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2024:DHC:8116

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

Judgment reserved on: 02.07.2024
Judgment pronounced on: 21.10.2024

\+ **ARB.P. 38/2024 & I.A. 700/2024**

KKH FINVEST PRIVATE LIMITED & ANR. ..... Petitioners

Through: Mr Akhil Sibal, Sr. Adv. with Ms Ranjana Roi, Ms Vasudha Sen, Ms K Hema and Ms Debosree Mukherjee, Advs.

versus

JONAS HAGGARD & ORS. ..... Respondents

Through: Mr Shivek Trehan, Mr Ishaan Kumar, Mr Pranay Mohan Govil and Ms Riya Nair, Advs. for R-2, R-4, R-5 & R-9.
Ms Rajeshwari H, Mr Tahir A.J and Ms Sugandh Shahi, Advs. for R-6 and R-7.
Mr Tarang Gupta and Mr Kartikeya Sharma, Advs. for R-3 and R-8.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. The present petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") seeking appointment of Justice T.S. Thakur, Former Chief Justice of India as the sole arbitrator to adjudicate the disputes between the parties.

Factual Matrix

2. The factual matrix as per the petitioner is as follows:

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3. Petitioner No. 1 is a company incorporated under the Companies Act, 1956 having its registered office at Shop No. 1, Ground floor, 101, Hari Nagar, Ashram, New Delhi – 110014 and is involved in the business of investment, consultancy, development and promotion of business activities of various companies across India.

4. Petitioner No. 2 i.e. Sensorise Digital Services Private Limited [referred to as "**SDS**" in the Memorandum of Settlement dated 09.05.2022] is a company incorporated under the Companies Act, 1956 and is engaged in the business of M2M and IoT service provider developing solutions, and offering services in the subscription lifecycle management and Internet of things space.

5. Respondent No. 1 was working as a Chief Solutions Officer with petitioner No. 2 and was aware of all the product related information. Moreover, respondent No. 1 also held substantial shareholding in petitioner No. 2-company.

6. Respondent Nos. 2 - 5 were actively employed as key managerial personnels and were also shareholders in petitioner No.2. Respondent No. 2 was in charge of the supply chain; respondent No. 4 was handling financial, accounting and secretarial functions and respondent No. 5 was working as the Chief Financial Officer with petitioner No. 2.

7. Respondent No. 6 was working as an ex-consultant and was also a shareholder in petitioner No. 2. Respondent Nos. 1 to 6 are defined as the "ex-promoter group" in the MoS.

8. It is stated that respondent No. 8 i.e. Ontrack Communication Private Limited is a company incorporated by respondent No. 3.

9. Respondent No. 7 i.e. Mannash Solutions Private Limited is a company controlled by respondent No. 6, and respondent No. 9 i.e.

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Mashmari Consultants Private Limited is a company controlled by Mr. Sharad Arora (proforma party No. 1).

10. Proforma party No. 1, Mr. Sharad Arora, was the founder promoter and former Managing Director of petitioner No. 2, while proforma party No. 2, Mr. Rajeev Arora, also a founder promoter, served as Director, Chief Technical Officer, and Head of HR at petitioner No. 2. Both proforma party Nos. 1 and 2 (hereinafter collectively referred to as "**proforma parties**") were the only signatories to the MoS and collectively held 32.39% shareholding in petitioner No. 2. Additionally, proforma party No. 1, Mr. Sharad Arora, was responsible for managing the day-to-day operations of petitioner No. 2.

11. A Share Subscription and Shareholder's Agreement ("**SSHA**") was executed on 27.05.2016 between petitioner No. 1, petitioner No. 2 and proforma party No.1, whereby the petitioner No. 1 came as an investor to acquire 50% shareholding and 49% voting rights in petitioner No. 2 and to provide funds for operations of petitioner No. 2.

12. Since there were disputes between the parties in terms of the SSHA, a petition was filed under Section 9 of the 1996 Act being O.M.P.(I)(COMM.) 276/2021 regarding the breaches of the SSHA which was subsequently withdrawn *vide* order dated 04.10.2021 on account of parties trying for an amicable settlement. However, no settlement could arrive between the petitioners and proforma party No. 1.

13. Petitioner No. 1, in view of the fraudulent acts committed by proforma parties and respondent Nos. 1, 2, 4 and 5 along with some other former promoters of petitioner No. 2, registered an FIR bearing No. 47/2022 under Sections 406/409/420/467/468/471/477- A/120-B of IPC dated 23.02.2022. The respondents filed anticipatory bail applications before the Ld. Sessions Court, Gautam Buddh Nagar, however, the same

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were dismissed. Thereafter, proforma party No. 1 along with other former promoters filed criminal misc. writ petitions seeking quashing of the aforesaid FIR. However, the petitions were also dismissed by the Allahabad High Court *vide* order dated 12.04.2022.

14. In order to put a closure to the subsisting disputes, the parties entered into a Memorandum of Settlement ("**MoS**") dated 09.05.2002 along with individual Share Purchase Agreements ["**SPA(s)**"], also dated 09.05.2002. These agreements were executed to facilitate the complete transition of petitioner No. 2 to petitioner No. 1.

15. The MoS was executed between petitioner No. 1, petitioner No. 2, proforma parties, and Sensorise Smart Solutions Pvt. Ltd (referred to as "**SSS**" in the MoS), whereby the petitioner No. 1 had agreed to take over petitioner No. 2 and SSS. In this regard, petitioner No. 1 was to pay an amount of Rs 8,00,00,000/- to the shareholders and a severance amount of Rs 2,00,00,000/- to proforma party No.1. The obligations of proforma parties along with the respondents were that they were to transfer their shareholding in petitioner No. 2. The former promoters of petitioner No. 2 and the respondents were obligated to support the audit process by providing necessary assistance and ensuring its completion. Additionally, they were required to offer a three-month consultancy following the execution of the MoS to facilitate the transition of management and the handover of petitioner No. 2's business to petitioner No. 1. In return, petitioner No. 1 had to provide support for quashing of FIR No. 47/2022 against the persons mentioned under the Schedule 10 of the MoS being, *inter alia*, Mr. Sharad Arora (proforma party No. 1), Mr. Rajeev Arora (proforma party No. 2), Mr. Jonas Haggard (respondent No. 1), Mr. Ajay Nandy (respondent No. 2), Mr. Abhishek Batra (respondent No. 5), and Mr. Achin Jain (respondent No. 4).

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16. On the same date i.e. 09.05.2022, individual SPAs also came to be executed between the petitioner No. 1, petitioner No. 2, SSS and respondent Nos. 1 to 6 in their individual capacities for the sole purpose of transferring the shares held by respondent Nos. 1 to 6 in favor of the petitioners.

17. Pursuant to the execution of the MoS, a criminal misc. writ petition bearing No. 5804/2022 came to be filed jointly seeking quashing of FIR No. 47/2022. *Vide* order dated 27.05.2022, the matter was deferred for a period of 3 months. Parties were referred to mediation to work out an amicable solution pertaining to the closing obligations contained in Clause 10 of the MoS. In this regard, Ersnt and Young ("**EY**") was appointed to conduct IP and finance audit for transition of management and handover of business of petitioner No. 2-company. Clause 10 of the MoS reads as under:

> *"10. Within 3 months from the date of execution of the present MOS, the ex-Promoters shall fulfill the obligations and covenants as stipulated under Clause 40- Finance and IP Audit, Assignment of Intellectual Property - 43, 44, 45 and 46; consultancy for a period of 3 months during Transition of Management of SDS and SSS- Clauses 53, 55, 57, 58, 59 and 60 Schedules 3, 4, 5, 7 and 9."*

18. It is asserted that the respondents failed to fulfill their obligations under the MoS and materially breached several terms and conditions outlined within the agreement. The petitioner's allegations are that the respondents have formed and are controlling respondent Nos. 7 to 9, which are being used for unlawful diversion of business and intellectual property of petitioner No. 2. Moreover, the respondents have failed to provide intellectual property rights, proper assistance for handover and

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smooth transition of petitioner No. 2 to petitioner No. 1, technical know-how and trade secrets of petitioner No. 2 etc. The respondents have also deliberately withheld essential information and provided misleading information along with falsified books of accounts.

