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Case Comment: Cox and Kings Ltd v SAP India Pvt Ltd and Anr - Addressing the Elephant in the Room and Settling the Debate on the Group of Companies Doctrine

Ansh Sethi^a

^aNational Law University, Jodhpur, India

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INTRODUCTION

Corporate transactions are always complex, comprising many correspondences, complicated agreements, long timelines, etc.¹ Amidst this, if any dispute arises the settlement of such disputes itself is a challenge. Especially in contemporary times when there exists a web of companies with many of such companies entangled with each other in terms of ownership due to common shareholding by a main parent company, transactions involving such groups become all the way more complicated.² One such problem that arises out of such arrangements is that of settlement of disputes by arbitration agreements wherein the signatory companies to such arbitration proceedings also ask for non-signatories to be joined for such arbitration proceedings which clashes with the traditional concepts of privity of contract, consent, etc.³ The

¹ *Cox and Kings Ltd v SAP India Pvt Ltd and Anr* (2023) SCC OnLine SC 1634

² *Ibid*

³ *Ibid*

Supreme Court in the current case has addressed this issue and has balanced the principles of arbitration, legal doctrines, and contract law involved, thereby, giving a landmark judgement in the arbitration history of India.

FACTS OF THE CASE/BACKGROUND

To briefly summarise the factual scenario, Cox and Kings Ltd. (**Cox**), had entered into an agreement with SAP India Pvt. Ltd. (**SAP India**).⁴ The project that they had agreed to work on could not be completed by the efforts of SAP India due to which the parent company or the main company, SAP SE, in Germany, was asked for support.⁵ Despite the efforts and multiple extensions of the deadlines, the project could not be completed, therefore, the contract was terminated by Cox and a demand for a refund was raised.⁶ SAP India had issued a notice of arbitration but after some time, Cox, also issued a notice of arbitration, making SAP SE, also a party to it despite SAP SE not being a signatory to any of the agreements.

Due to the non-appointment of the arbitrators, Cox approached the Supreme Court and claimed the inclusion of SAP SE as a party to the arbitration despite it not being a signatory to the arbitration agreements, on the basis of Group of Companies Doctrine (**GOCD**). The three-judge bench of the SC referred it to a five-judge constitutional bench to adjudicate upon the concerned matter which recently delivered the judgement on December 6, 2023, thereby, settling an important question in the realm of arbitration dispute resolution in India.⁷

⁴ 'Group of Companies Doctrine in Arbitration Proceedings' (SCO, 18 December 2023) <<https://www.scobserver.in/cases/group-of-companies-doctrine-in-arbitration-proceedings/>> accessed 26 December 2023

⁵ Manas Rohilla and Smruti Kulkarni, 'Group of Companies Doctrine: Apex Court's Landmark Ruling in Cox and Kings' (*IndiaCorpLaw*, 10 December 2023) <<https://indiacorplaw.in/2023/12/group-of-companies-doctrine-apex-courts-landmark-ruling-in-cox-and-kings.html>> accessed 26 December 2023

⁶ Group of Companies Doctrine in Arbitration Proceedings (n 4)

⁷ *Ibid*

LEGAL ISSUES

The SC framed the following questions which were to be delved into:⁸

1. Whether the phrase ‘claiming through or under’ in Sections 8,⁹ and 11(6),¹⁰ of the Indian Arbitration and Conciliation Act, 1996 (IACA), could be interpreted to include the GOCD;
2. Whether the GOCD as expounded by *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.*,¹¹ (**Chloro case**) and subsequent judgments is valid in law;
3. Whether the GOCD should be read into Section 8 of the IACA or whether it can exist in Indian jurisprudence independent of any statutory provision;
4. Whether the GOCD should continue to be invoked on the basis of the principle of ‘single economic reality’;
5. Whether the GOCD should be construed as a means of interpreting implied consent or intent to arbitrate between the parties;
6. Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the GOCD into operation even in the absence of implied consent;
7. Whether the IACA allows the joinder of a non-signatory as a party to an arbitration agreement;
8. Whether Section 7,¹² allows for determination of an intention to arbitrate on the basis of the conduct of the parties.

