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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 15.01.2019

\+ CS(COMM) 745/2017

RV SOLUTIONS PVT. LTD. ..... Plaintiff
Through Mr.Roshan Santhalaia and Ms.Nikitha Surabhi, Advs.

versus

AJAY KUMAR DIXIT & ORS ..... Defendants
Through Mr.Bharat Arora, Adv. for D-1 to 4.
Mr.Rajeev Sharma, Adv. for D-5.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

IA No. 5097-99/2018

1. These applications are filed by defendants No. 1, 2 and 4 respectively under Section 8 of the Arbitration and Conciliation Act, 1996 to refer the parties to arbitration and direct the plaintiff to have the dispute resolved in accordance with the mechanism of dispute resolution provided in the agreement specially Clause 14.

2. This suit has been filed by the plaintiff seeking a decree of permanent prohibitory injunction to restrain the defendants and its affiliates, directors, etc. from inducing or soliciting or working with any employee of the plaintiff. A decree of damages to the tune of Rs.1.10 crores is also sought against the defendants.

3. The case of the plaintiff is that the plaintiff is a company providing

quality mobile repairing and maintenance, telecom, IT services and IT solutions to its clients for a long period of time. It is stated that the plaintiff has created a reputation for itself. Defendants No. 1 to 4 are ex-employees of the plaintiff company. They joined the employment of the plaintiff at different points of time and were working at senior managerial positions. However, defendants No. 1, 3 and 4 abruptly left the services of the plaintiff company. Now, defendants No. 1 to 4 with mala fide and ulterior motives have colluded with each other and have acted in breach of the express agreement and covenants signed and executed by them and are hence acting in a manner causing grave damages to the plaintiff. It is pleaded that defendants No. 1 to 4 have in fact joined defendant No. 5 Company. Defendant No. 1 being CEO of defendant No. 5 Company is in complete control of defendant No. 5 Company. It is pleaded that defendant No.1 has misused the private and confidential information of the plaintiff company to solicit clients, vendors and staff of the plaintiff. It is stated that huge losses have been suffered from by the plaintiff Company on account of the soliciting activities committed by the defendants at the behest of defendant No. 1. Hence, the present suit has been filed.

4. As noted above, defendants No. 1, 2 and 4 have now filed the aforesaid applications under Section 8 of the Arbitration Act. The Arbitration clause in their employment agreement is admitted. There is no arbitration clause in the employment agreement with defendant No. 3. However, learned counsel for defendant No.3 does not oppose these applications. Similarly, learned counsel appearing for defendant No. 5 submits that there is no agreement between the plaintiff and defendant No. 5. However, defendant No. 5 has no objection in case the present dispute is

referred to arbitration.

5. Learned counsel for the plaintiff has vehemently opposed the present applications. He has submitted that in the present case, defendants No.5 is a foreign entity with whom there is no agreement or collaboration. He submits that in these facts, the judgment of the Supreme Court in the case of ***Sukanya Holdings Pvt. Ltd. vs. Jayes H. Pandya & Ors., AIR 2003 SC 2252*** would continue to apply.

6. Learned counsel for the defendants No. 1 to 4 has however submitted that the judgment of the Supreme Court in the case of ***Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Ors., 2018 SCCOnline 487*** will be applicable. He also relies upon the judgment of the Single Judge of a Coordinate Bench passed on 30.10.2018 in ***MGRM Medicare Ltd. vs. Narang Surgicals and Ors., MANU/DE/4043/2018*** which has relied upon the judgment of the Supreme Court in *Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Ors.*

7. Section 8 of the Arbitration and Conciliation Act reads as follows:-

> "8. Power to refer parties to arbitration where there is an arbitration agreement.—
> "1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. ;
> ...."

8. Hence, the Court before whom an action is brought may refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. The Supreme Court in ***A.Ayyasamy vs. A.Paramasivam and Ors., AIR 2016 SC 4675*** has held that the above provision contains a positive mandate that obligates the judicial authority to refer the parties to arbitration in terms of the arbitration agreement. The Supreme Court held as follows:-

> "26. The Arbitration and Conciliation Act, 1996 does not in specific terms exclude any category of disputes—civil or commercial—from arbitrability. Intrinsic legislative material is in fact to the contrary. Section 8 contains a mandate that where an action is brought before a judicial authority in a matter which is the subject of an arbitration agreement, the parties shall be referred by it to arbitration, if a party to or a person claiming through a party to the arbitration agreement applies not later than the date of submitting the first statement on the substance of the dispute. The only exception is where the authority finds prima facie that there is no valid arbitration agreement. Section 8 contains a positive mandate and obligates the judicial authority to refer parties to arbitration in terms of the arbitration agreement. While dispensing with the element of judicial discretion, the statute imposes an affirmative obligation on every judicial authority to hold down parties to the terms of the agreement entered into between them to refer disputes to arbitration. Article 8 of the Uncitral Model Law enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 of the 1996 Act has made a departure which is indicative of the wide reach and ambit of the statutory mandate. Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find place in Section 8."