19. In addition, the proforma parties along with the respondents were continuously operating through their competing companies i.e. through respondent Nos. 7 to 9, which is stated to be in total violation of clauses pertaining to non-solicitation and non-compete obligations as mentioned under the MoS. The former promoters and respondents were bound by the terms of the MoS to support the audit process and facilitate the management transition. Nevertheless, their intentional non-compliance in providing the requisite co-operation constituted a blatant breach of the MoS.

20. On account of multiple breaches on behalf of the respondents, the petitioners issued notice dated 21.06.2022 to the proforma parties. The petitioners on 21.06.2022 also issued notice to respondent Nos. 2 and 3 for violation of their obligations contained in the SPAs followed by another letter by the petitioners against the proforma parties and respondent Nos. 1 to 5 on 08.08.2022 indicating multiple breaches of the MoS and the SPAs.

21. Thereafter, petitioner No. 1 through its counsel issued notice invoking arbitration just against the proforma parties on 10.09.2022 in terms of the arbitration agreement i.e. Clause 79 of the MoS. *Vide* letter dated 20.09.2022, the proforma parties replied to the letter dated 10.09.2022 and denied the allegations made by the petitioners.

22. After rounds of failed negotiations, the proforma parties initiated a petition under Section 9 of the 1996 Act being O.M.P.(I)(COMM.) 56/2023. Petitioners filed two petitions: (i) under Section 11 of the 1996

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Act (being ARB.P. No. 382/2023) seeking appointment of an arbitrator, and; (ii) under Section 9 of the 1996 Act (being O.M.P.(I)(COMM.) 107/2023) seeking interim reliefs against both the proforma parties and the respondents. Subsequently, the proforma parties also sought the appointment of an arbitrator for adjudication of disputes arising from the MoS through a Section 11 petition being ARB.P. No. 392/2023.

23. *Vide* order dated 12.04.2023, the Court allowed the Section 11 petition filed by petitioner No. 1 i.e. ARB.P. No. 382/2023 and appointed Justice T.S. Thakur, Former Chief Justice of India as the sole arbitrator. The Section 9 petitions were to be treated as Section 17 applications before the learned arbitrator.

24. The petitioners, for the first time in the arbitration, impleaded respondent Nos. 1 to 9 in the hearing held on 14.05.2023 and notice was issued to them while leaving all their contentions and rights open to oppose their impleadment. The operative portion of the said order reads as under:

> *"3 The question whether or not Respondent Nos. 3 to 11, non-Applicants can be treated as non-signatory Parties to the Arbitration agreement and whether or not they can be taken as Parties to these proceedings, shall have to be decided only after hearing all the Parties, including Respondents 3 to 11 who are un represented before this Tribunal at present as no notice has been issued to them so far. Mr. Trehan rightly pointed out that if a notice is indeed issued for appearance to Respondents/Non-Applicants 3 to 11, they should have the liberty to raise all such objections as are otherwise open to them in law regarding their addition to these proceedings as Parties.*

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> *4. In the circumstances therefore, notices shall issue to Respondents 3 to 11 for their appearance in the present Application, returnable within 2 weeks from today. Needless to say that the said respondents shall be free to raise all such objections as are open to them not only on merits but even in regard to their addition to these proceedings."*

25. Henceforth, respondent Nos. 2 to 9 filed applications under Section 16 of the 1996 Act seeking termination of the arbitral proceedings *qua* them on the ground that the respondents are non-signatories to the MoS. It was also stated that the invocation notice dated 10.09.2022 was not served upon the respondents, and they were also not included as parties in the petition filed by the petitioners under Section 11 of the 1996 Act. Hence, the respondents could not be made parties before the learned arbitrator. In view of the objections of the respondents, the petitioners served legal notice dated 31.10.2023 to respondent Nos. 1 to 9 invoking arbitration in terms of Clause 79 of the MoS.

Submissions of the Petitioners

26. Mr. Sibal, learned senior counsel for the petitioner has divided his arguments into two parts *vis-a-vis* respondent Nos. 2 to 6 and respondent Nos. 7 to 9.

27. As regards respondent Nos. 2 to 6, he states that while it is an admitted position that respondents are not signatories to the MoS, however, by virtue of contents of MoS and SPAs and the interlinking between the two as well as the conduct of the parties, there is implied consent of respondent Nos. 2 to 6 to be bound by arbitration clause in the MoS, as respondent Nos. 2 to 6 were to sell their shareholding in petitioner No. 2 in favor of petitioner No. 1. He draws my attention to Recital K of the MoS to state that the respondents were to render full

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cooperation in order to execute the MoS. Recital K of the MoS reads as under:

> *"K. For the sake of convenience, simultaneous with the present MOS, separate Share Purchase Agreement containing Indemnity, non-disclosure, non-Compete and non-Solicitation, and Share Transfer Forms are being executed with persons enlisted in Schedules 1A, 1B and Schedule 2 herein and separate Share Purchase Agreements and Share Transfer Forms are being executed with persons enlisted in Schedule 2B. The ex promoters shall render full co-operation and assistance in execution and compliance of the said Share Purchase Agreements and other documents by persons enlisted in Schedules 1A, 1B, 2 and 2B."*

28. He further states that as per the description of the parties as mentioned in the MoS, the respondent Nos. 2 to 6 have been referred to as "ex-promoter group" or "sellers". In addition, the respondent Nos. 2 to 6 have been mentioned in Schedules 1A and 2 of the MoS whereby the respondents held certain shareholding in petitioner No. 2. In this regard, he states that the respondent Nos. 2 to 6 held substantial positions and were responsible for the day-to-day operations of petitioner No. 2. Hence, they cannot take the stance that they were not connected to the terms of the MoS.

29. Learned senior counsel for the petitioners submits that the SPAs executed with respondents Nos. 2 to 6 contain mirror obligations to those in the MoS, binding them to the terms of the MoS. He points out that the obligations under both agreements are identical, indicating that the respondents are bound by the arbitration clause in the MoS. By referring to various clauses of the MoS and the SPAs, he states that respondent Nos. 2 to 6 were necessary parties for proper implementation of the MoS.

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30. It is submitted that the non-signatories to the arbitration agreement can also be made parties to the arbitral proceedings by way of implied or specific consent. Reliance is placed upon ***Gaurav Dhanuka & Anr. v. Surya Maintenance Agency Private Limited &Ors.*** 2023 SCC OnLine Del 2178.

31. Reliance is placed upon the judgment of the Hon'ble Supreme Court in ***Cox & Kings Ltd. v. SAP India (P) Ltd. & Anr.,*** (2024) 4 SCC 1 wherein it was held that persons or entities who have not signed the arbitration agreement can also be bound by the agreement if they are veritable parties. A written contract does not necessarily require that parties put their signatures to the document embodying the terms of the agreement. Reference is also made to ***Green Edge Infrastructure Pvt. Ltd. v. Magic Eye Developers Pvt. Ltd. &Ors.*** 2024 SCC OnLine Del 1732 and ***Moneywise Financial Services Pvt. Ltd. v. Dilip Jain & Ors.*** 2024 SCC OnLine Del 1896.

32. As regards respondent Nos. 7 to 9, Mr. Sibal submits that respondent No. 7 is being controlled by respondent No. 6, respondent No. 8 is incorporated by respondent No. 3 and respondent No. 9 is incorporated by proforma party No. 1, and these companies are the entities being used as instruments for diversion of funds which eventually resulted in breach of the MoS.

33. He further places emphasis on the 'Group of Companies Doctrine' ("**GOC doctrine**") to bind the non-signatories to the arbitration agreement. In this regard, reliance is placed upon ***ONGC Ltd v. Discovery Enterprises (P) Ltd. &Anr.*** (2022) 8 SCC 42 whereby the Hon'ble Supreme Court had laid down principles that need to be seen before invoking the GOC doctrine. This was reiterated by the Hon'ble Supreme Court in ***Cox and Kings*** (supra). These principles are: a) mutual intent of

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the parties; b) relationship of a non-signatory to a party which is a signatory to the agreement; c) commonality of the subject matter; d) composite nature of the transaction; and e) performance of the contract.

