ANALYZING THE CONTOURS OF APPLICATION OF THE 'GROUP OF COMPANIES' DOCTRINE IN INDIA IN THE WAKE OF 'COX & KINGS' DECISION

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ABSTRACT

Businesses and other commercial transactions in modern times are lush with multi-party contracts and multiple contracts, where not every party involved signs each of the contracts or agreements but is a party to the contracts nonetheless. Things become difficult when the contracts also contain the dispute resolution clause and the parties involved try to ascertain whether a certain party is bound by the arbitration agreement or not, since they are non-signatory to the contracts themselves and 'signing' a contract remains an obvious declaration of consent. Arbitration being a dispute resolution method based entirely on 'consent' makes it difficult to reach a satisfactory solution in these instances. 'Group of Companies' doctrine emerged out of this need as a method to bind even the non-signatories to arbitration agreement based on the intentions of the parties involved or implied consent ascertained through the conduct of the parties involved. Indian Courts have been using this doctrine for binding non-signatories to arbitration agreements when called for but there remained some inconsistencies with the application of the doctrine. However, a recent judgment of the Supreme Court in December 2023 has set out the parameters of the application of the doctrine clarifying the different apprehensions expressed by the referring bench. This Case Comment explains the decision of the Supreme Court in the case and analyses the implications of the decision as well.

1. INTRODUCTION

Arbitration is a "*voluntary"* method of dispute resolution which means it's a creature of consent. Generally, only the signatories are bound by the agreements but in the times of multi-party contracts and multiple contracts situations sometimes arise that necessitate the binding of non-signatories to the arbitration agreement. Several doctrines and principles have been evolved to help with this endeavour, one of them being the 'group of companies' doctrine.

As the name suggests, the "group of companies" doctrine provides, in broad terms, that a non-signatory may be bound by an arbitration agreement if it forms part of the same group of companies as a signatory and all the parties to the arbitration agreement mutually intend that the non-signatory be bound by it. The parties' intentions are typically ascertained through their conduct, which includes a consideration of whether the non-signatory participated in the negotiation, performance, or termination of the contract. Authorities emphasise that the mere existence of an affiliate relationship between a signatory and a non-signatory cannot be the basis for consent. Unlike other non-signatory theories that find their roots in domestic law principles, the "group of companies" doctrine stems from international arbitration jurisprudence.

In *Cox and Kings v. SAP India Pvt. Ltd. & Anr.*[1] the Constitution Bench of the Hon'ble Supreme Court was called upon to deliberate on the Group of Companies doctrine and its validity in the context of the Arbitration and Conciliation Act, of 1996. The decision in Cox vs. SAP was a response to a reference made in *Cox and Kings vs. SAP India Pvt. Ltd. & Anr.*[2], which sought to revisit the 'group of companies' doctrine as first applied in *Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc.*[3]

In a judgment issued by a constitutional bench consisting of five judges, on 6th December 2023, Mr Chief Justice Dhananjaya Chandrachud clarified that the 'group of companies' doctrine has an important role to play in Indian arbitration jurisprudence.

[1] (2023) INSC 1051
[2] (2022) 8 SCC 1
[3] (2013) 1 SCC 641

This paper discusses the essence of the judgment along with the relevant facts, analysis and implications of the judgment.

2. FACTS OF THE CASE

In 2010 Cox and Kings ("C&K") and SAP India entered into a software licensing agreement. As C&K was developing its e-commerce platform in October 2015, SAP India suggested implementing a new software application. Following that, the two organisations entered into three agreements to make use of SAP's 'Hybris Solution' software. The General terms and conditions clause between the parties included an arbitration clause which also stated that the arbitration would take place in Mumbai and the procedure would be as per the Act[4].

In November 2016, C&K terminated the contract and demanded a refund from SAP on account of the "Hybrid" Technology not working, in response, SAP India issued notice to begin arbitration proceedings citing that the contract had been wrongfully terminated. The C&K issued notice to begin arbitration against SAP India Private Limited as well as against its parent company SAP SE GmbH, which was not a signatory to the contract containing the arbitration agreement. After the SAP entities failed to appoint an arbitrator, Cox and Kings applied to the court under Section 11 of the Act to appoint an arbitrator on their behalf and relied on Chloro Controls to argue that the non-signatory parent company – SAP SE GmbH – was bound by the arbitration agreement under the 'group of companies' doctrine.

