$~J-3 to 5

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

Judgment reserved on: 09.02.2023

% Judgment pronounced on: 17.04.2023

\+ **ARB.P. 1296/2022**

GAURAV DHANUKA AND ANR ..... Petitioners

Through: Mr. Rajesh Yadav, Sr. Adv. along with Mr. Gaurav Kakar and Mr. Amit Jain, Advs.

versus

SURYA MAINTENANCE AGENCY PVT LTD AND ORS.

..... Respondents

Through: Mr. Ravinder Sethi, Sr. Adv. along with Mr. Badal Dayal and Mr. Puneet Sharma, Advs. for R-1.
Mr. Shafiq Khan, Adv. for R-3.

\+ **ARB.P. 1297/2022**

GAURAV DHANUKA AND ANR ..... Petitioners

Through: Mr. Rajesh Yadav, Sr. Adv. along with Mr. Gaurav Kakar and Mr. Amit Jain, Advs.

versus

SURYA MAINTENANCE AGENCY PVT LTD AND ORS

..... Respondents

Through: Mr. Ravinder Sethi, Sr. Adv. along with Mr. Badal Dayal and Mr. Puneet Sharma, Advs. for R-1.
Mr. Shafiq Khan, Adv. for R-3.

\+ **ARB.P. 1324/2022**

GAURAV DHANUKA AND ANR ..... Petitioners

Through: Mr. Rajesh Yadav, Sr. Adv. along

with Mr. Gaurav Kakar and Mr. Amit Jain, Advs.

versus

SURYA MAINTENANCE AGENCY PVT LTD AND ORS

..... Respondents

Through: Mr. Ravinder Sethi, Sr. Adv. along with Mr. Badal Dayal and Mr. Puneet Sharma, Advs. for R-1.
Mr. Shafiq Khan, Adv. for R-3.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

ARB.P. 1296/2022
ARB.P. 1297/2022
ARB.P. 1324/2022

1. The present petitions have been filed under Section 11 of the Arbitration and Conciliation Act, 1996 *(the "A&C Act")* seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The petitioner no.1 herein is the owner of following three commercial units:

S. No.	Unit No.	Petition No.
1.	Unit No.1002, Plot No.B-2, 3, 4, NDM-1, Netaji Subhash Place, Pitampura Delhi-110034	ARB.P. 1296/2022
2.	Unit No. 1003, Plot No. B-2,3,4, NDM-1 Netaji Subhash Place, Pitampura, Delhi-11 0034	ARB.P. 1297/2022

3.	Unit No. 506, Plot No. D-1,2,3, NDM-2 Netaji Subhash Place, Pitampura, Delhi-11 0034.	ARB.P. 1324/2022

3. The petitioner no.2 is a sole proprietorship firm of the petitioner no.1 which is stated to be in occupation of the aforesaid units as a lessee.

4. The respondent no.3 is the builder/developer *(hereinafter referred to as the "developer")* of the buildings known as NDM-1 situated at Plot No. B-2, 3, 4, Netaji Subhash Place, Delhi-110034 and NDM-2 situated at Plot No. B-1,2,3, Netaji Subhash Place, Delhi-110034. The respondent no. 1 has been appointed by the developer as the maintenance agency for the said buildings responsible, *inter-alia,* for (i) Operation & Maintenance of air-conditioning system and plants, Fire – Fighting systems, lifts, other electrical & mechanical equipment systems as installed by the promoter/developer of the said building, (ii) maintenance of commons areas including basement, common areas, terraces, refuge areas etc., (iii) operation and maintenance of electric sub-station, pumps, transformer, D.G. Sets, Water Tanks, (iv) maintenance of compound wall, facade, landscaping, electrification, water supply, sewerage, roads, paths and other services within the said building, (v) security services for the building, (vi) insurance of the common plants & equipments in the building, (vii) responsibility of annual maintenance contract for electric sub-station, pumps, fire detection and fire-fighting equipments, transformers, DG Sets, HVAC, escalators, elevators, service lifts etc. (viii) insurance of electric sub-station, pumps, fire detection and fire-fighting equipments, transforms, DG sets, HVAC, escalators, elevators, service lifts, air conditioning plant room/chiller etc., and (ix) disposal of waste and garbage from garbage room.

5. The respondent no.2 is a company, which has been appointed by the respondent no.1 to function as property manager of the aforesaid buildings to maintain common areas of the buildings and operate the various facilities and to provide its services to the occupants in terms of Article 4 of the Maintenance Agreements. The respondent nos. 1 and 2 are collectively referred to hereinafter as the "maintenance agency".

Disputes between the parties

6. The grievance of the petitioners, in respect of which the disputes have arisen between the parties are stated to be as under:

(i) Determination of super area attributable to the petitioner no. 1's aforesaid units for the purposes of calculation of maintenance charges on the date of its appointment of maintenance agency as well as on the date of the present petition.

