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BINDING A NON-SIGNATORY TO AN ARBITRATION AGREEMENT: TRACING THE TRAJECTORY OF INDIAN LAW

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Abstract

The ease of doing any business in the globalized and inter-connected economies around the globe is dependent on a fast paced resolution of any disputes arising out of varied business transactions. The growth of arbitration as an alternate method of dispute resolution to traditional courts of law has greatly facilitated the resolution of business disputes. The businesses around the globe choose arbitration for a faster and qualitative adjudication of their disputes.

As the arbitration regime in India advance and evolve, there could be many issues for the legislature and the judiciary of the country to address. My focus in this research paper is on a very specific issue of referring a non-signatory of an arbitration agreement to an arbitration proceeding by the lower courts of the country. The modern business transactions often involve many stakeholders who are not necessarily are party to an agreement containing arbitration clause. However, they could possibly be very imperative to the resolution of any dispute arising out of relevant business transaction.

By analyzing the trends of legislative enactments and the judicial pronouncements of the apex court of the country, it becomes evident that the efforts are in line with the global standards of prioritizing businesses and their dispute resolutions in a time bound and qualitative manner. While party autonomy in any business and in their contractual engagements is paramount to a healthy business environment, the courts are obligated to pierce the veil on a group of companies, if the need arises, to protect the interests of all the stakeholders. A non-signatory of an agreement could well be within the reach of arbitration proceeding if the intent and the execution of business transaction obligates the same.

The modern businesses require standardized Indian arbitration regime in tune with the global standards. My research reflects that the Indian legislature and the Indian judiciary favors this trends and have made notable efforts to ensure the interests of the stakeholders are protected and at the same time the arbitration is evolved to facilitate the businesses in India.

Keywords : Arbitration Agreement, Enactments, Legislature, Judicial, Regine

Introduction

The extension of an arbitration agreement to a non-signatory concerns a situation where a party's standing to be made or not to be made a party to arbitration is considered. The pre-requisite to this consideration is the fact

that the party concerned has not been named or designated in the arbitration agreement. This extension is based on various legal recourses. The first of such recourse is based on the theory of implied consent, relying on the discernible intentions of the party. It is largely based on the principle of good faith. The other recourse could be to rely on the legal doctrines such as agent-principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel. This does not involve ascertaining the intention of the party but rather rely on the force of the applicable law. [1] Although there may be many fallouts and issues as regards the application of arbitration agreements on the non-signatories, this article focuses on the legislative and judicial trend in India to discover the principles and doctrines to refer the non-signatory to an arbitration proceedings.

The Judicial Trend

The Supreme Court of India reviewed, for the first time, the position of non-signatories to an arbitration agreement in Sukanya Holdings Pvt Ltd. V. Jayesh H. Pandya and Anr ("Sukanya Holdings"). [2] Sukanya Holdings had filed application under S.8 of the Arbitration and Conciliation Act, 1996 ("the Act") to enforce the arbitration agreement against the non-signatories. The court rejected the application to hold that the Act does not confer any power on the judiciary to add non-signatories to arbitration agreements and noted "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 S. 8."[3] In line with the Sukanya Holdings, the Apex Court declined to appoint an arbitrator in Indowind Energy Ltd. v. Wescare Ltd. & Anr. ("Indowind Enerfy"),[4] as a non-signatory to the concerned arbitration agreement was proposed to be joined in the arbitration proceedings. This was notwithstanding the fact that the non-signatory was an alter-ego of the signatory and shared a common registered office.[5]

Both of these cases were in relation to the domestic arbitration. To avoid the misconstruction of these judgments and avoid adverse implications on the cases of international commercial arbitration, the apex court addressed the issue in Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ori. ("Chloro Controls").[6] The main consideration before the court was to determine the scope of S.45 of the Act and to determine whether or not to authorize arbitration in case of multiple arbitration agreements having a common nucleus. The Supreme Court noted that, in light of similar wording being used in S.45 of the Act and Articles II of the New York Convention, the phrase "any person claiming through or under him" has to be construed as permitting reference upon a request by party to the arbitration agreement or any other person under or through him.[7]

Furthermore, applying the doctrine of Group Companies, the Supreme Court also analyzed the proximity of the relationship between the parties and different arbitration agreements. The court observed that when the agreement between the parties is part of a composite transaction and has a mother agreement, and when the performance of one is intrinsically linked to the others, a single reference to arbitration could be allowed by the courts. In doing so, however, the court added that each case should be determined on the basis of its factual matrix and that no straight jacket formula could be applied.[8]

These cases read together drew a confusing picture of extending arbitration agreements to the non-signatories in domestic arbitration vis-à-vis in international commercial arbitration. While the Sukanya Holdings and Indowind Energy completely rejected the extension of arbitration agreements to non-signatories in domestic

1 Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc. & Ors,. (2013) 1 S.C.C. 641.
2 Sukanya Holdings Pvt Ltd. V. Jayesh H. Pandya and Anr, A.I.R. 2003 S.C. 2252.
3 Id. 15.
4 Indowind Energy Ltd. v. Wescare Ltd. & Anr., (2010) 5 S.C.C. 306.
5 Id. 8.
6 Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc. & Ors,. (2013) 1 S.C.C. 641.
7 Id. 97.
8 Id. 165.2.

arbitration, Chloro Controls allowed it in an international commercial arbitration. All these were the consequence of the fundamental difference in the wordings of S.[8] and S.45 of the Act. While under S.[8] only the party to an arbitration agreement could apply for referring them to arbitration, S.45 allowed any person under or through a party to an arbitration agreement to apply for referring them to the arbitration. The lawmakers took note of it and amended S.[8] of the Act so as to permit any party or any other person under or through him to apply for reference.[9]