In 2022, a 3-judge bench led by the then CJI N.V Ramana referred the matter to the constitutional bench. The questions of law to be considered by the Bench were:

a. Whether the Group of Companies Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision;

b. Whether the Group of Companies Doctrine should continue to be invoked based on the principle of 'single economic reality';

c. Whether the Group of Companies Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties; and

[4] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

d. Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies Doctrine into operation even in the absence of implied consent.[5]

3. ANALYSIS AND IMPLICATIONS OF THE JUDGMENT

The Constitutional Bench while delivering the judgment validated the retention of the 'group of companies' doctrine as a part of Indian arbitration jurisprudence while concurring that the prior approach of the Court in Chloro Controls *(Supra)* was erroneous only to the extent that it traced the 'group of companies' doctrine to the phrase "claiming through or under" and held that this move was against the well-established principles of contract law and corporate law.[6]

Other key questions answered by the Bench are given below.

The definition of "Parties":

The Bench clarified that the approach of the Court in applying the doctrine in the Chloro Controls case was wrong to the extent that it did not consider the existence of non-signatory parties to be independent, rather it made them dependent on signatory parties thus seriously crippling their rights. The Court stated that "the phrase *'claiming through or under'* only applies to entities acting in a derivative capacity and not with respect to the joinder of parties in their own right".[7] The Bench, in essence, held that the non-signatories to the arbitration agreement will be held to have their existence independent of the signatories to the arbitration agreement. It further clarified that as per the definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatories as well as non-signatories to the arbitration agreement and therefore does not prevent the application of the 'group of companies' doctrine.[8]

The Court held that the non-signatories would be liable to be bound by the arbitration agreement if the consent of all the parties interested or involved to do so, is apparent through

[5] *Id* at note 1
[6] *Id.* at note 1 para 165 pt. j
[7] *Id* at note 1 para 146
[8] *Id* at note 1 para 149.

their conduct or action and in addition, such joinder would be legal under the provisions of the Indian Arbitration Act of 1996.

Consent-based doctrine:

The Court held that the 'group of companies' doctrine being a "consent-based doctrine" similar to other consent-based doctrines such as agency, assignment, assumption, and guarantee, is applied to identify the common intention of the parties to bind the non-signatory to the arbitration agreement.[9] The intention according to the Court is to be determined based on a "holistic" application of the factors previously identified in the case of *Oil and Natural Gas Corporation v. Discovery Enterprises*,[10] which are:

i.) The mutual intent of the parties;

ii.) The relationship of a non-signatory to a party which is a signatory to the agreement;

iii.) The commonality of the subject matter;

iv.) The composite nature of the transactions; and

v.) The performance of the contract.[11]

The Court has also made it clear that the fact that the non-signatory and the signatory belong to a "single economic unit" cannot be "the sole basis for invoking the group of companies doctrine."[12]

Different from other methods used for binding third parties to arbitration:

The Court clarified that the 'group of companies' doctrine differs from the veil piercing or alter ego principle. The latter principle does not allow for the consideration of corporate separateness and does not take into account the intentions of the parties given the overriding considerations of equity and good faith. In contrast, the 'group of companies' doctrine facilitates the identification of the parties based on mutual consent without intruding on the separate legal

[9] *Id.* at note 1 Para 101
[10] (2022) 8 SCC 42
[11] *Id.* at note 1 Para 127-128
[12] *Id.* at note 1 Para 165(h)

personality of the entities within a corporate group. The Court on this basis held that the "principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine."[13]

The far-reaching consequences of this decision is that the Delhi High Court in the case of *Vingro Developers Private Limited v. Nitya Shree Developers Private Limited*[14] refused to join the Directors of a company to the arbitration agreement on the behest of the petitioners citing that the 'group of companies' doctrine is not to be read in tandem with piercing of the corporate veil to apply the doctrine into situations where the ingredient of consent remains absent. This clarification of the Court hence helps to safeguard the employees of a company who otherwise would have been dragged into the adjudication proceedings owing to them being agents of their principal.