(ii) Determination of rate at which the maintenance charges are leviable by the respondents in proportion to the super area available.

(iii) Gross illegality on part of the respondents in providing and attributing electricity connection load to the petitioners' units and consequently charging excess money from the petitioners qua fixed charges, unit charges etc; and

(iv) Reduction of proportionate land rights in wake of common areas being encroached, constructed and sold off by respondents in connivance, and in violation of sanctioned building plan, leading to cascading effects such as (i) fire safety hazard for the all the occupants in entire building of NDM-1 and NDM-2, including the petitioners herein; (ii) reduction of super area attributable to the

aforesaid units for the purpose of maintenance charges etc.

Agreements between the parties

7. Sale deeds have been executed for aforesaid units i.e. (a) sale deed dated 14.10.2015 for Unit No.1002 and Unit No.1003 (NDM-1) and (b) sale deed dated 13.12.2010 for Unit No.506 (NDM-2), in favour of the petitioner no.1 by the predecessor in interest of the said units who in turn had purchased the said units from the developer/builder i.e. the respondent no.3 herein.

8. An agreement for services dated 30.06.2008 has been entered into between the developer (respondent no.3) and the respondent no.1, pursuant to which the respondent no.1 was appointed as maintenance agency. A copy of the said agreement has been submitted by learned senior counsel for respondent no.1 during the course of the hearing, and has also been appended along with the written submissions filed on behalf of respondent no.1.

9. The maintenance agreements have been executed for aforesaid units i.e. (a) maintenance agreement dated 01.11.2015 for Unit No.1002 and Unit No.1003 (NDM-1), between the respondent no.1, respondent no.2 and the petitioner no.1, and (b) maintenance agreement dated 03.12.2010 for Unit No.506 (NDM-2) between the respondent no.1, respondent no.2 and predecessor in interest of the said unit, subsequently endorsed by the petitioner no.1. The arbitration agreement which is sought to be invoked by the petitioners is contained in Article 20 of the said maintenance agreements which provides as under:

*"**ARTICLE 20***
ARBITRATION

20.1 All disputes, differences, or disagreement arising out of, in connection with or in relation to this agreement shall be mutually discussed and settled between the parties.

20.2 All disputes, difference or disagreement arising out of, in connection with or in relation to this agreement, which cannot be amicably settled, shall be finally decided by Arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Any arbitration pursuant hereunder shall be a domestic arbitration under the applicable law.

20.3 The venue of arbitration shall be Delhi and the language of the arbitration shall be English.

20.4 That all disputes difference between the parties or in respect of any matter with regard to rights, dues and liabilities of any of the parties, shall be settled by a reference to arbitration to a Sole Arbitrator to be appointed by the company as per provision of Arbitration and Conciliation Act, 1996, together with any statutory proceeding shall be held and conducted at Delhi."

Contentions of the parties

10. It is submitted that by the petitioners that the respondent no. 1 unilaterally appointed an arbitrator vide communication dated 24.05.2022. This was in the aftermath of an order dated 29.04.2022 being passed on petitions filed by the petitioner no.1 under Section 9 of the A&C Act. It is the contention of the petitioners that such unilateral appointment of the arbitrator by the respondent no.1 is null and void being in contravention of the judgment of Supreme Court in ***Perkins Eastman Architects DPC vs. HSCC (India) Ltd.,*** AIR 2020 SC 59.

11. It has been contended on behalf of the petitioners that an independent arbitrator is required to be appointed to adjudicate the disputes between the parties in view of the arbitration agreement incorporated in the maintenance

agreements. It is further contended that apart from the respondent nos.1 and 2 (who are parties to the maintenance agreements), the respondent no.3 would also be a necessary party in the proposed arbitration inasmuch as the respondent no.1 has been appointed by the respondent no.3 by virtue of the aforementioned agreement dated 30.06.2008.

12. It is contended that the maintenance agency derives its authority to act as such from the developer. The developer is stated to exercise direct and complete control over the activities of the maintenance agency in terms of their *inter se* agreement. It is further contended that the calculation of the super area in respect of which maintenance charges are payable necessarily requires the developer to be a party in proposed arbitration inasmuch, the developer has constructed the buildings in question and has earmarked/developed the common areas therein.

13. In support of its contentions regarding impleadment of respondent no.3 in the arbitration proceedings, learned senior counsel for the petitioners has relied upon the judgments of Supreme Court in the case of ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc***., (2013) 1 SCC 641and ***ONGC Ltd. v. Discovery Enterprises (P) Ltd.,*** (2022) 8 SCC 42.