Although, these developments paved way for an arbitration agreement to be extended to non-signatories in domestic arbitration and Indian seated international arbitrations, the emphasized caveat to do so very judiciously by the apex court in Chloro Controls and only in exceptional cases of necessity[10] still puts dictum on all courts to get the whole extension right. If not so, the interests of third party could be jeopardized and the conflicting determinations by the courts could condense the arbitration domain and make it inefficacious. There is certainly a need for functional equilibrium between the arbitration proceedings and multiparty substantive background of the arbitral proceedings. The mere fact that the parties bound by a substantive contracts and their business coincides with the parties bound by the arbitration agreement concluded in those substantive contracts cannot be a justification to curb the procedural party autonomy.[11] The Supreme Court in Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Anr ("Ameet Lalchand")[12] had the opportunity to interpret the amended S.[8] of the Act and freshly decide upon the extension of arbitration agreements to the non-signatories in domestic arbitration. The court discussed Sukanya Holdings and passively relied on the obiter dictum in the Chloro Controls, to take the extreme stance of referring all the parties of the four agreements involved in the execution of a commercial project to arbitration. There was no arbitration agreement between the applicant and the respondent.[13]

The apex court could have deliberated more on two core points surrounding the issue, to make the law governing it more comprehensible for the arbitrators, legal experts, and the courts. Firstly, it did not expressly overruled Sukanya Holdings but by discussing the recommendations of the 245th Law Commission Report and the amendments to S.[8] of the Act, 14 passively restricted applicability of the case. But the principle laid down in Sukanya Holdings as to the matter which lies outside the scope of arbitration agreements cannot warrant the applicability of S.8 of the Act still forms the law of the arbitration domain. Secondly, the court ruled that if the agreements are inter-connected and several parties are involved in a single commercial contract executed through several agreements, then all the parties could be made amenable to the arbitration.[15] Though not expressly, the court has relied on the principles laid down in the Chloro Controls for referring non-signatories to arbitration by making reference to them while arriving at the judgment.

There was an evident gap between the standards of domestic arbitration and international commercial arbitration as regards the extension of arbitration agreements to the non-signatories. But the apex court in the cases like Cheran Properties and Sons v Kasturi & Sons Ltd ("Cheran Properties"),[16] and MTNL v Canara Bank ("MTNL"),[17] set the record straight so as to avoid any confusion in the minds of domestic arbitrators and courts across the country. The court validated the application of the doctrine of group companies in the matters concerning the domestic commercial arbitrations as well by piercing the corporate veil on the non signatories. The court observed that the modern

9 Arbitration and Conciliation (Amendment) Act, 2015, Sec.4.
10 Supra note 1 165.2.
11 Dr. Stavros Brekoulakis, The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room, 113 Penn St. L. Rev. 1165 (1179).
12 Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Anr., 2018 S.C.C. OnLine S.C. 487.
13 Id. 27.
14 Id. 28-31.
15 Id. 27.
16 Cheran Properties and Sons v Kasturi & Sons Ltd., (2018) 16 S.C.C. 413.
17 MTNL v Canara Bank, (2020) 12 S.C.C. 767.

business transactions are layered and often have multiple agreements and multiple parties involved in it. Therefore, the courts while deciding the reference of non- signatories to the arbitration ought to look at the nature of transaction and the circumstances surrounding it, ascribing a true business sense to the totality of the situation. If the transaction between the signatories reflects the intention to bind non-signatories to the business arrangement, then the non-signatory assumes the obligation to be bound by the relevant agreement and thus becomes referable to the arbitration proceedings.

Recently in the case of ONGC v DEPL ("ONGC"), [18] the Hon'ble supreme court elaborately discussed the trajectory of the issue to effectuate the doctrine of "Group Companies" in domestic arbitration and held:

"In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:

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 transaction; and
v. The performance of the contract."

While stating these principles or the factors on which any relevant issue of referring non signatory to the arbitration has to be tested, the court stated that the consent and party autonomy still are the undergirded of Section 7 of The Act. But at the same time, the courts can make a non signatory bound to arbitration on a consensual theory founded on assignment or agency, or on non-consensual basis such as estoppel or alter ego.

Conclusion

The policy makers and the apex court of the country are making striking efforts towards standardizing the arbitration regime in the country through a global outlook. Underst and ably, these efforts are needed if we are to become a global arbitration hub. However, the judicial trend and the pronouncements which could shape the arbitration domain in the country cannot afford to be going in separate direction.

While Chloro Controls was concerning the international commercial arbitration and laid down the tests such as "composite transaction" and "mother agreement" for extending the arbitration agreement to non-signatories, the Ameet Lalchand in an domestic arbitration matter did so by laying down the tests such as "single commercial project executed through several agreements" and "inter-connected agreements." The development of the doctrine of "Group Companies" got effectuated in the cases like Cheran Industries, MTNL and ONGC, paving way for the Indian arbitration space to promote itself to the international standards.

However, as observed by the Apex court in ONGC, consent and party autonomy still is the cornerstone of arbitration arrangement. If one looks at the modern commercial transactions, the companies execute project specific agreements with different stakeholders and at the same time many agreements could be entered upon to execute a single commercial project. Thus, the applicability of single principle or test in all the cases would appear arbitrary and become hindrance to the success of arbitration. It was only appropriate for the Hon'ble Supreme Court to observe that the tribunals have to understand the principles in the context of the relevant case, and adjudicate the applicability of doctrine of "Group Companies" only upon vetting of all the evidences, and discovery and inspection of the relevant agreements. Only then the legislative intent of bringing the Indian arbitration space to the highest global standards would fructify.

18 Civil Appeal no. 2042 of 2022.