IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF MAY, 2023

BEFORE

THE HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR

WRIT PETITION NO. 15830 OF 2022 (GM-CPC)

Between:

M/s. Town Essentials Private Limited
A Company Incorporated under
The Provisions of the Companies Act 1956
Having its Registered Office at No.54/1,
Industrial Suburb, Yeshwanthpur,
Bengaluru-560022
Represented by its Director
Shrikant Patil

...Petitioner

(By Sri K.Arun Kumar, Senior Advocate for
Sri Sushal Tiwari, Advocate)

And:

1. M/s. Daily Ninja Delivery Services Private Limited
A Company Incorporated under
The Provisions of the Companies Act 2013
Having its Registered Office at Row House No.13,
Hill Garden View Society, Kokanipada,
Near Tikujiniwadi, Manpada
Thane, Maharashtra-400610

Also at No.107,
Woodstock Business Center
Nallurahalli Junction, Whitefield
Bengaluru-560066
Represented by its Director
contact@dailyninja.in

Digitally signed by VEERENDRA KUMAR K M
Location: HIGH COURT OF KARNATAKA

2. Supermarket Grocery Supplies Private Limited
A Company Incorporated under
The Provisions of the Companies Act, 2013
Fairway Business Park,
2nd, 7th and 8th Floor,
Challaghata Village,Behind Dell,
Domlur, Bengaluru-560071

Also at 7, Service Road, Domlur
100 Feet Road, Indiranagar
Bengaluru-560071
Represented by its Director
customerservice@bigbasket.com

3. Innovative Retail Concepts Private Limited
A Company Incorporated under
The Provisions of the Companies Act 2013
Ranka Junction No.224, (Old Sy No.80/3)
4th Floor, Vijinapura, Old Madras Road,
K.R. Puram, Bengaluru-560016
Represented by its Director
customerservice@bigbasket.com

4. Sagar Yarnalkar
Pow House No.13,
Hill Garden View Society, Kokanipada,
Near Tikujiniwadi, Manapada
Thane, Maharashtra-400610

Also at No.107,
Woodstock Business Center
Nallurahalli Junction, Whitefield
Bengaluru-560066
sagar@dailyninja.in

5. Anurag Gupta

6. Hari Menon

7. Vipul Mahendra Parekh

…Respondents

(By Sri Srinivas Raghavan, Senior Advocate for
Sri L.Srinivas, Advocate for R1;
Sri P.Chinnappa, Advocate for R2 and R3;
Sri Narasimhan Sampath, Advocate for R4 and R5;
Sri Deepak S.Sarangmath, Advocate for R6 and R7)

This Writ Petition is filed under Article 227 of the Constitution of India praying to set aside the impugned order dated 01.07.2022 passed by the Learned LXXXVII Additional City Civil Judge, (Commercial Court) on the application filed by the efendant No.1 u/s 8 of the Arbitration and Conciliation Act, 1996 r/w section 16 of the Commercial Court Act, 2015, and section 151 of the Code of Civil Procedure, 1908 Annexure-A in

Com.O.S.520/2021 and consequently restore the suit instituted by the petitioner and etc.,

This Writ Petition having been ***heard and reserved on 30.03.2023*** coming on for ***pronouncement*** this day, the court pronounced the following:

ORDER

The question to be answered in this writ petition filed under Article 227 of the Constitution of India is, whether civil suit is maintainable in view of the fact that defendants No.2 to 7 are not parties to the agreement which provides of resolution of the dispute between the plaintiff and the first defendant through arbitration.

2. Shorn of the unnecessary details of a lengthy plaint, the material facts upon which the plaintiff has founded the reliefs are that on 29.10.2017, there came into existence a Supplier and Service Provider Agreement between the plaintiff and the first defendant. The terms of the agreement provided that the plaintiff should supply

the essentials such as groceries, fruits, vegetables, bakery products, processed fruits and vegetables to the first defendant's customers who would place orders online. The plaintiff took over entire backend operation of the business of the first defendant and all was good for some time. The first defendant was later on acquired by the second defendant without notice to the plaintiff, however defendant No.2 was aware of the agreement between the plaintiff and the first defendant. After August-2020, the defendants started to siphon of their business violating the terms of the agreement. The plaintiff has alleged that very acquisition of defendant No.1 by defendant No.2 was with a view to inducing breach of the agreement. Defendants No.4 and 5 were the promoters and directors of defendant No.1 and after acquisition by defendant No.2, they became the employees of the latter. Consequent to this change, the plaintiff started suffering loss in its

business. Attributing the cause for loss in business to the inducement caused by defendants No.2 to 7 for breaching the agreement dated 29.10.2017, the plaintiff instituted Commercial Original Suit No.520/2021 before the Commercial Court, Bengaluru claiming the reliefs of permanent injunction and a direction to defendants to pay a sum of Rs.36,22,00,000/- with interest towards damages.

