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Emergency Arbitration – Finally recognised as an interim remedy in India?

Amazon NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.

Case No.	**O.M.P(Enf)(Comm) 17/2021**
Date	**18 March, 2021**
Court	**Delhi High Court**
Coram	**Hon'ble Mr. Justice J.R. Midha**

1. FACTS/ TRANSACTION:

1.1 In 2019, Future Group, which is India's second largest organized offline retailer, wanted to collaborate with foreign investors to grow their business. The promoters ("**Biyanis**") restructured an existing group entity, Future Coupons Private Limited ("**FCPL**") to acquire shares of Future Retail Limited ("**FRL**").

1.2 Seeing it as a brilliant opportunity, in August 2019, Amazon.com NV Investment Holdings LLC ("**Amazon**") invested Rs.1,431 Crores into FCPL to acquire 49% of its shares and entered into a Share Subscription Agreement ("**FCPL-SSA**") alongwith Biyanis. Through the FCPL-SSA, it was mutually decided that Biyanis and Amazon would jointly exercise the rights of FCPL in FRL, and specifically never without Amazon's consent.

1.3 After 1 year, in August 2020, Amazon to its utter surprise, learnt that FRL without their approval or consent had approved a disputed transaction with a restricted person, i.e. with Mukesh Dhirubhai Ambani Group ("**MDA**"). These disputed transactions and restricted persons were prohibited categorically under the FCPL-SSA.

1.4 Being aggrieved, Amazon invoked the arbitration under the FCPL-SSA, which was governed by Singapore International Arbitration Centre ("**SIAC**") and had New Delhi as the seat. Due to the urgency involved, in October 2020, Amazon filed an application for appointment of emergency arbitrator as provided under the SIAC Rules and thus, an Emergency Arbitrator ("**EA**") was appointed.

1.5 In response, FRL (co-Respondent), raised a preliminary objection to the jurisdiction and appointment of the EA. Amongst others, it was also contented that that there was no valid arbitration agreement between the FRL and Amazon.

2. AWARD OF THE EMERGENCY ARBITRAL TRIBUNAL

2.1 The EA rejected the ground raised by the Respondent that the EA does not have requisite jurisdiction to act on the prayer made by Amazon.

2.2 The EA held that all the parties have assented to SIAC arbitral proceedings on identical terms and their mutual obligations are inextricably linked. It was noted that:

> *"Section 2(8) of the Indian Arbitration Act 1996 expressly provides that where Part I of the Indian Arbitration Act 1996 refers to an —agreement of the parties, such agreement shall include the arbitration rules referred to in the parties agreement. In this way, the Indian Arbitration Act 1996 provides that any arbitration rules agreed to by the parties are incorporated into the arbitration agreement. Unless expressly excluded, it is trite that the parties cannot resile from the terms of their arbitration agreement, including their agreement to allow either party to request the appointment of an emergency arbitrator. Further, Section 17 of the*

Indian Arbitration Act 1996, which empowers an arbitral tribunal to grant interim reliefs, does not preclude or intimate that parties cannot agree to institutional rules which allow recourse to emergency arbitration. In the absence of a mandatory prohibition contained in the Indian Arbitration Act 1996 or public policy constraints, the parties may agree to any arbitral procedure."

2.3 On the aspect of FRL not being signatory to the arbitration agreement, the EA held that this matter is, at its core, about a group of affiliated Future Group companies entering into an indivisible contractual arrangement with Amazon within a conceptual framework that they all unequivocally consented to. The EA was of the impression that, under Section 2(1)(h) of the Arbitration and Conciliation Act, 1996 ('**Act**'), a 'party' is defined as a 'party to the arbitration agreement' and, crucially, not as a 'signatory' to the arbitration agreement. Therefore, FRL was held to be a party to the arbitration proceedings.

3. THE ENFORCEMENT PROCEEDING

3.1 Amazon approached the Delhi High Court for enforcing the EA's order dated 25 October 2020 under Section 17(2) of the Act read with Order 39 Rule 2A of the Code of Civil Procedure, 1908 ('**Court Proceeding**').

4. ISSUES

4.1 What is the legal status of an EA i.e. whether the EA is an arbitrator in terms of the Act and whether the interim order of an EA is an order under Section 17(1) and is enforceable under Section 17(2) of the Act?

