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The doctrinal ingredients of the doctrine 'Group of Companies' - Supreme Court refers issue to Larger Bench

Cox and Kings Limited v. SAP India Private Limited & Anr.

Case No.	**Arbitration Petition (civil) No. 38 OF 2020**
Date	**06 May 2022**
Court	**Supreme Court of India**
Coram	**Hon'ble Mr. Justice N. V. Ramana**
	Hon'ble Mr. Justice A.S. Bopanna
	Hon'ble Mr. Justice Surya Kant

1. BRIEF FACTS:

1.1 On 14.12.2020, Cox and Kings Limited ("**Petitioner**") entered into SAP Software End User License Agreement and SAP Enterprise Support Schedule (**"Software Agreement"**) under which the Petitioner were made licensee of ERP software which was developed and owned by SAP India Private Limited ("**Respondent No.1**")[1].

1.2 During 2015, while the Petitioner was developing its own e-commerce platform, the Respondents recommended a Hybris Solution (**"Hybris Solution"**) to the Petitioner as it would be 90% compatible with the Petitioner's own software. Respondents also claimed that this would be in the Petitioner's benefit as it would take only take 10 months to complete the remaining 10% customisation.

1.3 To execute the Hybris Solution, the aforesaid agreed arrangement was divided into 3 transactions-

- Software License and Support Agreement (**"Licence Agreement"**) dated 30.10.2015; and
- Services General Terms and Conditions Agreement ("**GTC**") dated 30.10.2015. This agreement had an Arbitration Clause as well.
- Another agreement for customisation (**"Customisation Agreement"**) of the software dated 16.11.2015 was entered into for the customization of the software.

1.4 Due to several issues in the implementation of the Hybris Solution, on 15.11.2016 the contractual framework in this regard was rescinded by the Petitioner. Following which, all the necessary resources were withdrawn by the Respondents. Aggrieved by the actions of the Respondents, Petitioner demanded for a refund of Rs. 45 crores.

1.5 As the disputes could not get resolved even after several meetings, on 29.10.2017 Respondent No. 1 invoked Arbitration Clause under GTC and demanded payment of Rs.17 crores on the ground of wrongful termination of the contract by the Petitioner. Arbitral Tribunal was constituted and important to note that the Respondent No. 2 was not made a part of these Arbitration Proceedings. Alongside, the Petitioner filled an Application under Section 16 of the Arbitration & Conciliation Act, 1996 (**"Act"**) contenting that all the four agreements were a composite transaction.

1.6 On 22.10.2019, National Company Law Tribunal ("**NCLT**") appointed an Interim Resolution Professional (**"IRP"**) to an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) made against the Petitioner. On 05.11.2019, NCLT directed the parties to adjourn the Arbitration Proceedings as Corporate Insolvency Resolution Process ("**CIRP**") was initiated.

1.7 On 07.11.2019, a second notice to invoking Arbitration was sent by the Petitioner arraying Respondent No. 2 this time, but no response was received from the Respondents' side. Aggrieved, the Petitioner filed an application before the Hon'ble Supreme Court of India under Section 11(6) and Section 11 (12) (a) of the Act praying constitution of an Arbitral Tribunal.

2. ISSUE RAISED:

[1] Respondent No. 2 was a German holding company of Respondent No. 1.

2.1 Whether the Group of Companies doctrine is applicable in the present arbitration proceedings to array Respondent No. 2 as a party?

3. SUBMISSIONS OF THE PETITIONER:

3.1 The Petitioner argued that the Respondent No. 1 was a wholly owned subsidiary of the Respondent No.2 and customisation would be only possible through the aid of Respondent No. 2, therefore all the four agreements and email exchanges between all the parties constitutes a composite agreement and will become part of the single transaction.

3.2 It relied on *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.*[2] to contend that arbitration can be invoked even against the non-signatories if mutual intention of the parties can be shown. It was also argued that as Section 11 of the Act has limited scope, the intervention by the Hon'ble Supreme Court should be minimal and thus the Court at this stage should only examine the existence of a valid arbitration agreement.