14. On the other hand, learned senior counsel for the respondent no.1 has contended that the disputes sought to be raised by the petitioners cannot be adjudicated in the absence of the respondent no.3. He has further contended that there is no arbitration agreement between the petitioners and the respondent no.3 (developer). It is also contended that the maintenance agency is an independent contractor and is neither a group company nor a sister company nor a subsidiary of the respondent no.3 (developer). It is

contended that since the respondent no.3 (developer) has no control over the affairs of business of the maintenance agency, the group company doctrine as well as the Supreme Court judgment relied upon by the petitioners in the case of ***ONGC Ltd. v. Discovery Enterprises (P) Ltd*** (supra) has no applicability in the present case. It is, therefore, contended that in this background, the disputes sought to be raised by the petitioners cannot be referred to arbitration. He relied upon the judgment of the Supreme Court in the case of ***Vidya Drolia v. Durga Trading Corpn***., (2021) 2 SCC 1. Specific attention was drawn by learned senior counsel to the following portions of the said judgment :

> ***"76.*** *In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:*
>
> ***76.1.*** *(1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
>
> ***76.2.*** *(2)* ***When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.***
>
> ***76.3.*** *(3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.*
>
> ***76.4.*** *(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*
>
> ***76.5.*** *These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable."*

15. Learned senior counsel for the respondent no.1 also relies upon the judgment of Supreme Court in the case of ***NTPC Ltd vs. M/S SPML Infra Ltd.***, Civil Appeal No.4778/2022 to contend that it is incumbent on this court to examine as to whether the respondent no.3 (developer) can be impleaded in the proposed arbitration and that while exercising jurisdiction under Section 11 of the A&C Act, the referral court must not relegate this aspect of the matter to the arbitrator. Specific reliance has been placed on the following paragraphs of the said judgement:

> "***25. Eye of the Needle:*** *The above-referred precedents crystallize the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.*
>
> *xxx* *xxx* *xxx*
>
> ***28.*** *The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia (supra), if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd."*

16. Learned senior counsel for the respondent no.1 has also relied upon the judgment of this court in the case of ***Umesh Cimechel Consortium v. IIC Ltd.,*** MANU/DE/4767/2022. Specific reliance is placed on the following paragraphs of the said judgment :

> *"**16**. As held by a Co-ordinate Bench of this court in STCI Finance Ltd. (supra), a situation where (i) a non-signatory party to an arbitration*

agreement invokes arbitration against a signatory party is different from a situation where a (ii) signatory party invokes arbitration against a non-signatory party. In situation (i) where arbitration is invoked by a non-signatory party against a signatory party (even though signatory with a third party), on the basis that the non-signatory party is claiming through or under such third party, the consent of the signatory party to refer the disputes to arbitration is a given. In situation (ii) however, when a signatory party invokes arbitration against a non-signatory party, since the non-signatory party has never consented to the remedy of arbitration itself, there is a heavy burden on the signatory party to establish that the non-signatory party had agreed to arbitration. In this regard, the Supreme Court has held in Reckitt Benckiser (supra) that the burden to establish that a non-signatory party had consented to arbitration is on the applicant, in the following words:

> *"**12**. In the backdrop of the averments in the application and the correspondence exchanged between the parties adverted to by the applicant, it is obvious that the thrust of the claim of the applicant is that Mr. Frederik Reynders was acting for and on behalf of Respondent 2, as a result of which Respondent 2 has assented to the arbitration agreement. This basis has been completely demolished by Respondent 2 by stating, on affidavit, that Mr. Frederik Reynders was in no way associated with Respondent 2 and was only an employee of Respondent 1, who acted in that capacity during the negotiations preceding the execution of agreement. Thus, Respondent 2 was neither the signatory to the arbitration agreement nor did have any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever. If the main plank of the applicant, that Mr. Frederik Reynders was acting for and on behalf of Respondent 2 and had the authority of Respondent 2, collapses, then it must necessarily follow that Respondent 2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if Respondent 2 happens to be a constituent of the group of companies of which Respondent 1 is also a constituent, that will be of no avail. **For, the burden is on the applicant to establish that Respondent 2 had an intention to consent to the arbitration agreement and be party thereto,** maybe for the limited purpose of enforcing the indemnity Clause 9 in the agreement, which refers to Respondent 1 and the supplier group against any claim of loss, damages and expenses, howsoever incurred or suffered by the applicant and arising out of or in connection with matters specified therein. That burden has not been discharged by the applicant at all. On this finding, it must necessarily follow that Respondent 2 cannot be subjected to the*

> *proposed arbitration proceedings. Considering the averments in the application under consideration, it is not necessary for us to enquire into the fact as to which other constituent of the group of companies, of which the respondents form a part, had participated in the negotiation process."*