4.2 Whether the EA misapplied the Group of Companies doctrine which arguably applies only to proceedings under Section 8 of the Act?

4.3 Whether the interim order of EA is null and void as being passed without jurisdiction?

5. CONTENTIONS OF THE PETITIONER

5.1 In the Court Proceeding, Amazon supporting the EA's order, and submitted that EA' is well within the scope of the definition of 'Arbitral Tribunal' under Section 2(1)(d) of the Act.

5.2 Having been passed in accordance of the SIAC Rules, the EA's order continues to be valid and binding qua parties.

5.3 The concept of party autonomy and its consequences have been relied upon by the Court to conclude that EA falls within the definition of 'Arbitral Tribunal' as the parties' selection of SIAC Rules to govern the arbitral proceeding, which have provisions of Emergency Arbitration, itself indicate parties' consent to be bound by the EA's order.

5.4 Amazon further relied on the Rules of the Delhi International Arbitration Centre, Mumbai Centre of International Arbitration and Madras High Court

Arbitration Centre, which provide for Emergency Arbitration procedures to contend that Emergency Arbitration is recognised under Indian law.

5.5 Amazon submitted that they were ready to financially assist the Future Group in the best way they can, but it was to its shock that its shareholding has been diluted due to the disputed transactions being entered into by Future Group with a with a restricted person i.e. MDA in violation of the terms of the FCPL-SSA.

5.6 Amazon also argued that, as rightly upheld by the EA, the Group of Companies doctrine apply squarely to the dispute in view of the precedents set forth by the Supreme Court *Chloro Controls India Private Limited v. Sever N Trent Water Purification Inc.*[1], *Cheran Properties Limited v. Kasturi and Sons Limited*[2], *MTNL vs. Canara Bank*[3], etc.

6. CONTENTIONS OF THE RESPONDENTS

6.1 Respondents contended that Part I of the Act does not contemplate any type of remedy before and by an EA.

6.2 Respondents submitted that 'Arbitral Tribunal' as defined in Section 2(1)(d) of the Act does not include an EA.

6.3 Respondents maintained that the appointment of an EA under SIAC Rules was invalid, so, any order granted by the EA would also be invalid. The reasoning adopted by the Respondents was that the EA's order could never be an order of the 'Arbitral Tribunal' either under the provisions of the Act or even under the SIAC Rules.

6.4 Respondents also argued that the language of Section 17(2) of the Act, can neither be stretched nor can the definition of 'Arbitral Tribunal' be expanded by the process of construction to create a situation where an order/award of by an EA is put at par with the order passed by an Arbitral Tribunal.

6.5 Respondents maintained that the Indian courts have taken note of orders made by EAs only in the context of foreign seated arbitrations, where proceedings were filed under Section 9 of the Act to seek enforcement of the foreign EA's order and not which treats an EA's order as one passed under Section 17 of the Act.[4]

6.6 Respondents argued that the group of companies doctrine applies only in proceedings under Section 8 of the Act and not in Court Proceedings such as the present.

7. DECISION OF THE DELHI HIGH COURT

[1] Chloro Controls India Private Limited v. Sever N Trent Water Purification Inc, 2013 1 SCC 641 *(Chloro)*.
[2] Cheran Properties Limited v. Kasturi and Sons Limited, (2018) 16 SCC 413 *(Cheran)*.
[3] MTNL vs. Canara Bank, 2019 SCC Online SC 995 (*MTNL*). See more -Chatterjee Petrochem v. Haldia Petrochemicals Ltd, (2014) 14 SCC 574; M/s Duro Felguera S.A. v. M/S Gangavaram Port Ltd., (2017) 9 SCC 729; and Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 1SCC 678.
[4] Raffles Design International Pvt Ltd v Educomp Professional Education Ltd & Ors., 2016 SCC Online Del 5521.

A. Legal Status of EA

7.1 Delhi High Court rules that an EA is a sole arbitrator appointed by an arbitral institution to consider application for an emergency interim relief in cases where the parties have agreed to arbitrate according to the Rules of an arbitral institution which contain provisions relating to emergency arbitration. The status of the EA is wholistically based on party autonomy and hence an order/award of the EA is binding on all the parties.

7.2 The Court then delved into the important characteristics of an emergency arbitration, and ruled that an EA has the power to deal only with emergency interim relief; and his order/award can be challenged only at the seat of arbitration.

