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

\+ O.M.P.(I) (COMM.) 71/2023

SBS HOLDING INC

..... Petitioner

Through: Mr.Gautam Narayan, Ms.Asmita Singh, Mr.Unmukt Gera, Mr.Harshit Goel, Mr.Renjith Nair, Mr.Altamash Quereshi & Ms.Akriti Arya, Advs.

versus

ANANT KUMAR CHOUDHARY & ORS.

..... Respondents

Through: Mr.I.P.S. Oberoi, Adv. for R-4.
Mr.Shashank Garg, Mr.Aman Gupta & Mr.Atharva Koppal, Advs. for R-5.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

O R D E R

% 07.03.2023

I.A. 4645/2023 (Exemption)

1. Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 71/2023

2. Issue notice.

3. Notice is accepted by Mr.I.P.S. Oberoi, learned counsel on behalf of the Official Liquidator appointed for respondent No. 4, and Mr.Shashank Garg, learned counsel on behalf of respondent No. 5.

4. Notice be served on the remaining respondents through all modes, returnable on 9th May, 2023.

5. Let reply(ies) be filed within a period of two weeks, as prayed for. Rejoinder thereto, if any, be filed within a period of two weeks thereafter.

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6. It is the case of the petitioner that the petitioner has succeeded in the arbitration proceedings held under the aegis of the Singapore International Arbitration Centre, being SIAC Arbitration No. 105 of 2019, ***Anant Kumar Choudhary And Ors. vs. Global Enterprise Logistics Pte Ltd and Anr.***, by way of an Arbitral Award dated 22.12.2022. The Arbitral Award, while rejecting the claims of the respondent nos.1 to 4 herein, has also awarded costs of those proceedings in favour of the petitioner herein, who was the respondent no.2 in the said proceedings, as under:

> *"861. The Respondents have succeeded in all the substantive issues. However, the Respondents have failed in a number of jurisdictional objections, namely on Issues 1, 2, 4 and 6. Furthermore, 1R's case on the change of ownership of 1R being a bona fide arms-length transaction is not accepted, and even though this ultimately had no bearing on the substantive merits of the case, this aspect of the case involved a lengthy cross-examination of Mr Shigemoto. Taking into account all these factors/circumstances, including the Tribunal's costs orders made in interlocutory applications above, the Tribunal orders in accordance with Rule 37 of the SIAC Rules:*
>
> *(a) The Claimants shall bear 80% of 2R's legal and other costs claimed, being SGD 1,212,838.98, USD 246,196.96, and JPY 1,102,612.*
>
> *xxxxx*
>
> *863. Having considered all the evidence and submissions placed before it and for the reasons set out above, the Tribunal hereby FINALLY DECLARES and DETERMINES as follows:*
>
> *(d) The Claimants are jointly and severally liable to 2R for, and shall pay to 2R the amounts of SGD 1,212,838.98, USD 246,196.96, and JPY 1,102,612 within 21 days of the date of receipt of this Award, after which simple interest on this amount shall run at the rate of 5.33% per annum until the costs ordered are paid in full."*

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7. The learned counsel for the petitioner submits that a group company of the petitioner, namely, SBS Logistics Singapore Pte Ltd., had succeeded against the respondent no. 4 in another arbitration proceedings by way of an Award dated 25.10.2017. In the course of the enforcement of the said Award against the respondent no.4, proceedings under the Insolvency and Bankruptcy Code, 2016 were initiated and the respondent no.4 is now facing liquidation. In the course of enforcement proceedings, the Court also found that amounts had been withdrawn by the respondent nos.1 to 4 from the bank accounts and all fixed assets had been encumbered so as to negate the enforcement of the Arbitral Award. In this regard, he has also drawn my attention to the order dated 27.11.2018 passed in Enforcement Petition, being O.M.P.(EFA)(COMM.) 4/2018***, SBS Logistics Singapore Pte Ltd v. SBS Transpole Logistics Private Limited.*** He submits that in case interim protection is not granted to the petitioner, the petitioner shall suffer the same fate in the enforcement proceedings of the present Arbitral Award.