***17**. Upon a considered interpretation of the transaction in the documents cited by the petitioner in the present case, this court is of the opinion that the petitioner has failed to discharge the burden to establish consent on the part of respondent No. 2 to have any disputes arising from the transaction to arbitration. The petitioner's emphasis on certain documents and correspondence exchanged with respondent No. 2, are all post the execution of the contractual documents between the petitioner and respondent No. 1; and most importantly, even such post-hock correspondence does not establish the existence of an arbitration agreement between the petitioner and respondent No. 2. From another perspective, the petitioner's reliance upon the later documents and correspondence is also destructive of the petitioner's own averment that respondent No. 2 was involved in the negotiations between the petitioner and respondent No. 1.*

xxx xxx xxx

***23**. In the opinion of this court, notwithstanding the above allegations, notice dated 27.08.2021 issued by the petitioner to respondent No. 2 does not raise any independent disputes with respondent No. 2; and does not call upon respondent No. 2 to refer any disputes to arbitration. The disputes sought to be raised by the petitioners and the claims made by it relate only to respondent No. 1; and there is nothing to show that respondent No. 2 was liable to pay the petitioner's dues if respondent No. 1 defaulted in doing so. The subject bank guarantees, in relation to which relief is sought by the petitioner, were admittedly issued by the petitioner only in favour of respondent No. 1; and the petitioner cannot therefore seek release of the subject bank guarantees from respondent No. 2.*

xxx xxx xxx

***25**. In the present case therefore, there is no valid invocation notice issued by the petitioner to respondent No. 2 under section 21, which could be the foundation of the present petition under section 11.*

xxx xxx xxx

***28**. Although the petitioner also lays some emphasis on the earlier proceedings in O.M.P.(I) (COMM.) 172/2020, which petition was filed by the petitioner seeking relief in relation to the performance bank guarantees, the orders made in the said matter relate only to respondent*

No. 1; and though the petitioner had impleaded respondent No. 2 also as a party-respondent, no order was made against respondent No. 2 since the performance bank guarantees in question were held only by respondent No. 1.

***29**. As a sequitur to the above, the present petition cannot be allowed against respondent No. 2, much less only for the reason that respondent No. 1 is presently under moratorium."*

(emphasis supplied in original)

17. Learned counsel for the respondent no.3 also opposes the present petitions and contends that the disputes sought to be raised by the petitioners are not arbitrable for the reasons that they involve and affect third party interest and rights, who are the respective owners of different commercial units inside the buildings in question. Besides, it is contended that the respondent no. 3 is not a party to the relevant maintenance agreements containing the arbitration clause which has been sought to be invoked by the petitioners, and as such, the respondent no. 3 cannot be made a party to the proposed arbitration.

18. It is further contended that the respondent no.3 has appointed respondent no.1 on a principal to principal basis as the maintenance agency of the concerned buildings and as such, the respondent no.3 has nothing to do with maintenance of common areas of the said buildings.

19. It is further contended that the respondent no.3 is neither a sister concern nor the parent company of respondent nos.1 and 2. Hence, the present petitions qua respondent no. 3 are stated to be misconceived.

Analysis and Findings

20. A perusal of the agreement dated 30.06.2008 between the respondent no.3 (developer) and the maintenance agency leaves no manner of doubt that the maintenance agency performs its functions only in terms of the

authorisation granted by respondent no.3 to respondent no.1 under the said agreement. Some salient provisions of the said agreement are as under:

> *"**WHEREAS:***
>
> *(c) The Promoter has awarded all the rights to the maintenance agency for running and maintain the said development either itself or through any maintenance agency.*
>
> ***ARTICLE 3***
> *PROVISION AND SCOPE FOR SERVICES AND MANAGEMENT THEREOF*
>
> ***3.4*** *The audit with respect to all the heads for the proper performance of the duties of the Maintenance agency may be done by promoter at any time after giving notice of atleast 3 days in advance. The Maintenance agency shall make available to the Promoter the services of its Property and Facilities Management Services Division (which is a party and parcel of Maintenance agency) as may be required during the performance of its duties and obligations hereunder. All costs and expenses in relation thereto shall be borne by the Maintenance Agency.*
>
> ***3.5*** *The Maintenance Agency shall provide Services from the operation date, which shall also be treated as the maintenance charges commencement date i.e. w.e.f. July 1, 2008. The Maintenance Agency may fix the Common Area Maintenance (CAM) charges as its own depending upon the actual cost of maintenance of the North Delhi Mall. The Maintenance Agency may revise the CAM charges time to time depending upon the actual cost of maintenance. However, the Maintenance Agency can take a profit for an amount not exceeding 20% in any financial year.*
>
> ***ARTICLE 4***
> *SERVICES*
>
> ***4.3*** *To maintain the Common Areas: To maintain and keep in good condition the Common Areas, Service Equipments, common Services and facilities, parking areas in basements and surface;*
>
> ***4.8*** *To deal with and enquiries: To deal fairly, impartially and courteously with all complaints and enquiries, complaints made by individual occupiers, Promoter and its customers.*
>
> ***ARTICLE 7***
> *REMUNERATION OF THE MAINTENANCE AGENCY AND OTHER DETAILS*