4. SUBMISSIONS OF THE RESPONDENT(s):

4.1 The Respondent No.1 argued that when the Clause 15.7 of the GTC was invoked, the Petitioner itself had challenged it on the ground of the GTC being *void ab initio*. Therefore, the reliance on the same provision cannot be invoked by the Petitioner in order to appoint an Arbitrator.

4.2 On the other hand, Respondent No. 2 argued that they were a separate and independent legal entity and does not have any business dealings in India. It was further claimed that neither they were signatory to the arbitration agreement nor have they expressly or impliedly agreed to be bound by the terms of the agreement.

4.3 The Respondent No. 2 further contented that the emails on which Petitioner has relied, does not reflect any participation from Respondent No. 2's side therefore they were not involved in the contract negotiation process. In addition, there was no consensus among the parties to be bound by the agreement, thus the doctrine of Group of Companies will not be applicable in the present case.

5. DECISION OF THE SUPREME COURT:

5.1 Hon'ble Supreme Court of India examined the Indian and foreign jurisprudence on the doctrine and by a majority of 2:1 there are various inconsistencies in the approached adopted by various Courts to apply the said doctrine – Some consider the economic factors while some the convenience. In light of this, the *Chloro Controls* judgement was referred for reconsideration to a larger bench.

Hon'ble Justice N. V. Ramana and Hon'ble Justice A. S. Bopanna:

5.2 **French law:**

5.2.1 The bench undertook a study, and opined that the said doctrine in its true essence had originated from the judgement in *Dow Chemical France, the Dow Chemical Company v. Isover Saint Gobain*[3] wherein the International Chamber of Commerce ("**ICC**") tribunal observed that, as the Dow Chemical Group operated as a single

[2] (2013) 1 SCC 641 ("Chloro Controls").
[3] ICC Case No. 4131 ("Dow Chemical").

economic reality and thus all the non-signatories were bound by the arbitration agreement. ICC opined that the "*scope and effect of the arbitration agreement should be determined on the basis of the common intent of the Parties"*.

5.2.2 The bench noted that in this case the non-signatories wished to join the arbitration proceedings which had already been initiated by its affiliates and did not resist it. The bench was of the view that this position, however, has never been evaluated in any of the previous precedents and the same needs to be examined.

5.3 English law:

5.3.1 The bench discussed various judgements under English law starting with *Roussel Uclaf v. G.D. Searle & Co. Limited and G. D. Searle & Co*[4] in which the term 'claiming through or under' was interpreted by the Court and had put a stay on the case against a company which was not a party to the arbitration agreement. It is to be noted that this case did not clearly indicate the acceptance of this doctrine in English law.

5.3.2 In another case, *Peterson Farms Inc. v. C & M Farming Ltd*[5] the Queen's Bench Division (Commercial Court) held that the doctrine of Group of Companies does not form a part of English law. The Commercial Court further stated that the general agency relationship would defeat the purpose of creating separate legal entities in a corporate structure.

5.3.3 The *Roussel* judgement was overruled in the *Mayor and Commonalty & Citizens of the City of London v. Ashok Sancheti*[6] in which the Court of Appeal held that *'mere legal or commercial connection is insufficient'* as it restricts the phrase 'claiming through or under.'

5.4 Swiss law:

5.4.1 The bench discovered that the Swiss Courts do not accept this doctrine under their Switzerland *de lege lata* – the municipal law of Switzerland.

5.5 Australian law:

5.5.1 The bench took a note of the judgement in *Tanning Research Laboratories Inc v. O'Brien*[7], where the High Court of Australia interpreted the phrase 'claiming through and under' and observed that when a company is undergoing liquidation, the liquidator may be a person who can 'claim through or under the company'.

5.6 Indian law:

5.6.1 Coming to the Indian jurisdiction, the bench started the discussion with *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*[8]*,* which was the first case which had dealt with this novel doctrine. In this case, by invoking Section 8 of the Act, the Court held that non- parties cannot be included in arbitration proceedings as the cause of action cannot be bifurcated in the said arbitration.