8. The learned counsel for the petitioner submits that in the present arbitration proceedings, the respondent nos.1 to 4 were being funded by the respondent no.5 under the terms of the Bespoke Funding Agreement dated 20.12.2018 (hereinafter referred to as the 'Bespoke Agreement'). The terms of the said agreement would show that the funding of the entire litigation, including the costs of the Lawyers, the Tribunal, the Experts, etc., were borne by the respondent no.5. The learned counsel for the petitioner further submits that in terms of Clause 3(f) read with Clause 5(d) of the Bespoke Agreement, the respondent no. 5 had the exclusive and unsevered prior rights on any damages that could have been awarded by the Arbitral Award in favour of the respondent nos. 1 to 4 and against the petitioner. The

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said damages, thereafter, would have been distributed amongst the respondents in the manner prescribed in Clause 3(f) of the Bespoke Agreement. He submits that, therefore, respondent no. 5 having funded the arbitration proceedings is equally liable to make good the costs that have been levied on the respondent nos.1 to 4 in the Arbitral Award. In support, he places reliance on the following:-

i) ***Arkin v. Borchard Line Ltd and Others***, (2005) EWCA Civ 655; and

ii) ***Excalibur Ventures LLC v. Texas Keystone Inc and Ors.***, Neutral Citation Number: (2016) EWCA Civ 1144

9. On the other hand, the learned counsel for the respondent no. 5, who appears on an advance notice, draws reference to Section 46 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') to submit that the Foreign Award can be enforced only against the "*persons as between whom it was made"*. Hence, it cannot be enforced against third parties.

10. He further submits that the liability of the respondent no.5 under the Bespoke Agreement is confined only to the costs that are incurred by the respondent nos.1 to 4 in the arbitration proceedings and not thereafter. Further, placing reliance on Clause 7A(iv) of the agreement, he submits that the Bespoke Agreement was to terminate in case the claim filed by the respondent nos.1 to 4 in the arbitration proceedings was not a success. The said eventuality having occurred, the Bespoke Agreement stands terminated and the respondent no.5 cannot be made liable thereunder.

11. In rejoinder, however, the learned counsel for the petitioner, placing reliance on judgment of the Supreme Court in ***Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited and Another***, (2022) 1 SCC 753, submits that the scope of Section 46 of the Act is even wider than Section 35 of the Act, and would include

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all persons who claim under the parties to the agreement. In the present case, as provided in the Bespoke Agreement, the respondent no. 5 had a right through respondent nos. 1 to 4 in the arbitration proceedings. They, therefore, are equally liable to make good the liability that has been imposed under the Arbitral Award.

12. I have considered the submissions made by the learned counsels for the parties.

13. It cannot be denied that the Arbitral Award, in terms of the paragraphs that have been quoted hereinabove, have awarded costs of the arbitration proceedings in favour of the petitioner and against the respondent nos. 1 to 4. The petitioner, by making reference to the earlier enforcement proceedings, has also established a *prima facie* case in its favour to show that in case an *ad interim* injunction is not granted in its favour, the Award may be rendered as a 'paper decree'.

14. The petitioner by relying upon the Bespoke Agreement has also, at least *prima facie*, been able to show that the respondent no.5 had a vested interest in the outcome of the arbitral proceedings, having funded the respondent nos.1 to 4 for a benefit of a return therefrom in form of the result of the arbitration proceedings.

15. In ***Arkin*** (Supra), in similar circumstances, it has been held as under**:-**

> *"38. While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event. R (on the application of Factortame) Ltd v Secretary of State for Transport, Environment and the Regions (No 2) [2002] 4 All ER 97, [2003] QB 381, on which he strongly relied, was not a case in which there was any need to take this balancing factor into account. In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the*

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opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.

39. If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.

40. The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.

41. We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a

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contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.

42. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.

43. In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. We have not, however, had to explore the ramifications of an extension of the solution we propose beyond the facts of the present case, where the funder merely covered the costs incurred by the claimant in instructing expert witnesses.

44. While we have confined our comments to professional funders, it does not follow that it will never be appropriate to order that those who, for motives other than profit, have

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contributed to the costs of unsuccessful litigation, should contribute to the successful party's costs on a similar basis."

16. In ***Excalibur Ventures LLC*** (Supra), it was reiterated that:-

"23. The argument for the funder boiled down in essence to the proposition that it is not appropriate to direct them to pay costs on the indemnity basis if they have themselves been guilty of no discreditable conduct or conduct which can be criticised. Even on the assumption that the funders were guilty of no conduct which can properly be criticised, and I accept that they did nothing discreditable in the sense of being morally reprehensible or even improper, this argument suffers from two fatal defects, both of which were identified by the judge. First, it overlooks that the conduct of the parties is but one factor to be taken into account in the overall evaluation. Second, it looks at the question from only one point of view, that of the funder. As the judge pointed out at paragraph 125, it ignores the character of the action which the funder has funded and its effect on the Defendants.