Leasing out of designated facade signage
The Promoter will identify and earmark signages on the facade of the complex/ building, which will be allotted to the Maintenance agency. The Maintenance agency shall rent them to any third party for monthly consideration. Such consideration shall be acceptable to the Promoter. The Maintenance agency shall pay 70% (Seventy Percent) of the monthly receipts towards signage to the Promoter and keep the remainder i.e. 30% (Thirty percent) of the receipts as part of the its remuneration for providing the services.

Receipt from Parking areas

The Promoter will identify an earmark parking areas in the Complex/building which the Maintenance agency can operate either through itself or through a nominated specialized agency/contractor on pay and park basis. The Maintenance agency shall pay 70% (Seventy Percent) of the monthly receipts towards parking to the Promoter and keep the remainder i.e. 30 % (Third percent) of the receipts as part of its remuneration for providing the services.

ARTICLE 8
TERMINATION

8.1 *Without prejudice to any right of Promoter and occupiers, the Promoter may with immediate effect, terminate this Agreement in the event the Maintenance Agency:*
(i) Is in breach of any of the terms and conditions of this Agreement, which, in the case of a breach capable of remedy, has not been remedied by the Maintenance agency within 4 (four) days from receipt of a notice given by the occupier and / or the Promoter specifying the breach and calling for its cure/rectification/remedy.
(ii) Is incompetent, guilty of misconduct and/ or negligence in the providing the Services as enunciated in this Agreement.
(iii) Has, after due warning by the Promoter, failed or refused to provide the Services opticomplex/ building and prudently as required of it."

[emphasis supplied]

21. It is evident from the aforesaid stipulations that:

(i) The respondent no.3 (developer) has "awarded all rights to the maintenance agency for maintaining the buildings in question, either

itself or through any other agency".

(ii) The respondent no.3 has the power to conduct an audit to ensure proper performance of duties by the maintenance agency; upon this option being exercised, the maintenance agency would make available to the respondent no.3 (developer) the services of its Property and Facilities Management Services Division as may be required (Clause 3.4 of the agreement).

(iii) Maintenance agency has been authorized to fix and collect the common area maintenance charges subject however, to the limitation that the profits of the maintenance agency shall not exceed 20% in any financial year.

(iv) Importantly, the respondent no.3 has entrusted respondent no.1 with a duty to deal fairly, impartially and courteously with all complaints and inquiries, complaints made by individual occupiers, builder/promoter and its customers (Clause 4.8 of the agreement)

(v) There is a revenue sharing which is envisaged between the developer and the maintenance agency in respect of proceeds arising as a result of leases of earmarked signages on the facade of the complex/building and in respect of receipts from parking areas.

(vi) The developer has power to terminate the services of the maintenance agency including *inter alia* in the event of negligence in providing the service as enunciated in the agreement.

22. Given the framework of the aforesaid agreement, it is completely untenable for the respondent no.3 (developer) to disassociate itself from the maintenance activities being carried out by the maintenance agency. It is also evident that the aforesaid agreement dated 30.06.2008 between the

respondent no.3 (developer) and the maintenance agency is inextricably connected with the maintenance agreements between the maintenance agency and the petitioner no.1. In fact, the maintenance agreements between the petitioner no.1 and the maintenance agency(the arbitration clause of which has been invoked by the petitioners), expressly records as under:

> *"AND WHEREAS the Company was engaged by M/s V3S Infratech Ltd. (herein after referred to as the Promoter or Developer) to provide maintenance and security related services by itself or through some other maintenance agency in the said Building located at the said plot either through itself or by engaging some reputed agency."*

23. In ***Chloro Controls*** (supra) it has been held by the Supreme Court that a non signatory or a third party can be impleaded in arbitration in certain situations, especially when there is a direct relationship between the signatory parties and the non-signatory party and when there is "direct commonality of the subject matter and the agreement between the parties being a composite transaction". In this regard it was also observed that the court would also examine whether a composite reference of such parties would serve the ends of justice. Specific reference may be made to the following observation of the Supreme Court:

> ***"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."*

24. In the present case, the respondent no.3 (developer), although not a party to the maintenance agreements dated 01.11.2015 and 03.12.2010 controls the functions and activities of respondent no.1 (maintenance agency) by virtue of its agreement dated 30.06.2008 with the respondent no. 1. There is direct commonality of the subject matter of the said agreements dated 01.11.2015, 03.12.2010 and 30.6.2008. The maintenance services being provided by the respondent nos.1 and 2 to the petitioners are in terms of the aforesaid agreements dated 01.11.2015 and 03.12.2010, read with the agreement for services dated 30.6.2008.