34. While reiterating the principles laid down in the aforesaid judgement, it is submitted that the subject matter of the disputes between the proforma parties and the respondents is common in nature. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. Moreover, the transactions pertaining to the MoS are also of composite nature, where the performance of the mother Agreement i.e. the MoS may not be feasible without aid, execution and performance of the supplementary or ancillary agreements for achieving the common object and collectively having a bearing on the subject matter of the dispute.

35. It is stated that the active involvement of the respondent Nos. 2 to 6 in the execution of the MoS was necessary to attain the objective of the MoS and hence, the respondents are veritable parties to the MoS. A non-signatory to the main agreement may have an obligation that is crucial for the execution of the main agreement, and the conduct of the non-signatory may be in harmony with the conduct of the other members of the agreement, leading the other party to legitimately believe that the non-signatory is a necessary party to the contract.

36. Learned senior counsel has also placed reliance upon ***DLF Ltd. v. PNB Housing Finance Ltd. & Ors.*** 2024 SCC OnLine Del 2165 to state that when the issue of impleading both the signatories and the non-signatories is concerned, both consensual and non-consensual theories should be considered.

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37. He further submits that the 1996 Act does not have an express provision for consolidation of two or more arbitral proceedings but also does not provide an express or implied bar on consolidation of arbitral proceedings. In this regard, he places reliance upon Article 10 of the ICC Arbitration Rules, 2021 along with Section 8 of the Singapore International Arbitration Centre (SIAC) Rules, 2016.

Submissions of Respondent Nos. 2, 4, 5, 9

38. Mr. Trehan, learned counsel for respondent Nos. 2, 4, 5 and 9 states that respondent Nos. 2, 4 and 5 were not privy to the negotiations and discussions that took place at the time of executing the MoS, and the MoS was only executed between the petitioners and proforma parties. Moreover, terms of the MoS are only binding on proforma parties and the petitioners as the objective of executing the MoS was to settle the pending disputes between two large shareholders of petitioner No. 2, being (i) petitioner No. 1 with 50% shareholding in petitioner No. 2 and; (ii) proforma party Nos. 1 and 2, collectively with 32.39% shareholding, thereby facilitating the takeover of petitioner No. 2 by petitioner No. 1.

39. He further states that the objective of the MoS and the SPAs was entirely different. The MoS was executed between the petitioners, the proforma parties and SSS to settle their disputes amicably. On the other hand, the individual SPAs were executed between the petitioners and the respondents for the purpose of transferring the respective shares of the respondents to petitioner No. 1.

40. He states that the obligations of proforma parties as contained in the MoS were much wider as compared to the obligations of the respondent Nos. 2, 4 and 5 in terms of their SPAs, as the respondent Nos. 2, 4 and 5 were merely employees with some shareholding in petitioner

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No. 2. It was only proforma parties who had undertaken to perform the obligations and tasks as per the demands of petitioner No. 1.

41. It is submitted that the fact that the MoS and the various SPAs were executed on the same date does not, by itself, create a presumption that these agreements are interlinked, nor does it impose any obligations upon respondent Nos. 2, 4, and 5 under the MoS. Conversely, the simultaneous execution of the MoS and SPAs, coupled with the absence of respondent Nos. 2, 4, and 5 as signatories to the MoS, clearly demonstrates their intent not to be bound by the MoS. The SPAs are standalone agreements, with independent rights and obligations solely pertaining to respondent Nos. 2, 4, and 5. There was never any question of the respondents being required to perform or be bound by any of the obligations of the MoS.

42. Learned counsel further draws my attention to Recital K of the MoS to state that proforma parties were obligated to fully cooperate in ensuring the execution and compliance of the SPAs with the respondent Nos. 1 to 6. MoS specifically required proforma parties to ensure that other employee shareholders, including respondent Nos. 2, 4, and 5, sign and perform their respective SPAs, clearly demonstrating that respondent Nos. 2, 4, and 5 were not bound by the MoS. Had respondent Nos. 2, 4, and 5 intended to be bound by the MoS, there would have been no need to impose this obligation on proforma parties to ensure the execution of separate SPAs by the respondents.

43. He submits that the SPAs were being executed simultaneously in terms of the MoS and as per the SPA, respondent Nos. 2, 4 and 5 were to transfer their shares to petitioner No. 1, however, it cannot be said that the SPAs were executed as ancillary agreements as the intent of the petitioners and proforma parties was to delineate the roles and obligations

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of respondent Nos. 2, 4 and 5 under the MoS *vis-à-vis* SPAs by not making them signatories to the MoS.

44. Learned counsel states that petitioners have already sought reference to arbitration for adjudication of disputes by way of filing a petition under Section 11 of the 1996 Act i.e. ARB P. 382/2023 whereby the petitioners have not sought reference against the respondents as the petitioners themselves acknowledged that the disputes between the petitioners and the respondents were not arbitrable. The petitioners had knowledge of the disputes subsisting between the respondents and the petitioners, however they did not seek reference against the respondents at the initial stage.

45. It is further stated that the petitioners had issued breach notices dated 21.06.2023 to the respondents regarding the violation of the SPAs and not the MoS, and no notice invoking arbitration under Section 21 of the 1996 Act was issued against the respondents, which makes it clear that the petitioners were aware of each purported violation of the SPAs by respondent Nos. 2, 4, 5 and 9, yet chose not to address any notice invoking arbitration to them. The notice invoking arbitration was only issued against the respondents on 31.10.2023. It is stated that the prayers sought in the present petition are inconsistent with the notice of invocation dated 31.10.2023 as the present petition seeks a fresh and independent reference against the respondents, albeit with the appointment of the same arbitrator. The said notice of invocation was issued retrospectively, seeking a composite reference in the ongoing arbitral proceedings.

46. Learned counsel states that the petitioners, by their own deliberate and voluntary choice, did not make the respondents a party to either the notice invoking arbitration dated 10.09.2022 or in the subsequent Section

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11 proceedings in ARB. P. No. 382/2023. Therefore, having consciously decided not to seek reference of these purported disputes to arbitration at the relevant stage, the petitioners are estopped from invoking arbitration at this stage. In addition, it is stated that the present petition is barred by Order II Rule 2 of the CPC.

47. It is stated that the issue raised in the present petition is already pending before the arbitral tribunal and the arbitral tribunal has already issued notice to the respondents in the ongoing arbitration proceedings and subsequently, the respondents have moved a Section 16 application before the arbitrator seeking their deletion on the ground that they are not signatories to the MoS which contains the arbitration clause.

48. Learned counsel places reliance upon ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited*** (2020) 2 SCC 455, wherein it has been held that once an arbitral tribunal has been constituted, all issues and objections are to be decided by the arbitrator. It is stated that since the arbitrator is already seized of the matter, any order passed by this Court would amount to interference with the arbitral proceedings which is against the scheme of the 1996 Act, specifically Section 5 of the 1996 Act.

49. It is submitted that the petitioners, in their second notice invoking arbitration dated 31.10.2023, failed to raise any prayer for fresh initiation of proceedings against the respondents. As a result, the respondents were never informed of the petitioners' intent to seek such relief, nor were they afforded an opportunity to challenge or respond to these claims. In view of this omission, the notice of invocation dated 31.10.2023 is legally deficient and invalid. Reliance is placed upon ***Umesh Cimechel Consortium v. IIC Ltd. & Anr.*** 2022 SCC OnLine Del 4128, wherein this Court, on similar facts, held that no valid notice had been served to a

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party, against whom arbitration had initially not been invoked and was served a separate notice. It was held that where a valid Section 21 notice has not been issued, there would be no foundation for initiating Section 11 proceedings.

50. Learned counsel further places reliance upon ***Sagar Ratna Restaurants Pvt. Ltd. v. DS Foods &Ors.*** 2021 SCC OnLine Del 2539 to state that a party cannot take inconsistent stands at different stages as the conduct of the petitioners also makes it clear that they agreed that there was no arbitration clause between the petitioners and the respondents, which is why separate SPAs were executed and the respondents were not named in the original notice invoking arbitration dated 10.09.2022.