24. The argument is yet further flawed in that it assumes that the funder is responsible only for his own conduct. This too is incorrect. As the judge pointed out at paragraph 60, where conduct comes into consideration in this context, the successful party is afforded a more generous basis for assessing which of his costs should be paid by his opponent because of the way in which the latter, or those in his camp, have acted. Thus as the judge pointed out at paragraph 118, a litigant may find himself liable to pay indemnity costs on account of the conduct of those whom he has chosen to engage – e.g. lawyers, or experts, which experts may themselves have been chosen by the lawyers, or the conduct of those whom he has chosen to enlist, e.g. witnesses, even though he is not personally responsible for it. The position of the funder is directly analogous. The funder is seeking to derive financial benefit from pursuit of the claim just as much as is the funded claimant litigant, and there can be no principled reason to draw a distinction between them in this regard. I also agree with Mr Waller that the analysis here is not dependent upon rules of agency – expert

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> *and factual witnesses are not agents of the party on whose behalf they give evidence any more than they are agents of the funder. The principle is a broader principle of justice. Deployment of lawyers, experts and other witnesses is a necessary part of bringing the claim to a successful conclusion for the benefit of the litigant, and it is equally a necessary part of bringing it to a successful conclusion for the benefit of the funder. The funder chooses which claims to back, whereas, as the judge rightly observed at paragraph 125, a defendant does not choose by whom to be sued, or in what manner. The judge continued:*
>
> > *"If, then, the funder's witnesses turn out to be liars or the litigation is conducted unreasonably, so that the court awards costs on an indemnity scale, it is just and equitable that the funder should pay on that scale."*
>
> *I agree. I can see no principled basis upon which the funder can dissociate himself from the conduct of those whom he has enabled to conduct the litigation and upon whom he relies to make a return on his investment."*

17. *Prima facie,* I am in agreement with the above observations. A party having funded the litigation for a gain in the result thereof, cannot escape its liability in case the result is contrary to its expectation. A balance would have to be struck between a need to ensure the access to justice through this funding arrangement and the cost that the defendant would bear in case such litigation fails and is found to be completely meritless, as in the present case. The defendant cannot be left high and dry and be made to bear its own cost for the purposes of defending a litigation, which was found without any merit and which may not have been initiated against such party but for the funding by the third party. In fact, *prima facie,* the costs which have been levied by the Arbitral Award would become the cost which will be covered by the Bespoke Agreement itself, as these are costs of litigation of respondent nos.1 to 4 herein.

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18. The fact that the Bespoke Agreement states that it shall stand terminated in case the claim is not successful, can also, *prima facie*, not affect the right of the petitioner inasmuch as the said agreement would continue till the passing of the Arbitral Award and the costs are part of the Arbitral Award. Thereafter, the petitioner is only seeking to enforce the Arbitral Award in terms of the Bespoke Agreement.

19. The submission of the learned counsel for the respondent no.5 that in terms of Section 46 of the Act, the enforcement of a Foreign Award can only be against the party to the Agreement, also *prima facie*, does not impress me. The Supreme Court ***Gemini Bay Transcription Private Limited*** (Supra), has observed as under:-

> *"73. Shri Salve argued relying upon three judgments of this Court, namely, Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306, Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413 that a comparison between Sections 35 and 46 of the Arbitration Act, 1996 would show that the legislature circumscribed the power of the enforcing court under Section 46 to persons who are bound by a foreign award as opposed to persons which would include "persons claiming under them" and that, therefore, a foreign award would be binding on parties alone and not on others.*
> *First and foremost, Section 46 does not speak of "parties" at all, but of "persons" who may, therefore, be non-signatories to the arbitration agreement. Also, Section 35 of the Act speaks of "persons" in the context of an arbitral award being final and binding on the "parties" and "persons claiming under them", respectively. Section 35 would, therefore, refer to only persons claiming under parties and is, therefore, more restrictive in its application than Section 46 which speaks of "persons" without any restriction…."*

20. In view of the above, the petitioner has been able to make out a good *prima facie* case in its favour. The balance of convenience is also

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in favour of the petitioner and against the respondents. The petitioner is likely to suffer grave irreparable injury in case an *ad interim* injunction is not granted in favour of the petitioner and against the respondents.

21. Accordingly, the respondent nos.1, 2, 3 and 5 are directed to disclose on affidavit their fixed assets and bank accounts, along with the credit balance in the same held by them in India or any other jurisdiction as on date. Such affidavit be filed within a period of four weeks. The respondent nos.1, 2, 3 and 5 are further restrained from creating any third-party interest/right/title in respect of any unencumbered immoveable assets for a sum as has been awarded in favour of the petitioner by way of the Arbitral Award dated 22.12.2022, till further orders.

22. List on 9th May, 2023.

NAVIN CHAWLA, J

MARCH 7, 2023*/rv/Rk*

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