25. It has further been expressly recognised in ***Chloro Controls*** (supra) as under:

> ***"103.*** *Various legal basis 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.*
>
> *…*
>
> ***105.*** *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.*
>
> *…*

> ***107.*** *If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."*
>
> [emphasis supplied]

26. In the present case, the impleadment of the respondent no.3 in the arbitration proceedings is mandated not on account of "group of companies doctrine" but on account of the fact that the authority of respondent no.1 to act as maintenance agency is directly derived from the respondent no.3 (developer) in terms of their *inter se* agreement dated 30.06.2008; and the said agreement is inextricably linked to the maintenance agreements to which the petitioner no.1 is the party. The agreements in question have to be read with each other to derive the respective rights and obligations of the parties.

27. In ***ONGC v. Discovery Enterprises*** (supra) the Supreme Court has taken note of the principle that a non-signatory party can be bound by the principle of estoppel to prohibit such a party from deriving the benefits of a contract while disavowing the obligations to arbitrate under the same. In this regard, it was observed as under:

> ***"39.*** *Recently, John Fellas elaborated on the principle of binding a non-signatory to an arbitration agreement from the lens of the doctrine of estoppel. He situated the rationale behind the application of the principle of direct estoppel against competing considerations of party autonomy and consent in interpreting arbitration agreements. Fellas observed that non-*

signatory parties can be bound by the principle of direct estoppel to prohibit such a party from deriving the benefits of a contract while disavowing the obligations to arbitrate under the same:

> *"There are at least two distinct types of estoppel doctrine that apply in the non-signatory context:"the direct benefits" estoppel theory and the "intertwined" estoppel theory. The direct benefits theory bears the hallmark of any estoppel doctrine-prohibiting a party from taking inconsistent positions or seeking to "have it both ways" by "rely[ing] on the contract when it works to its advantage and ignor[ing] it when it works to its disadvantage." Tepper Realty Co. v. Mosaic Tile Co. [Tepper Realty Co. v. Mosaic Tile Co., 259 F Supp 688 (SDNY 1966)]. The direct benefits doctrine reflects that core principle by preventing a party from claiming rights under a contract but, at the same time, disavowing the obligation to arbitrate in the same contract.*
>
> * * *
>
> *By contrast, the intertwined estoppel theory looks not to whether any benefit was received by the non-signatory, but rather at the nature of the dispute between the signatory and the non-signatory, and, in particular whether "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estoppel [signatory party] has signed….the intertwined estoppel theory has as its central aim the perseveration of the efficacy of the arbitration process is clear when one looks at the typical fact pattern of an intertwined estoppel case." [John Fellas, "Compelling Signatories to Arbitrate with Non-Signatories", New York Law Journal (28-3-2022)]"*

28. In the present case, (i) the respondent no.3 (developer) is deriving direct benefit (as noticed aforesaid) from the contract with the maintenance agency (respondent no.1); (ii) the maintenance agreements dated 01.11.2015 and 03.12.2010 between the maintenance agency and the owners of the built up unit/flats are inextricably connected with agreement for services dated 30.6.2008 between the maintenance agency and the developer. As such, both the 'direct benefits' estoppel theory and the 'intertwined estoppel theory' are applicable in the present case.

29. Gary B. Born, in his treatise '*International Commercial Arbitration'*,

3rd Edn. has drawn a valid distinction between binding a non-signatory party on the basis of the group of companies doctrine *vis-a-vis* other legal basis for binding a non-signatory, such as agency, alter ego, estoppel, third-party beneficiary, or assignment. This distinction was noticed by the Supreme Court in the case of ***Cox & Kings Ltd. v. SAP India (P) Ltd.,*** (2022) 8 SCC 1 [in which ***Chloro Controls*** (supra) was referred to a larger bench to expound on the "group of companies doctrine"]. Reference is apposite to the observations of the Supreme court in paras 48 and 49 of ***Cox & Kings*** (supra) as under:

> ***"48.*** *The [Vidya Drolia] predominantly dealt with the scope of judicial interference at the referral stage. However, this Court did not have an occasion to explore the jurisprudential basis of group of companies doctrine and required ingredients to refer a "non-signatory" to arbitration. Especially, the scope of judicial reference at the stage of Sections 8 and 11 of the Arbitration Act, needs to be relooked considering the ambit of unamended Section 2(1)(h) of the Arbitration Act.*
>
> ***49.*** *An arbitration agreement may be binding on parties, whether signatories or non-signatories, provided there is sufficient legal basis to bind them. Most legal bases for binding non-signatories to an arbitration agreement are of contractual origin, like agency, etc. Jurisprudence has shown that arbitration being a creature of contract, does not sit very well in binding non-signatories. Expounding on the same, Professor William Park, in one of his key works, captures the dilemma while attaching a non-signatory to the arbitral process [William W. Park, Non-Signatories and International Contracts : An Arbitrator's Dilemma, in Multiple Parties in International Arbitration (Oxford University Press) (2009).] as under:*
>
> > *"For arbitrators, motions to join non-signatories create a tension between two principles : maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons. Pushed to the limit of their logic, each goal points in an opposite direction. Resolving the tension usually implicates the two doctrines discussed below : implied consent and disregard of corporate personality ...*
> >
> > *The term "non-signatory" remains useful for what might be called "less-than-obvious" parties to an arbitration clause : individuals and*

> *entities that never put pen to paper, but still should be part of the arbitration under the circumstances of the relevant business relationship. The label does little harm if invoked merely for ease of expression, to designate someone whose right or obligation to arbitrate may be real but not self-evident ...*
>
> *Most significantly, the fact that a "non-signatory" might be bound to arbitrate does not dispense with the need for an arbitration agreement. Rather, it means only that the agreement takes its binding force through some circumstance other than the formality of signature."*
>
> [Emphasis supplied]

30. It is also relevant that at the stage of considering the petition under Section 11 of the A&C Act, this court is only to arrive at a *prima facie* finding with regard to impleadment of the respondent no.3 (developer) in the proposed arbitration proceedings, in the light of the inter-linked agreements as referred to aforesaid. The petitioners have made a *prima facie* case of impleadment of respondent no.3 in the proposed arbitration proceedings based on the control exercised by respondent no.3 (developer) in the activities of maintenance agency (respondent no.1) by virtue of the *inter se* agreement between them. Whether or not, there has been any lapse/ shortcoming on the part of the respondent no.1 in providing the requisite services, is one of the primary issues in the proposed arbitration. The agreement between the developer and the maintenance agency obliges the maintenance agency to maintain a particular standard of maintenance and to deal with the complaints of occupiers/flat owners. Under the said agreement, it is also incumbent on the developer to terminate the services of the maintenance agency in the event of any incompetence/negligence in providing services. Moreover, there is a revenue sharing arrangement between the maintenance agency and the developer; the developer also has

the right to conduct an audit in respect of the maintenance activities of respondent no.1 in respect of the buildings in question. The agreement between the maintenance agency and the developer caps the profit entitlement of the maintenance agency to 20%. In the light of these stipulations, the issue as to whether the common area maintenance charges being charged by the maintenance agency are excessive or not, cannot be decided in the absence of the developer.

31. The reliance sought to be placed by learned senior counsel for respondent no.1 on the judgment of the Supreme Court in the case of ***NTPC Ltd vs. M/S SPML Infra Ltd.*** (supra) and of this court in ***Umesh Cimechel Consortium vs. IIC Limited & Ors.*** (supra) is also misconceived.

32. In ***NTPC Ltd vs. M/S SPML Infra Ltd.*** (supra), it has been reaffirmed by the Supreme Court that the Arbitral Tribunal is a preferred first authority to determine and decide all questions of non-arbitrability. In this regard reference may be made to the following observations in the said judgment:

> *"**24**. Following the general rule and the principle laid down in Vidya Drolia (supra), this Court has consistently been holding that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engg. Pvt. Ltd., Sanjiv Prakash v. Seema Kukreja and Ors., and Indian Oil Corporation Ltd. v. NCC Ltd., the parties were referred to arbitration, as the prima facie review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the exception to the general principle that the court may not refer parties to arbitration when it is clear that the case is manifestly and ex facie non-arbitrable, in BSNL and Anr. v. Nortel Networks India (P) Ltd. and Secunderabad Cantontment Board vs. B. Ramachandraiah & Sons, arbitration was refused as the claims of the parties were demonstrably time-barred.*
>
> *xxx xxx xxx*
>
> ***26**. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra),*

this Court in a subsequent decision in Nortel Networks (supra) held:

> *"45.1… While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute…"*

33. Also, it was affirmed by the Supreme Court that while exercising jurisdiction under Section 11 of the A &C Act, the standard of scrutiny for examining non-arbitrability is only *prima facie*. Only when there is not even a vestige of doubt that the claim is non-arbitrable, the court will refuse to refer the parties to arbitration. On the other hand, even if there is a slightest doubt, the rule is to refer the dispute to arbitration. In this regard, reference may be made to the following observations:

> *"**27**. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts' they must only be confined to a primary first review and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is refer the dispute to arbitration."*

34. In ***NTPC Ltd vs. M/S SPML Infra Ltd.*** (supra), the Supreme Court proceeded to conduct a "primary first review" in the context of allegations made by the petitioner therein that the settlement agreement executed between the parties was a product of coercion and economic duress and therefore, did not preclude the petitioner from seeking reference of the disputes to arbitration in derogation of the settlement agreement entered into between the parties. It was in this background that the Supreme Court held that the claims sought to be submitted to arbitration were raised as an after-

thought and that the allegation of the petitioner therein regarding the settlement agreement being vitiated on account of coercion and economic duress, was not *bona fide*. There is no parallel with the facts of the said case with the facts of the instant case.