51. It is further stated that the petitioners have sought consolidation and clubbing of the ongoing arbitration proceedings with the proceedings proposed and such a prayer cannot be granted as the Hon'ble Supreme Court in ***Duro Felguera v. Gangavaram Port Ltd***. (2017) 9 SCC 729 has categorically held that separate arbitral proceedings have to be conducted for separate agreements. Moreover, this Court cannot proceed with the consolidation of proceedings with the fresh proceedings as no such power is conferred under the 1996 Act.

52. Learned counsel submits that GOC doctrine cannot be invoked in the present case as it cannot be extended to apply to individuals. This doctrine is limited to corporate entities and is inapplicable to respondent Nos. 2, 4 and 5 as the respondents are individuals who worked with petitioner No. 2 in individual capacities. Reliance is placed upon ***Vingro Developers Pvt. Ltd. v. Nitya Shree Developers Pvt. Ltd.*** 2024 SCC OnLine Del 486 wherein the Court refused to apply the GOC doctrine as detailed in the ***Cox & Kings*** (supra) on the grounds that certain

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respondents were individuals acting in their official capacities and were not signatories to the arbitration agreement.

53. As regards respondent No. 9, learned counsel states that it is neither a signatory to the said MoS nor the SPA, and there is no privity of contract between the petitioners and the respondent No. 9. Respondent No. 9 did not even exist at the time the MoS was signed. Moreover, there is neither express nor implied consent from respondent No. 9 for reference of disputes to arbitration.

54. The petitioners have also failed to show a single instance as to how respondent No. 9 is being used as an instrument for siphoning of funds and intellectual property of the petitioner No. 2 company.

55. Learned counsel states that the principle of piercing the corporate veil should be applied in a restrictive manner and only in scenarios where it is evident that the subsidiary company was a mere camouflage deliberately created by the holding company for the purpose of avoiding liability. In this regard, he places reliance upon ***Cox and Kings*** (supra).

Submissions of Respondent Nos. 6 and 7

56. Learned counsel for respondent No. 6 and 7 primarily submits that respondent No. 6 was working as a consultant with petitioner No. 2 from January 2019 until June 2020 and had left the employment in the year 2020 even before the disputes between the parties started. It is stated that respondent No. 6 neither agreed to, assured, guaranteed, nor participated in the performance of the MoS. Furthermore, respondent No. 6 was not part of the management team of petitioner No. 2, as is evident from both the MoS and the SPA. The SPA was solely executed by respondent No. 6 in his individual capacity, with no involvement in the broader obligations of the MoS.

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57. He further states that while the SPA and the MoS were executed on the same date, there is an express severance clause being Clause 16 of the SPA which categorically states that its execution is in no way connected to the MoS. This severance clause clearly reflects the intent of the parties that the SPA was entirely separate from the MoS.

58. He states that similarly as regards respondent No. 7 is concerned, respondent No. 7 is a company incorporated by the wife of respondent No. 6 and her father, and respondent No. 7 had no knowledge of the MoS or the execution of the SPA and did not execute either of these documents. Respondent No. 7 neither agreed to, assured, guaranteed, nor participated in the performance of the MoS, nor in the execution of the SPA. Additionally, respondent No. 7 was not part of the management team of petitioner No. 2, as is evident from both the MoS and the SPA. No contract of any nature was ever executed by respondent No. 7 with either petitioner No. 1 or petitioner No. 2. Therefore, respondent No. 7 cannot be held liable or bound by any obligations under the MoS or SPA.

59. Reliance is placed upon ***NTPC Ltd. v. SPML Infra Ltd.***, (2023) 9 SCC 385 and ***Pankaj Singh v. Bashir Ahmed Haroon***, 2024 SCC OnLine Del 2554 to state that the referral court is required to see the existence of an arbitration agreement, and in the absence of one, it cannot refer the matter to arbitration.

<u>Submissions of Respondent Nos. 3 and 8</u>

60. Learned counsel states that respondent Nos. 3 and 8 were not signatories to the arbitration agreement i.e. the MoS. Respondent No. 3 was only working as a consultant with petitioner No. 2 and used to receive compensation in return. Additionally, respondent No. 3 was neither a director, nor key managerial personnel of Petitioner No. 1 and was having a shareholding of 0.37% in petitioner No. 2. Respondent No.

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8 i.e. M/s Ontrack Communication Private Limited is a company incorporated by respondent No. 3 and his wife on 09.09.2011, however no business has been transacted by respondent No. 8 since 01.04.2022 (even before the MoS was executed).

61. He further submits that there is no privity of contract between the petitioner and respondent No. 8, and no correspondence has ever been exchanged between the petitioners and respondent No. 8 before the petitioners issued their notice invoking arbitration on 31.10.2023. The case of the petitioners that incorporation of respondent No. 8 by respondent No. 3 was in breach of the SSHA is also misconceived as respondent No. 8 was incorporated even before the execution of the SSHA i.e. on 09.09.2011 and respondent No. 3 was not even a signatory to the SSHA.

62. Learned counsel submits that the only relationship between the petitioners and respondent No. 3 is the execution of the SPA, which admittedly does not contain any arbitration clause and the conduct of the parties itself shows that respondent No. 3 and the petitioners have been in agreement with the fact that no arbitration agreement exists between them. The MoS which contains the arbitration clause and the SPA were executed with respect to distinct transactions. In addition, respondent Nos. 3 and 8 have never bestowed their approval or acted in any manner to be bound by the terms of the MoS.

63. He states that the petitioners have alleged breach of just the SPA against respondent No. 3 *vide* its notices dated 21.06.2022 and 10.09.2022, whereas on the other hand, the petitioners have alleged breach of MoS against the proforma parties *vide* its notices dated 21.06.2022, 08.08.2022 and 10.09.2022 which clearly indicate that the petitioners are cognizant of the fact that the respondent No. 3 was only a

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party to the SPA and not the MoS. Petitioners did not even implead respondent Nos. 3 and 8 in ARB.P. 382/2023, nor sent any notice under Section 21 of the 1996 Act at the first instance i.e. on 10.09.2022. Notice under Section 21 was only sent against respondent Nos. 3 and 8 on 31.10.2023.

64. Learned counsel submits that the notice dated 31.10.2023 sent to respondent Nos. 3 and 8 only called upon them to be impleaded in the ongoing arbitral proceedings. However, by way of present petition, the petitioners are seeking fresh initiation of arbitration against respondent Nos. 3 and 8. No fresh notice invoking arbitration was sent to respondent Nos. 3 and 8, and a notice calling upon respondent Nos. 3 and 8 for giving their consent to be impleaded in ongoing arbitration proceedings does not qualify the mandatory requirement contained in Section 21. Notice sent under Section 21 marks the commencement of fresh arbitral proceedings. Hence, notice invoking arbitration dated 31.10.2023 and filing of the present petition are mutually destructive of each other.

65. Learned counsel further states that the correct time to invoke the GOC doctrine would have been at the time of impleading the respondents when the earlier petition under Section 11 of the 1996 Act bearing ARB.P. 382/2023 was filed, and not when the pleadings stand completed before the arbitral tribunal. In this regard, reliance is placed upon ***State of Kerala v. National Highway Authority of India & Anr.,*** 2024 SCC Online Del 3127.

Analysis

66. I have heard learned counsel for the parties.

67. Before proceeding with the arguments advanced, it is pertinent to mention that even though the prayers sought in the present petition are for referring the disputes to arbitration between the petitioners and

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respondent Nos. 1 to 9, the petitioners have only pressed their reliefs against respondent Nos. 2 to 9 and not against respondent No. 1. Hence, the petition is dismissed as far as respondent No. 1 is concerned.

68. In a nutshell, the plea of the petitioners against respondent Nos. 2 to 6 is that the consensual theory to bind a non-signatory to arbitration proceedings applies in the present case as the MoS and SPAs are interlinked and form part of a composite transaction, and there is discernible intention as well as application of good faith principle. Against respondent Nos. 7 to 9, it is stated that both consensual and non-consensual theories apply, since these are entities, controlled/incorporated by some of the respondents who derive direct benefit from the MoS containing the arbitration agreement and who are using the entities as instruments of breach; hence, there is requirement to pierce the corporate veil. Lastly, it is stated that there is no express or implied bar on Court's power to consolidate arbitration proceedings.

