The Arbitrator heard the parties on 27.03.2012, on the issue whether CANFINA should be joined as a party to the proceedings.

The learned Arbitrator passed an interim award holding that CANFINA had not appeared on 16.09.2011 before the High Court, when the disputes were referred to arbitration. CANFINA was not a party to the arbitration agreement, and cannot be joined as a party to proceedings.

2.26. MTNL filed C.M. No. 8100 of 2012 before the Delhi High Court seeking clarification of Order dated 16.09.2011, as to whether CANFINA ought to be impleaded as a necessary party to the arbitration agreement.

The Delhi Court vide order dated 05.07.2013 dismissed the application as “not pressed” on the statement made by the Counsel of MTNL.

2.27. Canara Bank filed its Statement of Claim before the learned Sole Arbitrator on 06.12.2013.

2.28. MTNL filed I.A. Nos. 324 – 325 of 2014 before the Delhi High Court for recall of the Orders dated 16.09.2011, 21.10.2011 and 05.07.2013 passed in W.P. (C) No. 560 of 1995.

2.29. The Delhi High Court vide Order dated 10.01.2014, dismissed the Application for Recall on the ground that the application was identical to the application previously filed by MTNL being C.M. No. 8100 of 2012. Since MTNL had not pressed the earlier application, the subsequent application being identical in nature, could not be considered, and was dismissed. 2.30. In May 2014, MTNL filed its reply to the Statement of Claim filed by Canara Bank, and also made a Counter-Claim against Canara Bank.

3. Aggrieved by the Orders dated 16.09.2011, 21.10.2011, 05.07.2013, and 10.01.2014 passed by the Delhi High Court in W.P. (C) No. 560 of 1995, C.M. No. 12230 of 2011, C.M. No. 8100 of 2012 and C.M. No. 324 and 325 of 2014 respectively, the Appellant – MTNL filed the present Special Leave Petition. This Court vide Order dated 08.05.2014 issued Notice to all the Respondents, including CANFINA which has been joined as Respondent No. 2.

4. Ms. Madhavi Divan, learned ASG appeared on behalf of MTNL, Mr. Ameesh Dabass, learned Counsel appeared for Respondent No. 1 – Canara Bank, and Ms. Saumya Sinha, along with Mr. A.K. Sharma, learned Counsels appeared for Respondent No. 2 – CANFINA.

5. The Counsel for the Appellant – MTNL inter alia submitted as under:

5.1. In the absence of a written agreement for arbitration between the parties, as stipulated by Section 2(b) r.w. 2(h) and 7(3) of the Arbitration and Conciliation Act, 1996, the arbitration cannot proceed.

5.2. The disputes which were referred to arbitration pertaining to transactions between the Appellant – MTNL on the one hand, and Respondent No. 1 and 2 – Canara Bank and CANFINA on the other hand.

5.3. The arbitration proceeding cannot proceed in the absence of Respondent No. 2 – CANFINA as the Bonds in question were subscribed by Respondent No, 2 – CANFINA, and were subsequently transferred to its parent Company i.e. Respondent No. 1 – Canara Bank.

In the absence of Respondent No. 2 – CANFINA being made a party to the arbitration, the arbitral proceedings may be rendered infructuous.

5.4. The only existing arbitration agreement between the parties, is a draft tripartite agreement forwarded by Canara Bank wherein MTNL and CANFINA were both made parties. 5.5. There is no legal relationship or privity of contract between the Appellant – MTNL and Respondent No. 1 – Canara Bank as the disputed Bonds were bought from the Appellant – MTNL by Respondent No. 2 – CANFINA.

The Appellant – MTNL had consented to the disputes being referred to arbitration on the understanding that the arbitration would be amongst the three parties.

