Group of Companies Doctrine in Arbitration Law - The Supreme Court of India refers the Group of Companies Doctrine to a Larger Bench to re-examine the intricacies of the doctrine.

I. Introduction

The Hon'ble Supreme Court of India ("**Apex Court**") in the case of *Cox and Kings Limited v. SAP India Private Limited & Anr.* was called upon to examine the 'group of companies doctrine'("**doctrine**"). In particular, the Hon'ble Apex Court examined its own precedents and made key observations on the principle of party autonomy under arbitration law and corporate personality under company law.

The Court opined that arbitration being a creature of contract is characterised by party autonomy and consent. *However, one of the most challenging aspects of arbitration practise relate to multi-party and multi claim proceedings.* Generally, arbitration involves parties who have entered into an arbitration agreement with the intent to resolve their disputes by arbitration. However, the use of the doctrine allows binding third parties to an arbitration clause by tacit consent.

The Court also raised the important question of what the extension of the arbitration agreement by employing the doctrine entails. The application of the doctrine to extend the arbitration agreement to non-signatories also raises the question of extension of the Arbitral Tribunal's jurisdiction to such non signatories. How does one reconcile a law rooted in ad-idem consent with the concept of binding non signatories and third parties?

Vide order dated 6th May 2022 ("**Order**"), the Apex Court examined the Indian and foreign jurisprudence on the doctrine and by a majority of 2:1 opined that its own precedents are *based more on economics and convenience rather than law*. Having opined this, the majority referred the issue to a Larger Bench. Hon'ble Mr. Justice Surya Kant passed a separate dissenting judgment opining that whilst the doctrine is required to be defined it cannot be obliterated as it forms an integral part of Indian arbitral jurisprudence.

In this news alert we have discussed the key observations and analysis of the Supreme Court.

II. Judicial Development of the Group of Companies Doctrine

A. Foreign Law

i. ***Dow Chemical France, the Dow Chemical Company v. Isover Saint***

Gobain[1]

The case of Dow Chemical is the origination point of the doctrine.

In this case, subsidiaries of Dow Chemicals initiated Arbitration proceedings against Isover. Isover objected to jurisdiction on the grounds that some of the subsidiaries of Dow Chemicals were not signatories to the Arbitration Agreement.

The ICC rejected Isover's objection on two grounds: a) that the subsidiaries had an effective role in the performance of the agreement between the parent company and Isover and b) that the subsidiary companies were controlled and directed by the parent company, and thus they were entitled to agitate their claims in arbitration.

Pertinently, this was a case where the non-signatories did not have an objection to being bound by the arbitration clause.

ii. ***Peterson Farms Inc. v. C & M Farming Ltd.***[2]

An arbitral award was challenged before the Queen's Bench Division (Commercial Court), UK, wherein damages were awarded not only to the Claimant Company but also the group companies. The said award was set aside, and it was categorically stated that the group of companies doctrine does not form a part of English law. The Court held therein:

"65. In commercial terms the creation of a corporate structure is by definition designed to create separate legal entities for entirely legitimate purposes which would often if not usually be defeated by any general agency relationship between them…"

iii. ***Tanning Research Laboratories Inc. v. O'Brien***[3]

In this case, the Australian High Court interpreted the phrase "claiming through and under" as follows:

"…A person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of

[1] *(ICC Case No. 4131)*
[2] *[2004] EWHC 121 (Comm)*
[3] *(1990) 169 CLR 332*

defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence…"

The judgment of the Australian High Court and its interpretation of claiming 'through' and 'under' is in alignment with the development of the doctrine by the Apex Court and subsequent legislative changes to the Indian Arbitration and Conciliation Act, 1996 ("**Act**"), as elaborated hereinbelow.

B. **Indian Law**

i. ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya***[4]

In the facts of this case, the Respondents in the SLP had filed a suit for dissolution of the partnership deed. However, the Appellant filed an application under Section 8 of the Act which was dismissed by the High Court on the basis that the suit so filed by the Respondents sought reliefs which were not covered by the arbitration agreement between the parties. Upholding the High Court's decision, the Apex Court held as follows :

"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."

ii. ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.***[5] **("Chloro Control")**

The doctrine was expounded by a three-judge bench of the Apex Court vide its judgment in this case. The Apex Court had to formulate a perspective that would provide the best fit for the doctrine in the Indian context under Part II of the Act. Since many foreign parties were

[4] *(2003) 5 SCC 531*
[5] *(2013)1 SCC 641*

involved, the Court had to invoke Section 45[6] of the Act for appointment of an arbitrator. Drawing a distinction between Section 45 and Section 8 of the Act, the Apex Court held as follows:

"69. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the court shall refer them to arbitration…"

"…70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act…"

"…100. We have already referred to the judgments of various courts that state that arbitration could be possible between a signatory to an agreement and a third party. Of course, heavy onus lies on that party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated under Section 45 of the 1996 Act…"

The Apex Court held that reference to arbitration by non-signatories is a legal right which is subject to the provisions of Section 44 and Section 45 read with Schedule I of the Act. Further, the Apex Court in Chloro Control emphasised on two aspects: (i) the legal relationship between the non-signatory and the signatory to the arbitration agreement; and (ii) that the parties to the arbitration are ad-idem on joining the non-signatory to the arbitration.

iii. ***Cheran Properties Ltd. v. Kasturi and Sons Ltd.***[7]

[6] *45 Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

[7] *(2018) 16 SCC 413*

The doctrine was further expounded by the Apex Court in this case. The Apex Court interpreted Section 35[8] of the Act to enforce an award against a non-signatory, even though it did not participate in the proceedings.