69. *Per contra*, the plea of the respondent Nos. 2, 4, 5 and 9 is: a) applications under Section 16 of the 1996 Act are already pending before the arbitral tribunal; b) no Section 21 notice was issued at the first instance i.e. on 10.09.2022, nor were they made parties to the earlier Section 11 petition, and the present petition is barred by principles of estoppel and Order II Rule 2 of CPC; c) the notice dated 31.10.2023 is invalid; d) petitioners cannot refer disputes to arbitration in the absence of arbitration agreement or express/implied consent of the respondents to be bound by the arbitration clause in MoS; e) no legal principles to bind non-signatories are applicable in the facts of this case; f) there exists no power of consolidation of arbitral proceedings under Section 11 of the 1996 Act.

70. The plea of respondent Nos. 6 and 7, in a nutshell, is: a) respondent No. 6 was merely employed as a consultant with petitioner No. 2, had no

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role in the management team, was not involved in the performance or obligations of the MoS, execution of SPA done solely in his individual capacity, and Clause 16 of the SPA being the severance clause clearly indicates that the operation of the MoS was different from the SPA; b) respondent No. 7 is a company with no knowledge of the existence of the MoS or the SPAs and no contractual relationship with petitioners, cannot be held liable or bound by those agreements.

71. The plea of respondent No. 3 is that its sole connection with the petitioner arises from the SPA, which lacks an arbitration clause, and the conduct of both parties suggests a shared understanding that there is no arbitration agreement in place. Plea of respondent No. 8 is that there is no privity of contract between the petitioners and respondent No. 8 and no correspondence has ever been exchanged between them. It is also submitted that the Section 21 notice dated 31.10.2023 is defective, and the GOC doctrine should have been invoked at the time of filing the earlier Section 11 petition.

72. The issues for consideration before me are:

I. Whether, on a *prima facie* view, the arbitration clause contained in the Memorandum of Settlement dated 09.05.2022 ("**MoS**") can be extended to respondent Nos. 2 to 9, who are non-signatories to the MoS;

II. Whether this Court has the power to consolidate arbitration proceedings.

73. Before proceeding to give my findings on these issues, the powers of a referral Court need to be emphasized.

Powers of Referral Courts

74. The scope of enquiry by the referral Court under Section 11 of the 1996 Act has been reiterated recently by a 3-judge bench of the Hon'ble

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Supreme Court in ***Ajay Madhusudan Patel v. Jyotrindra S. Patel***, 2024 SCC OnLine SC 2597, wherein the Hon'ble Supreme Court *inter alia* held as under:

> *"64. Therefore, on the pivotal issue whether the non-signatories can be referred to arbitration, this Court took the view that the referral court is required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement. However, recognizing the complexity of such a determination, the arbitral tribunal was considered the proper forum since it can decide whether the non-signatory is a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. In this process, the non-signatory must also be given an opportunity to raise objections regarding the jurisdiction of the arbitral tribunal in accordance with the principles of natural justice.*
>
> *65. The position of law that emerges from the aforesaid discussion can be summarized as follows;*
>
> *....*
>
> - *The insertion of Section 11(6A) through the 2015 Amendment to the Act, 1996 stipulated that the **<u>Courts under Section 11 shall confine their examination to the 'existence' of an arbitration agreement.</u>** It legislatively overruled the decisions in SBP & Co. (supra) and Boghara Polyfab (supra) by virtue of its non-obstante clause.*
> - *Duro Felguera (supra), in clear terms, clarified the effect of the change brought in by Section 11(6A) and stated that **<u>all</u>***

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that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less.

- *Vidya Drolia (supra) endorsed the prima facie test in examining the existence and validity of an arbitration agreement both under Sections 8 and 11 respectively. However, it was clarified that in cases of debatable and disputable facts and reasonably good arguable case, etc. the Court may refer the parties to arbitration since the arbitral tribunal has the authority to decide disputes including the question of jurisdiction.* ***It was further stated that jurisdictional issues concerning whether certain parties are bound by a particular arbitration under the group-company doctrine etc. in a multi-party arbitration raise complicated questions of fact which are best left to the tribunal to decide.***
- *In In Re : Interplay (supra) the position taken in Vidya Drolia (supra) was clarified to state that the scope of examination under Section 11(6) should be confined to the "existence of the arbitration agreement" under Section 7 of the Act, 1996 and the "validity of an arbitration agreement" must be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. Therefore,* ***substantive objections pertaining to existence and validity on the basis of evidence must be left to the arbitral tribunal since it can "rule" on its own jurisdiction.***
- *Krish Spinning (supra) cautioned that the Courts delving into the domain of the arbitral tribunal at the Section 11*

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stage run the risk of leaving the claimant remediless if the Section 11 application is rejected. Further, it was stated that ***a detailed examination by the courts at the Section 11 stage would be counterproductive to the objective of expeditious disposal of Section 11 application*** *and simplification of pleadings at that stage.*

- *Cox and Kings (supra) specifically dealt with the scope of inquiry under Section 11 when it comes to impleading the non-signatories in the arbitration proceedings.* ***While saying that the referral court would be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement, it also said that in view of the complexity in such a determination, the arbitral tribunal would be the proper forum.*** *It was further stated that the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal and can be decided under its jurisdiction under Section 16."*

(emphasis supplied)

75. Hence, at this stage, this Court being a referral court is only required to take a *prima facie* view on whether there exists an arbitration agreement and whether the respondents who are non-signatories to the MoS are veritable parties to the arbitration agreement.

76. In the present case, the arbitration agreement is contained in Clause 79 of the MoS, which is not disputed by any of the parties. Clause 79 of MoS reads as under:

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> *"79. If the Parties are unable to resolve the Dispute in question within twenty-one (21) Business Days of the commencement of negotiations in terms of Clause 78, then the Dispute shall, unless the Parties otherwise agree in writing, be referred to arbitration in accordance with the Arbitration and Conciliation Act, 1996. The dispute shall be submitted for arbitration to a sole arbitrator to be jointly appointed by the Parties."*

77. The petitioners have already initiated arbitration proceedings against the proforma parties (who are signatories to the MoS), which is pending adjudication before the appointed arbitrator, Justice T.S. Thakur, Former Chief Justice of India. Admittedly, respondent Nos. 2 to 9 are non-signatories to the MoS. Respondent Nos. 2 to 6 have signed separate SPAs with the petitioners.

78. In cases where impleadment of non-signatories to arbitration proceedings is necessary, courts have delineated various approaches. It can be achieved *via*: a) consent-based theories, which emphasize identifying the mutual intent of the parties and include concepts like agency, implied consent, and the assignment or transfer of contractual rights; and b) non-consensual theories, which are rooted in equity and encompass doctrines such as alter ego/piercing the corporate veil, estoppel, succession, and apparent authority [refer to ***Cox & Kings*** (supra), para 192]. At this stage and as a referral court, as per ***Ajay Madhusudan Patel*** (supra), the test is whether *prima facie* the respondents are veritable parties to the MoS containing the arbitration clause. This has been dealt with in detail in Issue I.