6. The Counsel for Respondent No. 1 Canara Bank inter alia submitted that:

6.1. The present appeal is not maintainable as the Appellant – MTNL filed the present Appeal after filing its reply to the Statement of Claim and Counter-Claim before the learned Sole Arbitrator, and has therefore submitted itself to the jurisdiction of the learned Sole Arbitrator. 6.2. The only remedy available to Appellant – MTNL was to file an application under Section 16 of the Arbitration andConciliation Act, 1996.

6.3. Respondent No. 2 – CANFINA was merely joined as a proforma party in the Writ Petition before the Delhi High Court, and therefore cannot be made a party before the arbitral proceedings.

6.4. At the time of giving consent to arbitration and appointment of the learned Sole Arbitrator, Respondent No. 2 – CANFINA was not before the Court on 16.09.2011 and 21.10.2011. 6.5. The Appellant – MTNL has not filed any claim against Respondent No. 2 – CANFINA, and therefore, cannot seek any remedy or relief against Respondent No. 2 – CANFINA at this belated stage. Further, it cannot be allowed to raise an issue of impleadment without having any claim against the party sought to be impleaded.

7. We have heard the learned Counsel for the parties, and perused the pleadings and Written Submissions filed.

8. ISSUES There are two issues which have arisen for our consideration : (i) the first issue raised by the Appellant – MTNL with respect to the existence of a valid arbitration agreement between the three parties; (ii) the second issue has been raised by Respondent No. 1 – Canara Bank that the Order dated 16.09.2011 and

21.10.2011 is between Canara Bank and MTNL. Respondent No. 2 – CANFINA, is not a party to the arbitration agreement, and hence cannot be impleaded in the proceedings.

These issues will be dealt with seriatim.

9. THE EXISTENCE OF A VALID ARBITRATION AGREEMENT A valid arbitration agreement constitutes the heart of an arbitration. An arbitration agreement is the written agreement between the parties, to submit their existing, or future disputes or differences, to arbitration. A valid arbitration agreement is the foundation stone on which the entire edifice of the arbitral process is structured. A binding agreement for disputes to be resolved through arbitration is a sine-qua-non for referring the parties to arbitration. 9.1. Section 7 defines "arbitration agreement" and reads as follows :

7. Arbitration agreement. – (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. (5) There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties. 9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Actinserted the words "including communication through electronic means" in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement 3. 9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence 3 Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477 exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract.

The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpre- tation.4 9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An 'arbitration agreement' is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.

9.6. In Khardah Company Ltd. v. Raymon and Co. (India) Pvt. Ltd.5, this Court while ascertaining the terms of an arbitration agreement between the parties, held that: 4 Union of India v. DN Revry and Co., (1976) 4 SCC 147. 5 [1963] 3 SCR 183. "If on a reading of the document as a whole, it can fairly be deduced from the words actually used herein, that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis, a question of construction of the contract." (emphasis supplied) 9.7. In interpreting or construing an arbitration agreement or arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law. This Court in Enercon (India) Ltd. and Ors. v. Enercon GMBH6, held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute. 9.8. In this case, MTNL raised a preliminary objection that there was no arbitration agreement in writing between the parties, at this stage of the proceedings.

We will first deal with this issue. The agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the following documents exchanged between the parties, and the proceedings :

(i) The Minutes of the Meeting dated 27.03.2001 convened by the Cabinet Secretariat, wherein all three parties were present and participated in the proceedings. The Committee on Disputes, in the Meeting dated 16.12.2008 expressed the view that all the three parties should take recourse to arbitration in view of the different inter-liked transactions between them. Canara Bank suggested that to expedite the arbitration, it should be conducted under the Arbitration & Conciliation Act, 1996. This was accepted by MTNL, and no objection was raised.

(ii) Pursuant to the proceedings conducted by the Cabinet Secretariat, Canara Bank addressed letters dated 05.03.2009 and 17.03.2010 to MTNL, wherein it enclosed a draft Arbitration Agreements, wherein all three parties i.e. Canara Bank, CANFINA and MTNL would be joined in the arbitration proceedings.(iii) In the Writ Petition filed by Canara Bank, the Delhi High Court vide Order dated 16.09.2011 recorded the consent of MTNL and Canara Bank to be referred to arbitration by a Sole Arbitrator under the 1996 Act.