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[4] [1978] F.S.R 95 ("Roussel").
[5] [2004] EWHC 121 (Comm) ("Peterson").
[6] [2008] EWCA Civ 1283 ("Ashok Sancheti").
[7] (1990) 169 CLR 332 ("Tanning").
[8] (2003) 5 SCC 531 ("Sukanya").

5.6.2 The bench was of the view that the ratio of this case was restricted to Part I of the Act and cannot be useful for interpretation of Section 45 of the Act.

5.6.3 Next case in discussion was the *Chloro Controls*, wherein the Court had to invoke Section 45 of the Act as many foreign parties were involved. In this case, the Court noticed the distinction between the language of Section 8 and Section 45 of the Act.

> *"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." "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."*

5.6.4 Herein, the Court was of a firm opinion that a legal relationship has to exist between a non-signatory third party and a party which is a part of the arbitration agreement. The Court accepted the doctrine of Group of Companies as a sufficient basis to establish a legal relationship.

5.6.5 A contractual understanding of the doctrine without alluding to the contractual principles was also established under this case. This was reflected when the Court while discussing the ingredients of the doctrine, brought in the intention of the parties in order to check whether they were *ad-idem* to treat a non-signatory as being a party to the Arbitration Agreement.

5.6.6 The bench also noticed that the 246th Law Commission Report recommended certain amendments in Section 8 and Section 2(1)(h) of the Act. Pursuant to which the legislature only made amendments in Section 8(1) of the Act. The bench was of the view that the impact of not amending certain sections needs to be examined by the Court.

5.6.7 The interpretation of the *Chloro Controls* was further expanded in *Ameet Lalchand Shah v. Rishabh Enterprises*[9], wherein four parties had executed four agreements for commissioning a Photovoltaic Solar Plant in Uttar Pradesh. The Court by invoking the amended Section 8(1) of the Act, was of the view that arbitration will extend to the non-signatory parties as well.

5.6.8 Similarly, in *Cheran Properties Ltd. v. Kasturi & Sons Ltd*[10], the Court by interpreting Section 35 of the Act enforced an award against a non-signatory who was not even a part of the arbitration proceedings.

5.6.9 In *Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd*[11], the respondents were unable to prove the commonality of intention of the parties to be bound by arbitration agreement which ultimately led to the Court refusing to apply doctrine of Group of Companies.

5.6.10 In *Mahanagar Telephone Nigam Ltd. v. Canara Bank*[12], the Division bench of the Supreme Court observed that a third party can be attached to arbitration proceedings by using Group of Companies doctrine *if a tight corporate group structure constituting a single economic reality exists.*

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[9] (2018) 15 SCC 678 ("Ameet").
[10] (2018) 16 SCC 413 ("Cheran").
[11] (2019) 7 SCC 62 ("Reckitt").
[12] (2020) 12 SCC 767 ("Mahanagar").

5.6.11 The Hon'ble bench was of the view that all these cases have been decided by the Court without exploring the ambit of the phrase provided under Section 8 i.e., 'claiming through or under'. In fact, the bench further added that the ratio of *Chloro Controls*, where it was held that when parties are non-signatory to an arbitration agreement, it is left on the subjective intention of the parties to be bound by the arbitration proceedings. This issue felt to be relooked by the Court. The bench opined that *Chloro Controls* case has created a broad understanding of this Doctrine which is not suitable as it would go against distinct legal identities of companies and party autonomy.

5.6.12 It was very clear from the above discussions that the bench was of the view that the doctrine of Group of Companies should be applied with caution and an arbitration agreement will not extend to the non-signatory party merely on the ground that party is member of a group of affiliated companies.

5.6.13 The bench questioned the correctness of the laws laid down in *Chloro Controls* and the cases which followed afterwards and therefore referred the matter to the larger bench which may now undertake to look into the intricacies of the doctrine of Group of Companies and provide answers to following questions-

- Whether phrase 'claiming through or under' in Sections 8 and 11 could be interpreted to include 'Group of Companies' Doctrine?
- Whether the 'Group of companies' Doctrine as expounded by Chloro Control Case and subsequent judgments are valid in law?