Issue I

79. It is settled position of law that the definition of parties under the 1996 Act [as envisaged under Section 2(1)(h)] is inclusive of both

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signatories and non-signatories. The Hon'ble Supreme Court in ***Cox & Kings Ltd. v. SAP India (P) Ltd.,*** (2024) 4 SCC 1 observed that if a non-signatory party actively participates in the performance of a contract, and its actions align with those of the other members of the group, it gives the impression that the non-signatory is a "veritable" party to the contract which contains the arbitration agreement. Based on this impression, the other party may reasonably assume that the non-signatory is indeed a veritable party to the contract and bind it to the arbitration agreement. The operative portion of the said judgment reads as under:

> *"**96.** An arbitration agreement encapsulates the commercial understanding of business entities as regards to the mode and manner of settlement of disputes that may arise between them in respect of their legal relationship. In most situations, the language of the contract is only suggestive of the intention of the signatories to such contract and not the non-signatories.* ***<u>However, there may arise situations where a person or entity may not sign an arbitration agreement, yet give the appearance of being a veritable party to such arbitration agreement due to their legal relationship with the signatory parties and involvement in the performance of the underlying contract.</u>*** *Especially in cases involving complex transactions involving multiple parties and contracts, a non-signatory may be substantially involved in the negotiation or performance of the contractual obligations without formally consenting to be bound by the ensuing burdens, including arbitration.*
>
> .....
>
> ***123. <u>The participation of the non-signatory in the performance of the underlying contract is the most important factor to be</u>***

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considered by the Courts and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement. The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. *The UNIDROIT Principle of International Commercial Contract, 2016 [UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3.] provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:*

(a) preliminary negotiations between the parties;

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

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

(d) the nature and purpose of the contract;

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

(f) usages.

.....

127.*....[T]he Courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. The nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the*

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contract. In other words, ***<u>the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement.</u>*** *The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence.*

.....

132. *We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if the factors laid down under Discovery Enterprises [ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42 : (2022) 4 SCC (Civ) 80] are applied holistically.* ***<u>For instance, the involvement of the non-signatory in the performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is an important aspect. Other factors such as the composite nature of transaction and commonality of subject-matter would suggest that the claims against the non-signatory were strongly interlinked with the subject-matter of the tribunal's jurisdiction. Looking at the factors holistically, it could be inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in</u>***

> ***the performance of commercial obligations which are intricately linked to the subject-matter, are not actually strangers to the dispute between the signatory parties***.
>
> .....
>
> ***H.** Conclusions*
>
> ***170.** In view of the discussion above, we arrive at the following conclusions:*
>
> > ***170.1**. The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;*
> >
> > ***170.2.** Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;*
> >
> > ***170.3.** The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;"*
>
> (emphasis supplied)

80. Thus, the assessment required to be undertaken by this Court – to give *prima facie* observations on whether the respondents are veritable parties or not – is primarily an assessment regarding the conduct, role, and involvement of the non-signatory in the underlying contract i.e. the MoS. At the outset, it is to be noted that the term "veritable parties" applies to both persons and entities [refer to ***Cox & Kings*** (supra), para 96]. In order to assess the same, this Court is required to consider factors such as mutual intent, relationship between the signatories and non-signatories, commonality of subject matter, composite nature of transactions and performance of the contract.

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81. The intention of the parties to be bound by an arbitration agreement is to be gathered from the circumstances surrounding the involvement of a non-signatory party in the negotiation, performance, and termination of the underlying contract containing the agreement. If the non-signatory's actions align with those of the signatories, it could reasonably lead the signatories to believe that the non-signatory was a veritable party to the contract containing the arbitration clause. To infer the non-signatory's consent, its participation/involvement in the negotiation or performance of the contract must be positive, direct, and substantial, rather than merely incidental. The burden of proof to establish the same lies on the party seeking to implead the non-signatories to the arbitration proceedings, in this case, the petitioners.

82. I will conduct my assessment in two parts: (i) whether *prima facie* case can be made out against respondent Nos. 2to 6, being the non-signatory individuals to the MoS, and; (ii) whether *prima facie* case can be made out against respondent Nos. 7 to 9, being the companies controlled by respondent Nos. 6, 7 and proforma party No. 1.

(i) Respondent Nos. 2 – 6

83. Under the MoS, respondent Nos. 2 to 5 are referred to as the "management team" and fall in Schedule 1A of the MoS. Collectively, respondent Nos. 2 to 6 are also referred to as the "ex-promoter group" or "sellers". In this regard, relevant portion of the MoS reads as under:

> *"The following shall collectively be referred to as "ex-Promoter group" or "Sellers":*
>
> *a. ex-Promoters defined in Schedule 1;*
>
> *b. the Management Team defined in Schedules 1A and 1B;*
>
> *c. ex-MT Members and Employee Shareholders defined in Schedules 2; and*

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d. Shareholding Family Members and Associate Shareholders defined under Schedule 2B

…….”

84. Respective shareholding of respondent Nos. 2 – 6 as mentioned in the applicable schedules of the MoS is as under:

SCHEDULE 1A

LIST OF MT MEMBERS

Name of the Shareholder/MT Member	*Number of Shares*	*(%) Shareholding*
Ajay Nandy (respondent No. 2)	*50,550*	*1.85%*
Abhishek Batra (respondent No. 5)	*39,888*	*1.46%*
Prasun Nigam (respondent No. 3)	*10,000*	*0.37%*
Achin Jain (respondent No. 4)	*8,890*	*0.33%*
Total		

…..

SCHEDULE 2

List of Consultants/Employee Shareholders

(Note: 3 months consultation, Non-Compete/Non-solicitation & Indemnity)

Name of the Shareholder	*Number of Shares*	*(%) Shareholding*
Ashiesh Shukla (respondent No. 6)	*1,480*	*0.05%*
Vidyaranya Chakravarthy Vuppu	*1,480*	*0.05%*

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85. *Prima facie*, respondent Nos. 2 to 5, in addition to being employees of the petitioner, were also shareholders in petitioner No. 2. There were obligations under the MoS which were required to be performed by respondent Nos. 2 to 5 to give full effect to the MoS. Their dual role ties them to the contractual framework established by the MoS, as they had to fulfil their obligations in order to conclude the MoS. In this regard, some of the important clauses of the MoS are reproduced below:

> *"I. Further to discussions, the Buyer, has agreed to take initial handover of SDS and SSS as a going concern, and purchase the complete shareholding of the Sellers for a Settlement Amount of Rs. 8,00,00,000/- (Rupees Eight Crores Only). Accordingly, the shareholding of the persons named in Schedules 1, 1A, 1B and Schedules 2, 2A and 2B of the present MOS constituting 50% of issued and paid-up capital of SDS shall be transferred to the Buyer.*
>
> *……*
>
> *17. Simultaneous with the execution of the MOS, the Parties shall handover inter - alia the following-*
>
> *a. Duly issued and stamped share certificates evidencing title of the Sellers on the shares held by the Sellers, including persons listed in Schedules 1, 1A, 1B and 2 and 2B.*
>
> *b. Duly executed signed and stamped share transfer forms for transfer of all the shares held by the Sellers including persons listed in Schedules 1, 1A, 1B, 2 and 2B.*
>
> *…..*
>
> *20. Simultaneous to the execution of the present MOS, following shall also be executed by persons enlisted in Schedules 1A, 1B and Schedule 2:*

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•Share Purchase Agreements containing non-disclosure, non-Compete and non-Solicitation and indemnity;

• IP Assignment Deed;

• Consultancy Agreement by persons enlisted in Schedule 1A and 1B

• All handovers and documentations as required under Schedules 4 and 9 necessary for fulfilment of consultancy for a period of 3 months during Transition of Management of the SDS and SSS clause as contemplated in the present MOS;

.....

34. The ex-Promoters and MTs shall be obligated to assist the buyer with the proper handover of their functions and responsibilities as per Schedule 3, 4, 5, 7 and 9 of the present Agreement.

……

36. Upon execution of the MOS, the Ex-Promoters and MT members shall assist the transition of management of SDS to the Buyer and enter into consultancy agreements for a period of 3 (three) months from the date of execution of the present MOS.

37. The Ex-promoter Group shall assign the IP, if any, to SDS and SSS as provided in the present MOS. The ex-Promoter Group shall ensure that all employees/Consultants (past and present) assign the IP developed during the course of their employment, to SDS and SSS.

….

40. For the purpose of information and smooth operations of SDS and SSS, the buyer shall conduct a financial and IP audit as per the terms of reference in Schedule 3 and the initial requisition list

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provided in Schedule 4 of the present MOS. The ex-promoters and Management Team agree to provide necessary support to facilitate such audits conducted by the buyer.

….

43. The persons specified in Schedules 1, 1A, 1B and 2 shall assign all registered and/or unregistered copyrights, patents, trademarks and or designs, hereinafter referred to as "Intellectual Property/ IP" arisen or created in the course of business or relating to SDS or any SSS activities in favour of SDS.