The relevant extract of the Order dated 16.09.2011 passed by the Delhi High Court reads as follows :

"Unfortunately, although the parties had displayed their willingness for arbitration, the Committee on Disputes could not resolve the specific clauses of the arbitration agreement. Nor have the parties been able to arrive at a consensus with regard to the specific clauses of the arbitration agreement. As noted in the order dated 01.10.2010, according to the petitioner, it is a matter of arbitration as to whether the petitioner is liable for the acts or omissions of CANFINA. However, the respondents were insisting that the petitioners should agree to take over the liabilities and admit them in the arbitration agreement itself. It has now been agreed by the parties that both these issues could be made the subject matter of the arbitration, namely, whether the petitioner is liable for the acts or omissions of CANFINA and whether the petitioner is liable to take over the liabilities of CANFINA. There is no necessity now of requiring the petitioner to agree to take over the liabilities of CANFINA prior to the arbitration proceedings because that itself would not be one of the points to be decided in the course of arbitration. Even though the learned counsel for the petitioner has placed before us the subsequent decisions of the Supreme Court with regard to the scope and ambit of powers of the Committee on Disputes, we are making the present order because the parties themselves have agreed to go in for arbitration as a mode for resolving their disputes. This is welcome because both the parties are PSUs. The counsel for the parties shall suggest names of the arbitrators." (emphasis supplied)

(iv) Pursuant thereto, MTNL participated in the proceedings conducted by the Sole Arbitrator, and filed its Claim, and Counter-Claim. No objection was raised before the Sole Arbitrator that there was no arbitration

agreement in writing between the parties. The only objection raised was that CANFINA should be joined as a necessary party in the proceedings. 9.9. The agreement between the parties as recorded in a judicial Order, is final and conclusive of the agreement entered into between the parties.7 The Appellant – MTNL after giving its consent to refer the disputes to arbitration before the Delhi High Court, is now estopped from contending that there was no written agreement to refer the parties to arbitration. 9.10. An additional ground, for rejecting the preliminary objection raised by MTNL is based on Section 7(4)(c) of the Arbitration and Conciliation Act, 1996.

7 State of Maharashtra v. Ramdas Shrinivas Nayak (1982) 2 SCC 463.

See also Chitra Kumari v. Union of India (2001) 3 SCC 208. Section 7(4)(c) provides that there can be an arbitration 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.8 In the present case, Canara Bank had filed its Statement of Claim before the Arbitrator, and MTNL filed its Reply to the Statement of Claim, and also made a Counter Claim against Canara Bank.

The statement of Claim and Defence filed before the Arbitrator would constitute evidence of the existence of an arbitration agreement, which was not denied by the other party, under Section 7(4)(c) of the 1996 Act.

In view of the aforesaid discussion, the objection raised by MTNL is devoid of any merit, and is hereby rejected.

10. JOINDER OF CANFINA IN THE ARBITRAL PROCEEDINGS 8 Savitri Goenka v. Kanti Bhai Damini & Ors., 2009 (1) Arb LR 320 (Del) (DB).

10.1. Canara Bank raised an objection to the joinder of Respondent No. 2 – CANFINA as a party to the arbitration proceedings.

10.2. As per the principles of contract law, an agreement entered into by one of the companies in a group, cannot be binding on the other members of the same group, as each company is a separate legal entity which has separate legal rights and liabilities.

The parent, or the subsidiary company, entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group, to be bound by that agreement.

Similarly, an arbitration agreement is also governed by the same principles, and normally, the company entering into the agreement, would alone be bound by it. 10.3. A non-signatory can be bound by an arbitration agreement on the basis of the “Group of Companies” doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties.

Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.