9. Over passage of time the law regarding reference to arbitraton has evolved. Even non signatories have now been referred to arbitration. In this context reference may be had to some of the recent judgments of the Supreme Court. In ***Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc.& Ors., (2013) 1 SCC 641*** the Supreme 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* (2nd Edn.) 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."
>
> ……

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

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102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:

103.1 The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on

the force of the applicable law."

10. Similarly, in ***Cheran Properties Limited vs. Kasturi & Sons Limited and Ors., 2018 SCC Online SC 431*** the Supreme Court held as follows:-

> "26. The Court held that it would examine the facts of the case on the touch-stone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a 'direct commonality' of the subject matter and on whether the agreement between the parties is a part of a composite transaction:
>
> > "A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even no signatory parties would fall within the exception afore-discussed."
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> 27. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus:
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> > "The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible

> intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.
>
> The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.
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> ..
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> We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."
>
> …..

31**.** Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. **Redfern and Hunter** explain the theoretical foundation of this principle:

> "..The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended

to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession."

11. Similarly, in ***Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Another, 2018, SCCOnline SC 487*** the Supreme Court held as follows:-

"35. Under the Act, an arbitration agreement means an agreement which is enforceable in law and the jurisdiction of the arbitrator is on the basis of an arbitration clause contained in the arbitration agreement. However, in a case where the parties alleged that the arbitration agreement is vitiated on account of fraud, the Court may refuse to refer the parties to arbitration. In *Ayyasamy case*, this Court held that mere allegation of fraud is not a ground to nullify the effect of arbitration agreement between the parties and arbitration clause need not be avoided and parties can be relegated to arbitration where merely simple allegations of fraud touched upon internal affairs of parties is levelled. Justice A.K. Sikri observed that it is only in those cases where the Court finds that there are serious allegations of fraud which make a virtual case of criminal offence and where there are complicated allegations of fraud then it becomes necessary that such complex issues can be decided only by the civil court on the appreciation of evidence that needs to be produced. In para (25) of *Ayyasamy case*, Justice Sikri held as under:—

"25…..Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with

> the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

> 36. While concurring with Justice Sikri, Justice D.Y. Chandrachud pointed out that the duty of the Court is to impart "*sense of business efficacy*" to the commercial transactions pointing out that mere allegations of fraud were not sufficient to decline to refer the parties to arbitration. In para (48) of *Ayyasamy case*, Justice D.Y. Chandrachud held as under:—

> > "48. The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy."
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> (Underlining added)

12. As held by the Supreme Court in ***Cheran Properties Limited vs. Kasturi & Sons Limited and Ors.(surpa),*** the existence of a relationship between the parties, commonality of the subject matter and whether the agreement between the parties is a part of a composite transaction have to be seen. A third party or a non-signatory could be subjected to arbitration without his prior consent, though this would only be in exceptional cases. This would happen only when there is a direct relationship to the party signatory to the arbitration agreement, commonality of the subject-matter and the agreement between the parties being a composite transaction.

13. In the present case, there is clearly commonality of facts which bind the defendants together. It is the own case of the plaintiff that the defendants have in collusion with each other in a mala fide and unlawful manner acted to cause loss and damages to the plaintiff. Defendants No. 1 to 4 are said to be the ex-employees of the plaintiff. The said five defendants are said to have together caused loss and damages to the plaintiff. It is manifest that there is commonality of parties, commonalities of interest which would warrant that the matter be referred to arbitration. The objection of the plaintiff is without merit.

14. At this stage, learned counsel for the parties request that the matter be referred for arbitration to Delhi International Arbitration Centre. Accordingly, I appoint Mr.Justice N.K. Mody (Retd.) r/o A-192, Defence Colony, New Delhi (Mobile No.9425115911) as the Sole Arbitrator in the present case. The learned Arbitrator will work under the aegis of Delhi International Arbitration Centre.

15. The application stands disposed of.

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At this stage, learned counsel for the plaintiff submits that as the matter has been referred to arbitration, this court may direct refund of the court fees under Section 89 of the CPC read with Section 16 of the Court Fees Act, 1870. It is ordered accordingly. The plaintiff shall be entitled to refund of the court fees

In view of the above, the suit stands disposed of.

All pending applications also stand disposed of.

JANUARY 15, 2019/rb **JAYANT NATH, J**