OBSERVATIONS OF THE COURT

The SC considered various previous judgements given by it for deciding upon the matter and divided the scenario for considering the position of law in the concerned question, before and after the Chloro case to analyse the trajectory of the jurisdiction in such cases.¹³ Furthermore, the

⁸ *Cox and Kings Ltd v SAP India Pvt Ltd and Anr* (2023) SCC OnLine SC 1634

⁹ Arbitration and Conciliation Act 1996, s 8

¹⁰ Arbitration and Conciliation Act 1996, s 11

¹¹ *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641

¹² Arbitration and Conciliation Act 1996, s 7

¹³ Rohilla (n 5)

Court extensively examined the positions of International jurisdictions like France, Singapore, Switzerland and the U.S.A. and concluded that though GOCD was recognised by all but not universally accepted and that it was a fact-specific aspect to be determined from the objective evidence by the acts of the non-signatories to the contract containing the arbitration agreement.¹⁴ The Model law on arbitration by UNCITRAL was also considered and the decision was also based on the Model law's interpretation since IACA is also based upon the UNCITRAL Model law.

The Court concluded that non-signatories cannot forcibly be made parties to arbitration agreements since it would violate the principles of privity of contract and party autonomy, however, for multiparty contracts, the parties to an arbitration agreement itself need to be looked into by the Courts. In this regard, the Court mentioned that though the signature is a profound expression of consent it does not mean that signature is the only way to show consent for any such contractual obligation.¹⁵ Thus, the situations in the case of non-signatories, as opposed to third parties, mean the situations wherein consent to an arbitration agreement is expressed through means other than signature.¹⁶ Hence, concluding that the issue of being a 'party' to the arbitration agreement is an issue of consent, is needed to be concluded from the acts or conduct of the said party in question.¹⁷ This was said to have been based upon the principle of implied contract which was concluded to have been extended to not only classic contracts but to modern arbitration agreements as well which is also a form of a contract.¹⁸ Thus, Section 7 of the IACA was said to include the non-contractual parties whose consent for arbitration is to be derived from the conduct of such parties.m

The Court explained the Group of Companies as a set of separate firms linked together in formal or informal structures under the control of a parent company and in the Indian context as,

¹⁴ *Cox and Kings Ltd v SAP India Pvt Ltd and Anr* (2023) SCC OnLine SC 1634

¹⁵ *Ibid*

¹⁶ Aaliya Waziri, 'Cox and Kings; Supreme Court on Group of Companies Doctrine' (*LiveLaw*, 27 December 2023) <<https://www.livelaw.in/articles/cox-and-kings-supreme-court-arbitration-conciliation-act-245402?infinetscroll=1>> accessed 27 December 2023

¹⁷ *Ibid*

¹⁸ *Cox and Kings Ltd v SAP India Pvt Ltd and Anr* (2023) SCC OnLine SC 1634

“agglomeration of privately held and publicly traded firms operating in different lines of business, each of which is incorporated as a separate legal entity, but which are collectively under the entrepreneurial, financial, and strategic control of a common authority, typically a family, and are linked by trust-based relationships forged around a similar persona, ethnicity, or community.”¹⁹

In this regard, the Court concluded that GOCD aims to maintain the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatories to the arbitration agreements.²⁰ Furthermore, it held that justice and equity cannot be the grounds of invoking the arbitration agreements and that the intention of the group companies as per the facts and circumstances must be looked into for determining the parties to the arbitration agreement.²¹ The Court stated that a non-signatory can be said to be involved in the performance of a contract when it on actively assuming the obligations or performance upon itself, has had a positive, direct and substantial involvement in the negotiation or performance of the contract and that mere incidental involvements in the former incidents would not be sufficient to infer such consent.²² In this regard, the burden will be on the party seeking the joinder of the non-signatory to the arbitration agreement, to prove a conscious and deliberate involvement of the non-signatory based upon objective evidence as per the facts and circumstances of the case.²³

DECISION

In view of the authorities cited, arguments advanced and prayers put forward before the SC, it concluded that:

¹⁹ *Ibid*

²⁰ Vijay Purohit et al., ‘Group of companies doctrine: An analysis in view of Cox and Kings’ *Bar and Bench* (13 December 2023) <<https://www.barandbench.com/columns/group-companies-doctrine-analysis-view-cox-and-kings>> accessed 26 December 2023

²¹ Sherina Petit and Mark McMahon, ‘Indian Supreme Court issues landmark judgment on the application of the ‘Group of Companies’ doctrine’ (*Lexology*, 22 December 2023) <<https://www.lexology.com/library/detail.aspx?g=0e25d4a0-0380-4c52-8552-fe9ffb53c077>> accessed 26 December 2023