44. The ex-Promoter Group shall ensure that all employees (past and present) assign the IP developed during the course of their employment, to SDS and SSS.

45. Simultaneous with the execution of this MOS, the persons specified in Schedules 1, 1A, 1B and 2, past and present employees and/or consultants shall enter into valid written specific assignment deeds for the assignment of all such Intellectual Property in their name created in the course of business or relating to SDS or SSS activities in favour of SDS (as more particularly described under Schedule 12 (Last of IP Inventory prepared during 3 days joint inspection dated 06.05.2022 to 08.05.2022) and do all such acts as may be reasonably necessary for carrying out of the provisions of this clause and to formally register any assignments at the national Patent Offices or any get the for any assignment at the trademark Office, within 30 days of such assignment.

…..

47. Each of the persons specified in Schedules 1, 1A, 1B and 2 covenant that for a period of 4 (four) years after execution of the

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present MOS, they shall not directly or indirectly, jointly, or in conjunction with, any other Person, in any manner whatsoever, except with the prior written consent of SP, solicit, interfere with or endeavour to direct or entice away from SDS and SSS, any customer, agent, client, employee or any person, firm or company dealing with SDS or its subsidiaries, or Affiliates or associates.

48. That persons named in Schedule 1 shall, during the period they are associated SDS and SSS and for a period of 4 (four) years from the date of execution of the present MOS, not engage or participate or compete or solicit business or engage in commercial activities and/or activities which are capable of being commercialized, either directly or indirectly, jointly, or in connection with, any other person, in any manner whatsoever, similar to the activities of SDS and SSS as provided in terms of Schedule 6 of the MOS.

49. That persons named in Schedules 1A, 1B and 2 shall, during the period they are associated SDS and SSS and for a period of 4 (four) years from the date of execution of the present MOS, not engage or participate or compete or solicit business or engage in commercial activities and/ or activities which are capable of being commercialized, either directly or indirectly, jointly, or in conjunction with, any other person, in any manner whatsoever, similar to the activities, assets, intellectual property of SOS and SSS, including the intellectual property, if any, which is found to exist during the course of the IP audit and which was not previously known to the parties."

86. A bare reading of the MoS suggests that respondent Nos. 2 to 5 held specific roles and responsibilities under the MoS, which now form

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the core of the dispute in the ongoing arbitral proceedings. Individual SPAs were executed between the parties which contained mirror obligations, *prima facie* indicating the interconnected nature of the SPAs with the MoS. The same are not reproduced here for the sake of brevity, however, the table reproduced below is a comparison of the relevant clauses of the MoS and its mirror obligations contained in the SPAs. For reference, the SPA executed between the petitioners and the respondent No. 2 is considered:

Relevant Clauses of the MoS	**Relevant Clauses of the SPA**
Clause 34 (Handover obligations)	Clause 3 (Handover obligations)
Clause 36 (Consultancy obligations of the respondents)	Clauses 8 – 9 (Consultancy obligations of the respondents)
Clause 40 (Obligation of co-operation in Finance and IP audit by Ex-promoters and MT members)	Clause 11 (Obligation of co-operation in Finance and IP audit)
Clauses 43 - 45 (Obligations of IP Assignment and execution of Assignment deeds)	Clause 15 - 17 (Obligation of IP Assignment and execution of Assignment deeds)
Clauses 47 - 49 (Non-solicitation and non-compete obligations of Respondent No.2 to Respondent No.6 for a period of 4 years from execution of MoS)	Clause 18 - 19 (Non-solicitation and non-compete obligations)

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87. As regards respondent Nos. 2 to 5 are concerned, given the framework of the MoS, *prima facie*, it is difficult to dissociate respondent Nos. 2 – 5 from the obligations of the MoS being carried out by them. Commonality of subject matter can be derived from a conjoint reading of the MoS and the SPAs, which also suggests that the respondent Nos. 2 to 5 were obligated to perform the following tasks:

a. Assist in the transition of the management of petitioner No. 2 to the petitioner No. 1 and enter into consultancy agreements for a period of three months, providing guidance and support during the transitional phase.

b. Provide full cooperation and support to the Buyer in conducting financial and IP audits, which were crucial for ensuring smooth operation of the petitioners.

c. Assign all intellectual property, whether registered or unregistered, including copyrights, patents, trademarks, and designs, to petitioner No. 2.

d. For a period of four years following the execution of the MoS, refrain from directly or indirectly, either alone or in conjunction with any other person or entity, soliciting, interfering with, or attempting to entice away from SDS or SSS any customer, agent, client, employee, or any other person or entity associated with SDS, its subsidiaries, affiliates, or associates

88. The objective of the MoS was for the petitioner No. 1 to take complete control over business, management, administration and running operations of petitioner No. 2. With that objective, the petitioners entered into the MoS and parted with valuable consideration. The signatories to the MoS, being the proforma parties, assured that in order to give complete control, respondent Nos. 2 to 5 would also sign their

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shareholding in favor of the petitioner. Further, as per the MoS, certain obligations were conferred upon respondent Nos. 2 to 5 which already have been enumerated above. It is with this objective that under Clause 20 of the MoS, separate SPAs were entered into between the petitioners and respondent Nos. 2 to 5.

89. Since the SPAs were executed between the petitioners and respondent Nos. 2 – 5 in terms of Clause 20 of the MoS, it *prima facie* indicates that the SPAs are a creation of the MoS, and the performance of the MoS would not be complete without the execution and performance of the SPAs. This indicates, in my *prima facie* view, that the transactions were composite in nature.

90. On the face of it, the common goal of these agreements was to ensure the complete transfer of control and ownership of petitioner No. 2 to petitioner No. 1. As a result, the obligations under the MoS and SPAs seem to be so interwoven that the performance under one agreement seems to directly impact the obligations under the other, furthering the overall objective of transition of petitioner No. 2 to petitioner No. 1. The relationship between respondent Nos. 2 to 5, the petitioners and the proforma parties seems to be direct and interlinked, and the obligations under the MoS and the SPAs are interconnected.

91. I am of the view that the petitioners have made out a *prima facie* case of respondent Nos. 2 to 5 being veritable parties to the arbitration agreement contained in the MoS. Although they are not signatories to the arbitration agreement, their positive, direct and substantial involvement in fulfilling the terms of the MoS establishes their role as necessary parties to the dispute. The legal relationship they share with the proforma parties, coupled with their required participation in the performance of the underlying contract i.e. the MoS, suggests that they are directly connected

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with the execution and completion of the MoS. Their actions and obligations under the MoS make them effectively bound by its terms, including any obligations related to dispute resolution, despite not formally consenting to the arbitration agreement, and it seems that their presence is required for complete and effective adjudication of the disputes.

92. Other arguments raised by the respondents before me are pertaining to the maintainability of the present petition. Relying upon Order II Rule 2 of CPC, the respondents have contended that no notice invoking arbitration was sent to them earlier, nor were they made parties to the earlier Section 11 proceedings, despite the petitioners having knowledge of the disputes subsisting between them, and hence, they are now estopped from invoking arbitration at this stage. I am of the view that this argument is untenable at this stage. In light of the judgment of ***Gammon India Ltd. v. National Highways Authority,*** 2020 SCC OnLine Del 659 (referring to ***Indian Oil Corpn. Ltd. v. SPS Engg. Ltd.,*** (2011) 3 SCC 507), the arbitral tribunal is the relevant/correct authority for deciding whether the claims are barred by Order II Rule 2 CPC, and not the referral Court. Operative portion of ***Gammon India Ltd.*** (supra) reads as under:

> *"35. It is the settled position in law that the principles of res judicata apply to arbitral proceedings. The observations of the Supreme Court in Dolphin (supra) also clearly show that principles akin to Order II Rule 2 CPC also apply to arbitral proceedings. The issue as to whether any claims are barred under Order II Rule 2 CPC or whether any claim is barred by res judicata is to be adjudicated by the arbitral tribunal and not by the Court…."*

93. Hence, this ground, including other grounds raised by the respondents on merits, are available to them to raise at the appropriate

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stage i.e. before the arbitral tribunal. At present, these grounds will not come in the way of a referral Court to refer the parties to arbitration.