10.4. The doctrine of ‘Group of Companies’ had its origins in the 1970’s from French arbitration practice. The ‘Group of Companies’ doctrine indicates the implied consent to an agreement to arbitrate, in the context of modern multi-party business transactions.

It was first propounded in the case of Dow Chemical v. Isover-Saint-Gobain,9 where the arbitral tribunal held that:

"… the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise". 9 1984 Rev Arb 137; 110 JDI 899 (1983). The 'Group of Companies' doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group.

The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts. 10 Interim Award in ICC Case No. 4131, IX YB Comm Arb 131 (1984);

Award in ICC Case No. 5103, 115 JDI (Clunet) 1206 (1988). See also Gary B. Born: International Commercial Arbitration, Vol. I, 2009, pp. 1170-1171. The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

A 'composite transaction' refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute. 10.5. The Group of Companies Doctrine has also been invoked in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group.11 10.6. The 'Group of Companies' doctrine has been invoked and applied by this Court in Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., 12 with respect to an international commercial agreement. Recently, this Court in Ameet Lal Chand Shah v. Rishabh Enterprises,13 invoked the Group of Companies doctrine in a domestic arbitration under Part I of the 1996 Act.

10.7. Coming to the facts of the present case, CANFINA was set up as a wholly owned subsidiary of Canara Bank. This is evident from the Report of the Joint Committee to Enquire into Irregularities in Securities and Banking Transactions, 1993,14 which states as follows :

"Canbank Financial Services Ltd.

11 ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.

12 (2013) 1 SCC 641.

The Madras High Court has invoked the Group of Companies Doctrine in a foreign seated arbitration in SEI Adhavan Power Pvt. Ltd. v. Jinneng Clean Energy Technology Ltd. & Ors.2018 (4) CTC 46.

13 (2018) 15 SCC 678.

14 Report, Presented to the Lok Sabha on 21st December, 1993.

6.14 CANFINA was set up as a wholly owned subsidiary of Canara Bank and it commenced its operation with its Head Office at Bangalore on 1 st June, 1987. Its authorized and paid up capital are Rs. 50 crores and Rs. 10 crores respectively. It was staffed mostly be personnel from Canara Bank and has branches at Ahmedabad, Bombay, Calcutta, Hyderabad, Madras and New Delhi besides Bangalore. As the Board comprised mostly of senior executives of Canara Bank and its Chief Executive is also a senior official of that bank (on deputation) the company functioned under the umbrella of the parent bank; besides it submits periodical returns on its functioning to the Board of Canara Bank for information.

6.15 The activities authorized to be conducted by the Company are equipment leasing, merchant-banking, venture capital and consultancy services. The Company, initially deployed a major portion of its owned funds and deposits in equipment leasing business and obtained the classification of an 'Equipment leasing company' from the Department of Finance Companies of RBI; this classification entitles the company to mobilize public deposits to the extent of ten time its owned funds.

… 6.25 The Committee hope that the nature and extent of the financial assistance being provided by Canara Bank to its subsidiaries are such as could be justified on prudent commercial norms. Further the parent bank cannot be absolved of the responsibility for various irregularities of its subsidiary. " (emphasis supplied) 10.8. The disputes between the parties emanated out of the transaction dated 10.02.1992, whereby CANFINA has subscribed to the bonds floated by MTNL. CANFINA subsequently transferred the Bonds to its holding Company – Canara Bank. It is the contention of MTNL, that since CANFINA did not pay the entire sale consideration for the Bonds, MTNL eventually was constrained to cancel the allotment of the Bonds.

10.9. It will be a futile effort to decide the disputes only between MTNL and Canara Bank, in the absence of CANFINA, since undisputedly, the original transaction emanated from a transaction between MTNL and CANFINA – the original purchaser of the Bonds. The disputes arose on the cancellation of the Bonds by MTNL on the ground that the entire consideration was not paid.