²² *Ibid*

²³ *Cox and Kings Ltd v SAP India Pvt Ltd and Anr* (2023) SCC OnLine SC 1634

- *'The definition of 'parties' under Section 2(1)(h) of the IACA read with Section 7 of the IACA includes both the signatory as well as non-signatory parties;*
- *The conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;*
- *The requirement of a written arbitration agreement under Section 7 of the IACA does not exclude the possibility of binding non-signatory parties;*
- *Under IACA, the concept of a 'party' is distinct and different from the concept of 'persons claiming through or under,' a party to the arbitration agreement;*
- *The underlying basis for the application of the GOCD rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement;*
- *The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the GOCD.*
- *The GOCD has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) of the IACA along with Section 7 of the IACA;*
- *To apply the GOCD, the Courts or Tribunals, as the case may be, have to consider all the cumulative factors laid down in Oil and Natural Gas Corporation Ltd. v Discovery Enterprises Pvt. Ltd. Resultantly, the principle of a single economic unit cannot be the sole basis for invoking the GOCD;*
- *The persons 'claiming through or under,' can only assert a right in a derivative capacity;*
- *The approach of SC in the Chloro case to the extent that it traced the GOCD to the phrase 'claiming through or under' is erroneous and against the well-established principles of Contract law and Corporate law;*
- *The GOCD should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements;*
- *At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement; and*

- *In the course of this judgment, any authoritative determination given by the SC, pertaining to the GOCD should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.*²⁴

ANALYSIS

The SC by balancing the principles of contract law with the arbitration act has given a clear stand on the applicability of the GOCD in the Indian parlance. This does not include any company or entity related to the signatory as a party to the arbitration agreement but at the same time does not exclude those related entities which by virtue of their acts can be said to be included as parties, thereby, settling the discord surrounding the issue. The guidelines in *ONGC Ltd. v Discovery Enterprises (P) Ltd.*,²⁵ consider (a) the mutual intent of the parties, (b) the relationship of a non-signatory to a signatory, (c) the commonality of the subject matter, (d) the composite nature of the transaction, and (d) performance of the contract, have been upheld to be looked into while applying the GOCD.²⁶ We must also note that though this judgement revolved around the GOCD but no restrictions on the application of other doctrines have been made, thereby, allowing for flexibility and keeping open the entry of any other pertinent doctrine for the interpretation and balancing of the IACA with other laws, thus, making way for a successful alternate dispute resolution industry in India.²⁷

Furthermore, the SC by recognising non-signatories as ‘parties’ to the arbitration agreement based on implied consent implies that the non-signatories do not derive their rights from the signatories and are rather parties in their own right owing to the mutual intention of both the signatories and the non-signatories.²⁸ This also will allow the non-signatories like the signatories to seek interim relief as opposed to the position held in the *Chloro Case*.²⁹ Hence, the judgement

²⁴ *Ibid*

²⁵ *Oil and Natural Gas Corporation Ltd v Discovery Enterprises Pvt Ltd* (2022) 8 SCC 42

²⁶ *Ibid*

²⁷ *Cox and Kings Ltd v SAP India Pvt Ltd and Anr* (2023) SCC OnLine SC 1634

²⁸ Aamir Kapadia and Shivam Yadav, ‘The Group of Companies Doctrine: Has The Dust Settled?’ (*Indian Review of Corporate and Commercial Laws*, 12 January 2024) <<https://www.irccl.in/post/the-group-of-companies-doctrine-has-the-dust-settled>> accessed 12 January 2024

²⁹ *Ibid*

is a step forward in resolving the emerging complexities of the arbitration industry in India, making way for a seamless out of the court dispute resolution, especially in cases involving complex and multi-faceted corporate structures involving multiple parties in the dispute

CONCLUSION

Therefore, the judgement has settled the long-due contention of adding non-signatory parties to the arbitral proceedings. Given the complex corporate structures that exist while executing mammoth projects, the acceptance of the GOCD in the Indian Arbitration jurisprudence for the settlement of multiparty disputes is a welcome step that upholds the principles of party autonomy and harmoniously construes it with the conventional principles of the Contract law.³⁰ Now that the dust has settled, non-signatory companies out of a corporate structure participating in the execution of the contracts must ensure that they do not unnecessarily take part in negotiations, etc., if they do not want to be involved in the arbitration proceedings since such participation may amount as their implied consent and may make a case for their involvement in disputes arising from such an arrangement even if they did not intend to be consent to such arbitration agreement.³¹

³⁰ Petit and McMahon (n 21)

³¹ 'Indian Supreme Court clarifies applicability of the 'Group Of Companies' Doctrine n Cox And Kings Ltd. v. SAP India Private Ltd.' (Herbert Smith Freehills, 14 December 2023)
<<https://hsfnotes.com/arbitration/2023/12/14/indian-supreme-court-clarifies-applicability-of-the-group-of-companies-doctrine-in-cox-and-kings-ltd-v-sap-india-private-ltd/>> accessed 26 December 2023