94. Further, I am of the view that the respondents' reliance on ***Sagar Ratna Restaurants Pvt. Ltd.*** (supra) is misconstrued. In that matter, the respondents therein, as per their convenience, took inconsistent stands at different stages. When the petitioner therein invoked arbitration, the respondents contested the same stating that the disputes were not arbitrable and obtained a favorable order. The petitioner accepted the same and filed proceedings in Court, wherein the respondents filed an application under Section 8 of the 1996 Act to refer the matter to arbitration again. In the present matter, that is not the case.

95. The respondents have also contended that the notice issued on 31.10.2023 only sought to retrospectively (and wrongly) implead them to the ongoing proceedings, whereas the prayer in the current petition seeks initiation of fresh proceedings, and hence the two, i.e. the Section 21 notice dated 31.10.2023 and the present petition, do not align. I am of the view that this argument is also untenable. Section 21 notice is a mandatory pre-requisite for initiating Section 11 proceedings. Its purpose is to convey one party's intent to the other party to refer the disputes to arbitration and as per ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.***, 2017 SCC OnLine Del 7228, to facilitate a consensus on the appointment of arbitrator. In this view of the matter, the provision cannot, however, be construed to confer such strict and technical restrictions on the contents of the notice as is purported by the respondents. Such an interpretation, in my view, would be against the ethos of the 1996 Act. Suffice to state at this stage that the notice dated 31.10.2023 clearly shows the petitioners intent to refer the disputes with the respondents to arbitration.

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96. The reliance placed upon ***Umesh Cimechel Consortium*** (supra) by the respondents is misplaced. In that matter, the disputes sought to be raised by the petitioner were only with respondent No. 1 therein, and there was nothing to show any independent disputes with/claims against respondent No. 2 (the non-signatory sought to be impleaded). In the present case, that is not so.

97. For the reasons noted above, the petitioners have made out *a prima facie* case for impleadment of respondent Nos. 2 to 5 as veritable parties for adjudication of disputes between the parties under the MoS and hence they are referred to arbitration. It is reiterated that the views given hereinabove are only *prima facie* views. The issues, being complex in nature, need more detailed examination which can only be done by the arbitral tribunal who is most suited to delve into the factual, legal and circumstantial aspects of the matter.

98. Since Justice T.S. Thakur, Former Chief Justice of India is already appointed as the arbitrator for adjudication of disputes between the petitioners and the proforma parties under the MoS, he is appointed as the arbitrator in the present case.

99. In this regard, following directions are issued:

i. Justice T.S. Thakur, Former Chief Justice of India (Mob. No. 8800309969) is appointed as a sole arbitrator for adjudicating the alleged disputes between the petitioners and respondent Nos. 2 to 5.

ii. The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC').

iii. The remuneration of the learned arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018.

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iv. The learned arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

v. It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objections, as well as claims/counter-claims and merits of the dispute of either of the parties including, are left open for adjudication by the learned arbitrator.

vi. All the legal objections of respondent Nos. 2 to 5 pertaining to whether they are bound by the terms of the MoS and/or whether they are proper and necessary parties are also left open. As and when fresh applications are filed under Section 16 of the 1996 Act by respondent Nos. 2 to 5 before the learned arbitrator, he may adjudicate the same without being bound/influenced by the observations made herein as the same are only a prima facie view to be formed by a referral court.

vii. The parties shall approach the learned arbitrator within two weeks from today.

100. At this juncture, it is relevant to deal with the argument of the respondents regarding the pending Section 16 applications in the ongoing arbitral proceedings and this petition causing duplicity of proceedings. The fact is that in the earlier Section 11 petition, the respondents were not made parties, however claims were lodged by the petitioners against the respondents in the ongoing proceedings, giving rise to the Section 16 applications which are now pending.

101. Two coordinate benches of this Court have taken contrary views on whether the arbitral tribunal is vested with the power to implead parties in arbitration proceedings. While ***Arupri Logistics (P) Ltd. v. Vilas Gupta***, 2023 SCC OnLine Del 4297 holds that the arbitral tribunal lacks the

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jurisdiction to implead, ***Indraprastha Power Generation Co. Ltd. v. Hero Solar Energy (P) Ltd.***, 2024 SCC OnLine Del 6080 holds that following ***Cox and Kings*** (supra), such jurisdiction may be conferred upon the arbitral tribunal. Since I have referred respondent Nos. 2 to 5 to arbitration, the only issue that remains to be adjudicated is whether respondent Nos. 2 to 5 are, in fact, proper and necessary parties. The same shall be decided by the arbitrator in accordance with law. The finding of the referral court which takes a bird's eye view and does not go into minute details is only for the purpose of referring the parties to arbitration. The respondents will be at liberty to agitate this issue before the arbitrator, who shall take an independent view based on the pleadings and arguments of the parties.

102. Further, in light of the fresh appointment, the reliance placed upon by respondent No. 3 on ***State of Kerala v. NHAI*** (supra) becomes irrelevant.

103. As regards respondent No. 6 is concerned, a distinguishing feature of the SPA executed between respondent No. 6 and the petitioners is Clause 16 contained therein, which reads as under:

> *"16. The transfer/ sale of such shares shall be conclusive, independent, mutually exclusive and in no way connected with any of the remaining clauses of the present SPA and the MOS dated 09.05.2022."*

104. The aforesaid clause expressly showcases the intention of respondent No. 6 not to be bound by any of the clauses in the MoS. The provision categorically separates the sale of shares from the other obligations and disputes arising under the MoS. Therefore, invoking arbitration against respondent No. 6 on the basis of the MoS would be legally unsustainable, as Clause 16 unambiguously disconnects any/all

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issues between the SPA and the MoS. Hence, given the fact that a) there is no arbitration agreement between respondent No. 6 and the petitioners in the SPA; and b) by way of the severance clause, the parties have ousted the possibility of arbitration, and applying the principle of party autonomy, being a cardinal rule of arbitration, I am of the view that no case can be made out against respondent No. 6 to be referred to arbitration. If this Court was to refer respondent No. 6 to arbitration, Clause 16 would become redundant and meaningless, and would lose its purpose.

(ii) *Respondent Nos. 7 – 9*

105. In my view, respondent Nos. 7 to 9 cannot be referred to arbitration as there are no SPAs executed between them and the petitioners. Respondent Nos. 7 to 9 are not mentioned in the MoS either. The allegations made by the petitioners against respondent Nos. 7 to 9 stating that they are being used as entities for siphoning and diversion of funds are mere averments. In the absence of any binding contractual relationship, such as an SPA or their inclusion in the MoS, there is no basis to subject respondent Nos. 7 to 9 to arbitration proceedings. Respondent Nos. 7 to 9 have no discernible link with the MoS, which was primarily focused on facilitating the transition and transfer of control of petitioner No. 2 to petitioner No. 1. Their exclusion from the framework of the MoS is evident from the absence of any binding obligations or duties assigned to them within the agreement.

106. Hence, in view of the absence of any contractual relationship or obligations between respondent Nos. 7 to 9 and the petitioners, and in the absence of any role played by them in the performance of the underlying contract, there is no *prima facie* case made out holding respondent Nos. 7

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to 9 as veritable parties to the disputes. Thus, respondent Nos. 7 to 9 are not referred to arbitration.

Issue II

107. As regards the issue of consolidation of the present reference with the ongoing arbitration proceedings between the petitioners and the proforma parties is concerned, I am of the view the said issue is premature and need not be delved into at this stage. Any direction to consolidate the disputes between the petitioners and respondent Nos. 2 to 5 at this stage would be prejudicing the issue of whether the respondents are in-fact proper and necessary parties, which is yet to be decided by the arbitral tribunal.

108. Hence, no directions on consolidation are issued.

Conclusion

109. With these directions, the present petition along with pending applications, if any, is disposed of.

JASMEET SINGH, J

OCTOBER 21, 2024/
pp/s

Click here to check corrigendum, if any