3. The first defendant filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 ('Act' for short) to refer the parties to the suit to arbitration as the agreement dated 29.10.2017 provided for resolution of dispute through arbitration. Since the Commercial Court allowed the said application by its order dated 01.07.2022, the plaintiff has challenged the said order.

4. I heard the arguments of Sri K.Arun Kumar, learned Senior Advocate for the plaintiff-petitioner, Sri Srinivas Raghavan, learned Senior Advocate for respondent No.1, Sri Chinnappa, learned counsel for respondents No.2 and 3, Sri Narasimhan Sampath, learned counsel for respondents No.4 and 5 and Sri Deepak S Sarangmath, learned counsel for respondents No.6 and 7.

5. The first point of argument of Sri K. Arun Kumar was that though the agreement which provided for arbitration was between the plaintiff and the first defendant, the inducement caused by defendants 2 to 7 to defendant No.1 to breach the agreement amounted to tort, for which the plaintiff could sue not only the first defendant but also other defendants, who were the inducers, for damages, and on this point he relied a decision of THE QUEEN'S BENCH in **LUMLEY V. GYE** and of the

High Court Of Judicature at Bombay in the case of **AASIA INDUSTRIAL TECHNOLOGIES LIMITED AND OTHERS VS. AMBIENCE SPACE SELLERS LIMITED AND OTHERS [1997 SCC ONLINE BOM 681]**. It is not necessary to dwell on this point of argument as it touches the merits of the dispute which has to be decided by the court or the arbitrator.

6. On the point that the suit is maintainable despite the fact that the agreement contains arbitration clause, Sri Arun Kumar argued that the dispute is not just between the plaintiff and the first defendant so that arbitration clause can be invoked; there are allegations against defendants 2 to 7. The cause of action stated in the plaint is composite and joint against all the defendants. Defendants 2 to 7 cannot be driven to arbitration as they are not parties to agreement. Referring to the judgment of the Supreme Court in the case of

SUKANYA HOLDINGS (P) LTD., VS. JAYESH H PANDYA AND ANOTHER [(2003)5 SCC 531], he argued that splitting up of cause of action into two parts, one against the first defendant and the other against second defendant is not permitted, and since the Act does not provide for adding in the arbitration proceeding those persons who are not parties to the arbitration agreement, suit is very much maintainable.

7. Sri Arun Kumar made a comparison between Section 8 as it stood before amendment and as it stands after amendment, and argued that after the amendment a person who acts under a party to agreement can seek a reference to arbitration; but in the case on hand, defendants 2 to 7 are not the parties acting under first defendant and since the suit is filed against them and not by them, amended section 8 is not applicable. For all these reasons, impugned order

is not sustainable, and therefore writ petition deserves to be allowed, he argued.

8. Sri Srinivas Raghavan argued that notwithstanding the fact that defendants 2 to 7 are not parties to agreement, suit is not maintainable. The first defendant can invoke Section 8 for, as has been held by the High Court of Calcutta in **LINDSAY INTERNATIONAL PRIVATE LIMITED AND OTHERS VS. LAXMI NIVAS MITTAL AND OTHERS (2022 SCC ONLINE CAL 170),** since the dispute between the parties are interlinked in such a way as no adjudication is possible concerning defendants 2 to 7 without reference to the agreement, necessarily the parties must be referred to arbitration. In support of his argument, he also relied upon a judgment of the Division Bench of the High Court of Gauhati in **BHARAT HEAVY ELECTRICALS LTD., VS. ASSAM STATE ELECTRICITY BOARD [(1990) 2**

GAUHATI LAW REPORTS 130] and of the Supreme Court in **VIDYA DROLIA AND DURGA TRADING CORPORATION [(2021) 2 SCC 1].**