Hon'ble Justice Surya Kant:

5.7 A concurring opinion was authored by Hon'ble Justice Surya Kant regarding the issue where he acknowledged the doctrine as an integral part of Indian arbitral jurisprudence. He discussed international arbitration practice on this issue and formulated a different set of questions which can be referred to the larger bench. His opinion formed on the basis of following precedents:

5.8 **French law:**

5.8.1 The bench noticed that an arbitral tribunal in the ICC Case Nos.7604 & 76104[13] had laid down distinct steps for application of this doctrine. The *first step* is of course to check the presence of a group and *second* is to determine the intention of the non-signatory third party. These have been widely followed by the French Courts.

5.8.2 In *Lakovoglou Prodomos and Co. v. SAS Amplitude*[14], the *Cour de Cassation* observed that simply the existence of a closely knit group of companies would be an insufficient ground to bind a third party to an arbitration agreement.

5.9 **Swiss law:**

5.9.1 The Swiss law sets a very high threshold for a third party to be joined in arbitration proceedings. A clear and unambiguous intent is required to be shown with an active involvement on the part of the third party, save for certain exceptions in the case of implied consent.

[13] ICC award in Cases No. 7604 and 7610 of 1995, 125 J Droit Int'l 1027 (1998) and 4 ICC Awards 510.
[14] Cour de Cas, 1st Civ Ch, 27 Mar 2007, no 04-20842, JCP E 2007, 2018 ("Lakovoglou").

5.10 **English law:**

5.10.1 Under English law, this doctrine has been rejected. It has been interpreted that the expression "claiming under or through" in Section 82(2) of the English Arbitration Act, 1996, is unrelated to the Group of Companies Doctrine.

5.11 **American law:**

5.11.1 Bench noted that American Courts rely on American Contract Law and Agency Law and hence *per se* Group of Companies doctrine is not utilised there. *American Courts have sometimes reached conclusions through reasoning that resembles the Group of Companies Doctrine but which are actually based on the principle of equitable estoppel*.[15]

5.12 The Hon'ble Justice was of the view that this doctrine had travelled a long way in the Indian jurisprudence and should not be uprooted altogether. The amendment made in Section 8 of the Act by the legislature depicts an acceptance of this Doctrine in India. Usually it is left for the judicial interpretation to decide which entities will become party to the Arbitration Agreement.

5.13 The standard for joining a third party to arbitration in now based on implied consent drawn from the acts and conduct of the entity. It should be noted that this doctrine is an exception to the general rule of arbitration. Even after the 2016 amendment, Courts have recognised and applied this Doctrine in exceptional cases.

6. PSL OPINION:

6.1 In this judgement, the Apex Court took upon the liberty to discuss the legal status of doctrine of Group of Companies in India and across leading other jurisdictions. The judgment ends on a cautionary note that extension of arbitration agreement to the non-signatories must be dealt with due diligence as there have been inconsistencies as reflected in various judgements. Even in the international jurisprudence, the application of this doctrine has been in varying forms. Also, in some select jurisdictions – the doctrine is not applied in the strict sense of Group of Companies, but depends upon consent and has applied standards such as estoppel and piercing of corporate veil.

6.2 Lately, the application of this doctrine was utilised by keeping in mind the economic and convenience factors rather than apply golden rule of interpretation of the Act. Necessary considerations like – participation of the non-signatory party in the execution of the agreement, its involvement in the performance and termination of the contract must come at play when a Court is tested to array a third party into private arbitration proceedings.

6.3 Therefore, there is a need to establish a set standard around this doctrine. Hopefully, the outcome of the larger bench could resolve and provide answers to the questions around the applicability of this doctrine.

[15] Astra Oil Co v Rover Navigation, Ltd, 344 F 3d 276, 277 (2003); Choctaw Generation LP v. Am Home Assur Co, 271 F 3d 403, 406-07 (2001).