7.3 Institutions like SIAC appoints an EA within 24 hours of the request by a party and the application for the said specific purpose is decided within 15 days. The Court observed,

> *"so, if the order of the Emergency Arbitrator is not enforced, it would make the entire mechanism of Emergency Arbitration redundant."*

7.4 Thus, Delhi High Court held that the EA is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the Act and SIAC Rules which are part of the arbitration agreement by virtue of Section 2(8) of the Act.

7.5 Further, in the opinion of the Court, Section 2(1)(d) is wide enough to include an EA. Under Section 17(1) of the Act, the Arbitral Tribunal has the same powers to make interim order as the Court, and Section 17(2) makes such interim order enforceable in the same manner as if it was an order of the Court.

7.6 The Court further opined that the current Indian legal framework is sufficient to recognize the jurisprudence of Emergency Arbitration and that there is no necessity for an amendment in this regard.

B. Whether the EA misapplied the Group of Companies doctrine which arguably applies only to proceedings under Section 8 of the Act?

7.7 The Court held, the law relating to the concept of Group of Companies doctrine is well settled by the Supreme Court in *Chloro, Cheran,* and *MTNL.* The Group of Companies doctrine binds the non-signatory entity where the multiple agreements reflect a clear intention of the parties to bind both the signatory and non-signatory entities within the same group.

7.8 The Supreme Court laid down a number of tests to be applied for invoking the Group of Companies doctrine, a few of which have been mentioned below[5]:

i. *direct relationship* to the party signatory to the arbitration agreement,

ii. *direct commonality* of the subject-matter and the agreement between the parties being a composite transaction,

[5] *Supra 3*, Chloro.

iii. 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,

iv. Where an arbitration agreement is entered into by a company, being one within a group of companies, if the circumstances demonstrate that the *mutual intention* of all the parties was to bind both the signatories and the non-signatory affiliates.

v. The non-signatory entity of the group has been *engaged in the negotiation or performance* of the contract.

vi. Where the *agreements are consequential* and in the nature of a follow-up to the principal or mother agreement, and are intrinsically intermingled or interdependent that it is their composite performance.

vii. The composite reference of such parties must serve the *ends of justice.*

7.9 Hence, on applying the well settled law relating to Group of Companies doctrine laid down by the Supreme Court to the present case, the Court was satisfied that the Group of Companies doctrine is applicable to the present case and FRL is a proper party to the arbitration proceedings for the reasons given by the EA.

C. Whether the interim order of Emergency Arbitrator is null and void as being passed without jurisdiction?

7.10 According to the Respondents, the interim order was null and void. However, they did not dispute the legality of the various agreements entered into between the parties.

7.11 Delhi High Court came down heavily on the Respondents, who pleaded the interim order to be null and void without pleading the law on nullity. The Court remarked that the Respondents' approach did not appear to be innocent, as it is not believable that the Respondents were not aware of the law on nullity. It appeared to be a deliberate attempt to mislead the Court.

7.12 Furthermore, Court observed that Amazon was always ready and willing to assist with helping FRL in a manner consistent with law, and it is alarming that FLR, in fact did not engage with Amazon to find a commercial solution to the problems it was facing. It instead did so by way of finding partners namely, MDA, which was listed as a restricted person as per the FCPL-SSA.

7.13 Towards the end, upholding the validity of the order passed by the EA, the Court recorded that the EA has given fair opportunity to both the parties to submit their written pleadings and the oral arguments. The EA had also recorded the respective contentions of the parties and has given a very detailed reasoned findings.

8. PSL Opinion

8.1 Emergency Award needs to be viewed with different perspective than the final award. The relief given in Emergency Awards is mostly towards the preservation of assets and situations where a paddle-back approach would not curb the damage already done.

8.2 Therefore, in global arbitration context, this judgment is a breakthrough analysis of the existence of Emergency Arbitration as an enforceable interim remedy available under Indian law.

8.3 The judgment has made it clear that even if the term 'Emergency Arbitration' is not mentioned in the Act, the reference to or opting for an Arbitral Institution (which encapsulates the provisions for emergency arbitration) to govern the arbitral proceedings, itself makes an order of EA enforceable under Indian law due to principle of party autonomy.