9. Analysis of facts show that existence of arbitration clause in the agreement is not disputed, and if the dispute were to be between the plaintiff and the first defendant only, it is needless to say that the plaintiff should have sought for appointment of an arbitrator. The anomalous situation is because of presence of defendants 2 to 7 who are not parties to the agreement. The plaintiff has not sought the reliefs only against first defendant, and if it were to be the situation, it can forcefully be said that arbitration could be the proper forum for its dispute with the first defendant. Since reliefs are claimed against all the defendants, reference may be made to Order 1 Rule 3(3) of the Code of Civil

Procedure which deals with joinder of defendants.

It reads as below:

ORDER I *:* ***PARTIES OF SUITS***

1. Who may be joined as plaintiffs.

Xxxxxxx

2. Power of Court to Order separate trial.

Xxxxxx

3. ***Who may be joined as defendants.***

All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

3A. Power to Order separate trials where joinder of defendants may embarrass or delay trial.

Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may Order separate trials or make such other Order as may be expedient in the interests of justice.]

10. Therefore it is clear that if an act or transaction or series of acts or transactions give rise to reliefs against several persons either jointly or severally or in the alternative, all such persons may be joined as defendants in a suit and another requirement for joining several persons as defendants in a suit is if separate suits are brought against them, a common question of law or fact would arise for adjudication.

11. Adjudication of a dispute through arbitration requires existence of an agreement between the parties. But in a situation where there are more defendants than one, and relating to some of them there is no arbitration agreement,

it is held by the Supreme Court in **Sukanya Holdings** that:

> *12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part-I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under*

sub- sections (1) & (2) of Section 8 of the Act.

13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new

procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

(emphasis supplied)

12. But Sri Srinivas Raghavan placed reliance on **VIDYA DROLIA AND DURGA TRADING CORPORATION [(2021) 2 SCC 1]** and argued that Sukanya Holdings was considered in **Vidya**

Drolia and held that if a question of arbitrability arises, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. He referred to paras 154.3 and 154.4 of ***Vidya Drolia*** (supra), where the observations are as follows:

> *154.3 The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*
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> *154.4. Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non- existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-*

arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

13. ***In Bharat Heavy Electricals*** (supra) the High Court of Gauhati, does not actually discuss a situation as is found in the case on hand; there the issue related to arbitrability of a dispute tortuous in nature.

14. In **Lindsay International** (supra) of the High Court of Calcutta, there is a reference to the effect of judgment in Sukanya Holdings post amendment. The discussion is found in Paras 29 to 36 which are extracted here:

> *29. Hence, this Court does not find any merit in the argument made on behalf of the plaintiffs that the disputes, if referred, would result in bifurcation of composite causes of action or split-up necessary and proper parties. This interpretation is in any event destructive of the legislative intent to promote arbitration as noticed in the earlier part of the judgment. The view of this Court is bolstered by the fact that none of the decisions cited, including Vidya Drolia, have held that an application under section 8 will only succeed if the entire suit is capable of being referred to arbitration. D. Is Sukanya Holdings relevant at the stage of reference, post-amendment?*
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> *30. The recommendation of the Law Commission of discouraging reference where the parties to the action, who are not the parties to the arbitration agreement, are*

necessary parties to the action, read with the Note referring to Sukanya Holdings, did not serve as a trailer in the final cut of the 2016 Amendment. The legislature, in fact, jettisoned the entire portion on "necessary parties" as well as Sukanya Holdings to declare, with unequivocal intent, that a judicial authority shall refer the parties to arbitration "notwithstanding any judgment, decree or order of the Supreme Court or any Court". The amended section 8 hence does not contain any remnant of the recommendation with reference to Sukanya Holdings and has thrown out any impediment in connection with the dictum in Sukanya Holdings, or any other judicial pronouncements before the amendment, in its entirety. (Ref: Emaar MGF)

31. The dictum in Sukanya Holdings that bifurcation of causes of action and parties cannot be permitted in adjudicating an application under section 8 has been rejected in N.N. Global (see the preceding section of this judgment). Vidya Drolia cannot also be used as a proposition to support the plaintiffs' argument that the entire cause of action in the suit must be capable of being referred to arbitration in a section 8

application. In fact paragraph 225 of Vidya Drolia recognizes that judicial interference at the reference stage has been substantially curtailed and the 2015 amendment has altered the structure of the Act to make it pro-arbitration. Paragraph 154.3 of the said judgment further reinforces the principle of severability, competence-competence and that the Arbirtal tribunal is the preferred first authority to determine all questions of non-arbitrability. In paragraph 244.4, the advice of the Supreme Court is "when in doubt, do refer".