Interim measures under Section 9:

The Court explained that since the 'group of companies' doctrine is based on determining the mutual intention to join a non-signatory as a "veritable" party to the arbitration agreement in their own right, the requirement under Section 9 which allows a "party" to approach the court to seek interim measures is fulfilled, which allows a non-signatory to approach the court for seeking interim measures under the Section 9 of the Act. However, the Court clarified that the option would be open to the non-signatory only after the tribunal determines that such non-signatory is a party to the arbitration agreement.[15]

This direction of the Apex Court has the potential to complicate the matters of granting interim measures for the preservation of the subject matter if the power does not reside with the courts at least on a *prima facie* basis. This is because, as soon as a plaintiff applies for relief, the respondent(s) will claim that the issue is an arbitrable one and that the plaintiff is a non-signatory party to the agreement hence, the issue needs to be decided by arbitration. The matter then would need to be referred to the arbitral tribunal who will first decide whether or not the party could be joined as a party to the arbitration agreement. Only then can the person again prefer the court for interim measures under Section 9 of the Act of 1996, if the tribunal decides that they are a party to the arbitration agreement. This would make it difficult for the

[13] *Id.* at note 1 Para 104
[14] MANU/DE/0504/2024
[15] *Id.* at note 1 Para 152-153

person/entity seeking immediate relief to ensure the preservation of the subject matter which might lead to irreparable loss.

Also, the reading of Section 9(3) of the Arbitration Act provides that the court is not to entertain any application for interim measures once the arbitral tribunal has been constituted. This presents a situation of procedural confusion as the court is barred from entertaining such an application at that stage, and the non-signatory is not able to move forward with such an application even under Section 17 that is, interim measures from the tribunal itself. This renders the situation of the non-signatory to seek interim measures utterly bereft of any recourse.

The powers of the referral court in applications under Sections 8 and 11:

The Court has also clarified that the arbitral tribunal, and not the referral court, should decide on the issue of joinder of a non-signatory to the arbitration proceeding. When a non-signatory person or entity is thus arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement and leave the determination of the issue regarding the joinder of such party to the arbitral tribunal.[16]

The Bombay High Court in the case of *Cardinal Energy and Infra Structure Private Ltd. v. Subramanya Construction and Development Co. Ltd*.[17] has interpreted that the "Arbitrator does have the power/authority to implead the non-signatory if such non-signatories are otherwise liable to be impleaded based on the 'group of companies' doctrine, not depending on whether or not there has been any prayer for the impleadment of a non-signatory in the application under Section 11 of the Arbitration Act." The Court did not find "any merit in the submission that in the event the issue of joinder of a non-signatory to an Arbitration Agreement is not raised before the Referral Court, the Arbitral Tribunal on its own accord does not have the power to determine this issue and/or allow the impleadment of a non-signatory to an Arbitration Agreement."

The burden of proof to prove the consent of the non-signatory:

The Court has also clarified that the party seeking the joinder of a non-signatory shall bear the burden of proof of satisfying the factors (as mentioned above) set forth by the Court for such

[16] *Id.* at note 1 Para 163
[17] MANU/MH/2164/2024

joinder to the satisfaction of the court or arbitral tribunal.[18]

4. CONCLUSIONS AND WAY FORWARD

To conclude it could be said that, while the decision and clarification provided by the Court in the present case is commendable and helpful in better understanding the scope of the application of the doctrine, it unfortunately suffers through some problems still. The issue of seeking interim measures under Section 9 and Section 17 of the Act by non-signatories is an important lacuna that in practicality frustrates the provision of such measures as the non-signatories do not get the benefit of such provisions for they do not qualify for applying for the relief owing to the insistence of the Court that the arbitral tribunal alone will be able to determine whether the non-signatory is a party to the arbitration agreement or not and the caveat that non-signatories can apply for such relief only after such determination.

The possible way out in such a situation is that the Court must either allow the non-signatories to apply for such reliefs after determining the issue of their joinder on a prima facie basis or decide such a matter of temporary injunctions on the merit alone of the cases completely separate from arbitral proceeding but with the condition that the tribunal in such cases will be empowered to alter such interim measure if it funds such alteration necessary or fit to move forward with. Of course, the party applying for such interim measure in those cases must be ready to furnish security as is custom for providing such reliefs.

Another possible way forward applies to the parties themselves, that is, the parties while entering into arbitration agreements must pay due diligence and consider all such implications, especially in cases involving a Group of Companies entering into such multi-party contracts and signing multiple contracts.

As a concluding remark, it is sufficient to state that the approach of India in the application of the 'group of companies' doctrine in the wake of the Cox & Kings v. SAP Case is far-reaching in its implications but also suffers from some lacunae which hopefully with time and needs will be rectified.

[18] *Id.* at note 1 Para 111