There is a clear and direct nexus between the issuance of the Bonds, its subsequent transfer by CANFINA to Canara Bank, and the cancellation by MTNL, which has led to disputes between the three parties.

Therefore, CANFINA is undoubtedly a necessary and proper party to the arbitration proceedings. 10.10. Given the tri-patite nature of the transaction, there can be a final resolution of the disputes, only if all three parties are joined in the arbitration proceedings, to finally resolve the disputes which have been pending for over 26 years now.

It is of relevance to note that CANFINA has participated in the proceedings before the High Court, and the Committee on Disputes. CANFINA was also represented by its separate Counsel before the Sole Arbitrator. Canara Bank in CWP No. 560 of 1995 filed before the Delhi High Court, had joined CANFINA as Respondent No. 2, even though it was joined as a proforma party. CANFINA was represented by Counsel in the Writ Proceedings before the Delhi High Court. The Counsel for CANFINA was however not present on two dates i.e. on 16.09.2011 and 21.10.2011, when the High Court recorded the agreement between the parties for

reference of disputes to arbitration. MTNL had submitted before the Delhi High Court that Canara Bank should agree to take over the liabilities of CANFINA before the arbitration could commence. The High Court recorded that there was no necessity of requiring Canara Bank to agree to take over the liabilities of CANFINA, prior to the arbitration proceedings. This issue would be decided in the arbitration.

10.11. On the commencement of arbitration proceedings before the Sole Arbitrator, notice was issued by the Sole Arbitrator to all the three parties including CANFINA, which was represented by its Counsel.

10.12. We find that the objection to CANFINA being impleaded as a party to the arbitration proceedings was raised by Canara Bank, and not CANFINA.

10.13. We do not find any merit in the objection raised by Canara Bank opposing the joining of CANFINA as a party to the dispute. Canara Bank vide letters dated 05.03.2009 and 17.03.2010 had enclosed a Draft Arbitration Agreement to MTNL, wherein it has clearly stated that the arbitration would be between three parties i.e. Canara Bank and CANFINA as party of the first part, and MTNL as party of the second part.

It is incomprehensible why Canara Bank is now objecting to the impleadment of CANFINA in the arbitration proceedings. There is no justifiable ground advanced by the Counsel for Canara Bank to oppose the impleadment of CANFINA in the arbitration proceedings. 10.14. The present case is one of implied or tacit consent by Respondent No. 2 – CANFINA to being impleaded in the arbitral proceedings, which is evident from the conduct of the parties. We find that Respondent No. 2 – CANFINA has throughout participated in the proceedings before the Committee on Disputes, before the Delhi High Court, before the Sole Arbitrator, and was represented by its separate Counsel before this Court in the present appeal. There was a clear intention of the parties to bind both Canara Bank, and its subsidiary – CANFINA to the proceedings. In this case, there can be no final resolution of the disputes, unless all three parties are joined in the arbitration.

11. In view of the aforesaid discussion, the present appeals are partly allowed. We invoke the Group of Companies doctrine, to join Respondent No. 2 – CANFINA i.e. the wholly owned subsidiary of Respondent No. 1 – Canara Bank, in the arbitration proceedings pending before the Sole Arbitrator.

The matter is remitted to the Sole Arbitrator to continue with the arbitral proceedings, and conclude the same as expeditiously as possible. We have, however, expressed no opinion on the merits of the dispute.

Pending applications, if any, are disposed of accordingly.

…….....J. (ABHAY MANOHAR SAPRE) ……..J.

(INDU MALHOTRA) New Delhi August 8, 2019.

REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL Nos.6202-6205 OF 2019 (Arising out of S.L.P.(C) Nos.13573-13676 of 2014) Mahanagar Telephone Nigam Ltd. ….Appellant(s) VERSUS Canara Bank & Ors. ….Respondent(s) JUDGMENT Abhay Manohar Sapre, J.