35. Likewise, the reliance placed by learned senior counsel for the respondent no.1 on the judgment of this Court in the case of ***Umesh Cimechel Consortium vs. IIC Limited & Ors.*** (supra) is also misconceived. In that case, the petitioner sought to raise claims in arbitration against a non-party, since the party with which the contract agreement/s was executed, was undergoing corporate insolvency resolution process and a moratorium was in place in terms of the Insolvency and Bankruptcy Code, 2016. This court noticed that there was no privity of contract between the petitioner and the respondent no.2(non-party) therein and the invocation of arbitration against the respondent no.2 merely on account of the fact that the respondent no.1 and the respondent no.2 had a common director was untenable.

36. The factual conspectus of the present case is completely different from the factual conspectus of the aforesaid cases. In the aforesaid cases, the court was not concerned with a situation where there were intertwined agreements involving intertwined obligations, as in the present case.

37. In the circumstances, the petitioners have made out a *prima facie* case for referring the parties to arbitration and for appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

38. It is also pertinent to note that in a petition filed by the owner of some other unit/ flat against the respondents herein, seeking appointment of an arbitrator in an identical context, a coordinate bench of this court vide order/judgment dated 20.03.2023 passed in Arb. P. 1145/2022 titled as

Nexus Solutions vs Surya Maintenance Agency Pvt Ltd & Ors., has allowed the said petition and has held that *prima facie*, the respondent no.3 (developer) would also be bound by the Arbitration Agreement. The operative portion of the said order/judgment reads as under:

> *"**6.** Prima facie, I am in agreement with the submission of the learned counsel for the petitioner. The relevant recitals in the Maintenance Agreement is reproduced hereinbelow:-*
>
> > *"AND WHEREAS the Company was engaged by M/s V3S lnfratech Ltd. (herein after referred to as the Promoter or Developer) to provide maintenance and security related services by itself or through some other maintenance agency in the said Building located at the said plot either through itself or by engaging some reputed agency."*
>
> ***7.** The respondent no.1 is, therefore, acting at the behest of the respondent no.3 and at least, prima facie, the respondent no.3 would also be a party to the Arbitration Agreement. This issue may require a further detailed examination by the Arbitral Tribunal, which for the purposes of the present should not be undertaken in view of the judgment of the Supreme Court in Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1.*
>
> ***8.** The learned counsel for the respondent no.1 submits that he is not ready with the arguments today.*
>
> ***9.** I have perused the reply filed by the respondent no.1 and find that in the reply the only objection to the appointment of the Arbitrator is on the merits of the disputes raised by the petitioner. In any case, any objection on the jurisdiction of the Arbitrator can be raised by the respondent no.1 before the Arbitrator himself.*
>
> ***10.** In view of the above, as the existence of the Arbitration Agreement and due invocation thereof is not denied by the respondent no. 1, and for respondent no. 3, I prima facie find the respondent no. 3 to be also bound by the Arbitration Agreement, I see no impediment in appointing a Sole Arbitrator."*

39. Needless to say, impleadment of the respondent no.3 in the arbitration proceedings would be subject to a further detailed examination by the Arbitral Tribunal based on submissions of the parties and the material placed before the Arbitral Tribunal. As held by the Supreme Court in the case of

Vidya Drolia (supra), "jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good faith, etc., in a multi-party arbitration raises complicated factual questions, which are best left for the tribunal to handle".

40. In the circumstances, Mr. Justice (Retd.) J.R. Midha, Former Judge, Delhi High Court, (Mobile- 9717495003) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties in each of these petitions.

41. It is made clear that the reference in each of these petitions shall be independent even though the Arbitrator shall be entitled to hold common hearing/s for the sake of convenience.

42. It shall be open for the respondents to raise preliminary objections as to jurisdiction and/or arbitrability/maintainability of the claims before the learned Sole Arbitrator which shall be adjudicated by the Sole Arbitrator on their merits, in accordance with law.

43. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

44. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

45. Parties shall share the arbitrator's fee and arbitral costs, equally.

46. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

47. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the contentions of the parties.

48. The present petitions stand disposed of in the above terms.

APRIL 17, 2023/cl **SACHIN DATTA, J**