iv. ***Mahanagar Telephone Nigam Ltd. v. Canara Bank[9]***

Pursuant thereto, the Apex Court further enlarged the scope of the doctrine and held that the doctrine could be utilized to bind a third party to an arbitration if a tight corporate group structure constituting a single economic reality existed. In this case the Court held as follows:

"10.6. The circumstances in which the "group of companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group. [ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.]"

v. ***Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd. & Anr.[10]***

The Apex Court, very recently, held that the following factors may be considered while deciding whether a non-signatory company within a group of companies would be bound by the arbitration agreement:

[8] *35. Finality of arbitral awards.—Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.*
[9] *(2020) 12 SCC 767*
[10] *Civil Appeal No. 2042 of 2022*

i. The mutual intent of the parties;
ii. The relationship of a non-signatory to a party which is signatory to the agreement;
iii. The commonality of the subject matter;
iv. The composite nature of the transaction; and
v. The performance of the contract.

III. Legislative Developments

A. 246th Law Commission Report

Pursuant to the Chloro Control judgment, with a view to give legislative enactment to the interpretation laid down in Chloro Control, the Law Commission made the following recommendation:

"64. This interpretation given by the Hon'ble Supreme Court follows from the wording of Section 45 of the Act which recognizes the right of a "person claiming through or under [a party]" to apply to a judicial authority to refer the parties to arbitration. The same language is also to be found in Section 54 of the Act. This language is however, absent in the corresponding provision of Section 8 of the Act. It is similarly absent in the other relevant provisions, where the context would demand that a party includes also a "person claiming through or under such party". To cure this anomaly, the Commission proposes an amendment to the definition of "party" under Section 2 (h) of the Act."

B. The Arbitration and Conciliation (Amendment) Act, 2015[11]

The Legislature in its wisdom did not amend the definition of Section 2(1)(h)[12] of the Act but Section 8 of the Act was amended which now reads as follows:

"(1). A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

IV. Conclusion

Vide the said order, the Apex Court analysed the law on non-signatories being bound

[11] *Act 3 of 2016*
[12] *(h) "party" means a party to an arbitration agreement.*

by arbitration agreements and expressed discordance with the corpus of cases. The majority judgment authored by the Hon'ble Chief Justice of India observes that whilst Chloro Control specifically alludes to the subjective intention of the parties to the arbitration agreement to bind non-signatories to arbitration, the consequent expansion of the doctrine in subsequent judgments seeks joinder of third parties in their own right.

The Apex Court whilst referring the expansion of the doctrine in Chloro Control and subsequent judgments to a larger bench, raises significant questions on the application and expansion of the doctrine when seen in the context of party autonomy and the doctrine of distinct legal corporate entities. The majority judgment states *"...38...The aforesaid exposition in the above case clearly indicates an understanding of the doctrine which cannot be sustainable in a jurisdiction which respects party autonomy."*

On the other hand, Justice Surya Kant in his dissenting judgment states that the inconsistencies in the precedents of the Apex Court can easily be remedied by an authoritative determination of the contours of the doctrine rather than a *wholesale uprooting of the same from Indian Arbitration Law*. Justice Surya Kant has also interestingly observed that the group of companies' doctrine, when formulated in its modern sense, does not affect the separate legal entity principle in company law. The order mentions that corporate law doctrines such as piercing the veil and alter ego are means to identify fraudulent activity by a non-signatory which would then provide the legal justification for application of the group of companies' doctrine to bind that non-signatory to the arbitration. It appears that joining a third party to arbitration based on the convergence of a group of companies as a "single economic unit" is no longer the norm under the group of companies' doctrine. Instead, the standard is premised primarily on implied consent drawn from the acts and conduct of an entity within the group of companies.

The factum of consent plays a key role in arbitrations. The existence of a group of companies lends a unique dimension to the issue of conduct or consent. A reading of the cases highlights that in a majority of them, a party's conduct should not necessarily be regarded as an expression of a its implied consent; rather a party's substantial involvement in the negotiation and performance of the contract and the knowledge of the existence of the arbitration clause have a standing of their own. Factors such as strong organizational and financial links, whether the companies are a single economic unit, the substantial role played during the negotiation and performance of the agreement, knowledge of the arbitration clause, weigh in heavily whilst the courts are considering the applicability of the 'group of companies' doctrine. Thus, whilst negotiating transactions involving multiple companies from the same group, it would be prudent to agree on the roles and liabilities and the manner in which the liability could be imputed on each company at the time of entering into the contract. This, once again, highlights the importance of negotiating agreements and including clauses

which are clear and succinct.

To conclude, essentially, the following questions have been referred to a larger bench to expound on the intricacies of the group of companies doctrine:

i. Whether phrase 'claiming through or under' in Sections 8 and 11 could be interpreted to include 'Group of Companies' doctrine?

ii. Whether the 'Group of Companies' doctrine as expounded by the Chloro Control judgment and subsequent judgments are valid in law?

Whilst the question as to the applicability of the doctrine as interpretated in Chloro Control and expanded in subsequent judgments remains sub judice, we certainly look forward to a more detailed analysis of the doctrine by the Apex Court and its applicability keeping in mind the need to adequately harmonise party autonomy with piercing the corporate veil. Whilst a straight-jacket formula on the applicability of the doctrine would be removed from commercial and economic realities, should the larger Bench of the Court uphold the validity of the doctrine in Indian Arbitration Law, clear guidelines on its applicability would definitely aid its effective implementation by Courts in India.

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