32. The conclusion, without a doubt, is that Sukanya Holdings is no longer a relevant factor for the Court to consider at the stage of reference in an application under section 8 of the Act. The Court is not even under a mandate, post amendment, to adjudicate on the bifurcability of the causes of action or the presence of parties who are necessary parties to the action but not to the arbitration. The only brake in the momentum of reference is the court finding, prima facie, that no valid arbitration agreement exists.

33. The rejection of the Law Commission's recommendation in the Note to section 8 with

regard to Sukanya Holdings was considered in Emaar MGF where the Supreme Court opined that pronouncements made prior to the amendment were not to be adhered to as the legislative intent was to move away from the conditions in P. Anand and Sukanya Holdings. The Court proceeded to explain that the object of the amendment was to minimise the scope of the judicial authority to refuse reference to arbitration.

34. Besides, the argument that Sukanya Holdings continues to hold the field would, in effect, result in the amended section 8 looking somewhat like this;

"... notwithstanding any judgment, decree or order of the Supreme Court or any Court save and except the judgment in Sukanya Holdings..." (the added bit is underlined).

35. This Court is of the view that adding to the plain and unambiguous words of the provision in the pretext of interpretation cannot be the permitted course of action.

36. It is also important to bear in mind that the issue is not whether the dictum in Sukanya Holdings is correct, as the law laid down in that decision may continue to be

relevant for deciding applications under section 8 filed prior to the amendment of 2016 but not where the suit or application is filed after 23.10.2015 when the amendment came into force (underlined for emphasis).

D1. The bar to reference under the amended Section 8 of the 1996 Act:

15. Therefore what I find is that though High Court of Calcutta in Lindsay International holds that Sukanya Holdings is not applicable to cases arising post amendment, in **Vidya Drolia** (supra), it is held that agreement is ineffective against non signatories. Para 49 of the judgment in Vidya Drolia is extracted here.

49. Exclusion of actions in rem from arbitration, exposits the intrinsic limits of arbitration as a private dispute resolution mechanism, which is only binding on 'the parties' to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The arbitral tribunals not being

courts of law or established under the auspices of the State cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has erga omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Equally arbitration as a decentralized mode of dispute resolution is unsuitable when the subject matter or a dispute in the factual background, requires collective adjudication before one court or forum. Certain disputes as a class, or sometimes the dispute in the given facts, can be efficiently resolved only through collective litigation proceedings. Contractual and consensual nature of arbitration underpins its ambit and scope. Authority and power being derived from an agreement cannot bind and is non-effective against non-signatories. An arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. Prime objective of arbitration to secure just, fair and effective resolution of

disputes, without unnecessary delay and with least expense, is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise.

(emphasis supplied)

16. Here is a case where except the plaintiff and the first defendant, other defendants are not parties to the arbitration agreement. Though it can be said that because of acquisition of first defendant by second defendant, the agreement binds the second defendant, it is to be noted that the other defendants are not parties. Defendants 4 and 5 might have signed the agreement, but they did so in the capacity of directors of first defendant and not in their individual capacity; they are stated to be the employees of second defendant now. This is how the suit is framed, and

whether or not the first defendant was induced by other defendants to breach the agreement and thereby the plaintiff got a cause of action to claim the reliefs of permanent injunction and damages against all the defendants is a question to be decided at a single platform. The non signatory defendants cannot be exposed to arbitral proceedings. Cause of action against all the defendants is stated to be same, and it cannot be bifurcated. In this view, I find that the order impugned in the writ petition cannot be sustained. Hence the following:

ORDER

Writ petition is therefore ***allowed*** with costs.

The impugned order is set-aside and the application filed under Section 8 of the Arbitration and Conciliation Act is dismissed. The suit is restored. The

parties are directed to appear before the trial court on 12.6.2023.

Sd/-
JUDGE

KMV
List No.: 1 Sl No.: 5

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