1. I have had the advantage of going through an elaborate, well considered and scholarly drafted judgment proposed by my esteemed Sister Justice Indu Malhotra.

2. I entirely agree with the reasoning and the conclusion, which my erudite Sister has drawn, which are based on remarkably articulate process of reasoning. However, having regard to the nature of the controversy involved in these appeals, I wish to add a few words of mine.

3. As rightly observed by my learned Sister in para 8, following two questions arise for consideration in these appeals:

4. One, whether the arbitration agreement in question is a bi-party agreement between the MTNL(appellant herein) and Canara Bank (respondent No. 1) or it is a tri-partite agreement between the MTNL, Canara Bank and CANFINA (respondent No. 2) and, if so, whether the agreement satisfies the conditions laid down in Section 7(4)(b) and (c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") so as to enable the arbitral tribunal to decide the dispute which has arisen between these parties in relation to the agreement.

5. Second, if the answer to the first question is that the agreement in question is a tri-partite agreement, whether CANFINA is also a necessary party to the arbitral proceedings for deciding the rights of the parties inter se in relation to the dispute.

6. In my considered opinion also, the agreement in question is essentially a tri-partite agreement between the parties, namely, MTNL, Canara Bank and CANFINA. Indeed, this is clear from the documents exchanged between the parties, pleadings and orders of the Court.

7. It is also clear when one examines the nature of the dispute. It is so inextricably linked between the three parties that it can be effectively decided only when all the three parties are made parties to the arbitral proceedings.

8. Once we examine the issue on facts in the light of requirements of Section 7(4)(b) and (c) of the Act, we have no hesitation in coming to a conclusion that the agreement in question is, in fact, a tri-partite agreement between the three parties mentioned above. In my view, it satisfies the requirements of Section 7(4)(b) and (c) of the Act.

9. This issue is extensively dealt with by my learned Sister in the light of law laid down by this Court in several decisions and I agree with her reasoning.

10. Somewhat similar question also arose in international arbitrations as to when there are more than two parties in a dispute then how such dispute should be dealt with in the arbitral proceedings- whether it should be dealt with in one arbitral proceedings between one set of parties or it should be dealt with in separate or parallel arbitration proceedings.

11. This question was succinctly dealt with by the learned Authors-Alan Redfern and Martin Hunter in their book on "International Arbitration". (see -Redfern and Hunter on International Arbitration - sixth edition- under the heading 'J' "Multiparty Arbitrations" (a) to (e) 2.212 to 2.247 pages 141 to 153).

12. The learned authors examined the aforementioned question in the context of ICC and AAA Rules, decisions rendered by English Court of appeal and the reports of ICC Commission on multi-party arbitration. They opined that subject to the terms of the agreement and any rules framed in that behalf, it is desirable that such disputes should be resolved as far as possible in one arbitral proceedings to avoid any inconsistent findings and parallel arbitral proceedings.

13. Since the main object of the arbitral proceedings is to decide the disputes expeditiously and within a time frame, this object can be achieved only when the disputes are resolved as far as possible in one arbitral proceedings. In this case, this object can be achieved only when all the three parties named above are made

party in one arbitral proceedings to enable the arbitral tribunal to finally decide the dispute on merits in accordance with law.

14. As rightly observed by my learned Sister, the undisputed facts brought on record, in clear terms, entitles this Court to invoke the well known doctrine of “Group of Companies” and apply its principle to the facts of this case so as to enable the arbitral tribunal to determine the rights of three parties named above. In my considered view, one cannot dispute the legal proposition the doctrine “Group of Companies” has its application to arbitral proceedings and, in appropriate cases, it can be so applied (See-Redfern and Hunter on International Arbitration - Sixth Edition - 1.115 page 33, 2.42- 2.51 pages 85 to 88)

15. In view of what I have said above, I respectfully agree with the reasoning and the conclusion of my learned sister.

……..J. [ABHAY MANOHAR SAPRE] New Delhi;

August 08, 2019