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CASE COMMENTARY ON COX AND KINGS LTD V. SAP INDIA PRIVATE LTD

~ *Sakina Juzar Vohra*

INTRODUCTION

The recent judgement by the Hon'ble Supreme Court of India in Cox and Kings Ltd v. SAP India Private Ltd.¹, delivered by a Five-Judge Constitutional Bench of Chief Justice of India DY Chandrachud and Justices PS Narasimha, Hrishikesh Roy, JB Pardiwala and Manoj Mishra, on December 6, 2023, marks a pivotal development in Indian arbitration jurisprudence. The court has affirmed the applicability of the "Group of Companies Doctrine," allowing non-signatories to be impleaded or made parties in arbitration proceedings under certain conditions. This decision, which originated from a referral by a three-judge Bench led by former CJI N.V Ramana to a larger bench for clarity on the scope and contours of the Doctrine.

BACKGROUND

In the 2010 case of Indowind Energy Ltd v. Wescare (I) Ltd.², the Supreme Court of India decided against including a non-signatory party in the arbitration agreement. The Court underscored several factors. It stated that arbitration could be initiated only by one signatory party against another signatory party. It also emphasized the need for a strict interpretation of the Act's provisions, specifically those that refer to "parties", and the Court ruled out any implied consent, highlighting the importance of explicit consent for non-signatories to be bound by an arbitration agreement.

The "Group of Companies Doctrine" in Indian Courts was first recognized in the landmark case of Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. in

¹ Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr., 2023 INSC 1051.

² Indowind Energy Ltd v. Wescare (I) Ltd, (2010) 5 SCC 306

2012³. This doctrine allows for a non-signatory company within the group to be bound by an arbitration agreement signed by another member⁴. The case involved several agreements which included an arbitration clause in the primary shareholders' agreement, even though not all entities signed it. When disagreements emerged, the Indian entities took the case to arbitration based on the clause in the agreement.

The Supreme Court, in *Chloro Controls*, held that non-signatories could be bound by arbitration agreements if they were integral to the transaction and claimed "through or under" a signatory party⁵. The Court decided that factors to examine the pleas were "the language of the contract" and "the intention of the parties."⁶

Following *Chloro Controls*, the Indian judiciary continued to explore and refine the doctrine. In *ONGC Ltd. v. Discovery Enterprises (P) Ltd.*⁷, the Supreme Court reiterated the factors that could bind a non-signatory to an arbitration agreement. In *Cheran Properties v. Kasturi & Sons*⁸, the Court enforced an arbitral award against a non-signatory, further illustrating the doctrine's applicability. However, the expansive application of the doctrine led to concerns about its consistency with principles like party autonomy and privity of contract. These concerns culminated in the present case.

FACTS

The travel company, Cox and Kings Ltd. and SAP India Pvt. Ltd., signed a software licensing agreement on December 14, 2010, to become SAP's software licensee. SAP India contacted Cox and Kings in 2015 while they were creating their e-commerce platform and suggested using their Hybris Solution.

Three agreements were signed by the parties, one of which was a General Terms and Conditions Agreement which included an arbitration clause requiring that future disputes will be resolved as per the Arbitration and Conciliation Act, 1996 with hearings to be held in Mumbai.

When Cox and Kings had difficulties with the Hybris Solution project, they sought assistance from the parent company of SAP, the SAP SE. Even with its involvement and assurances, the

³ *Chloro Controls India Private Limited v. Seven Trent Water Purification Inc.*, (2013) SCC 641, at para 149.

⁴ *Chloro Controls India Private Limited v. Seven Trent Water Purification Inc.*, at para 102

⁵ *Chloro Controls India Private Limited v. Seven Trent Water Purification Inc.*, at para 92-96

⁶ *Chloro Controls India Private Limited v. Seven Trent Water Purification Inc.*, at para 71.

⁷ *ONGC Ltd. v. Discovery Enterprises*, Civil Appeal No. 2042 of 2022.

⁸ *Cheran Properties v. Kasturi and Sons Ltd.*, (2018) 16 SCC 413, at para 24-28

project did not go as planned. As a result, Cox and Kings revoked the agreement in November 2016 and sought a compensation of ₹45 crores, alleging non fulfilment of contractual duties. SAP India filed for arbitration in retaliation claiming wrongful termination and requesting ₹17 crores in damages.

Since, Cox and Kings were facing insolvency, the National Company Law Tribunal (NCLT) decided to temporarily halt the arbitration process in November 2019. Despite SAP SE's non-signatory status to the first agreements, Cox and Kings still submitted a fresh arbitration notice, adding SAP SE as a party. Cox and Kings applied to the Supreme Court under Section 11 of the Arbitration and Conciliation Act, seeking the judicial appointment of an arbitrator, since SAP failed to do so.

Applying the "Group of Companies Doctrine," the petitioner contended that SAP SE ought to be a party to the arbitration on the grounds of its dominance over SAP India and its substantial contribution to the project. Cox and Kings argued that ownership of SAP India and the acts of SAP SE indicated implied consent to the arbitration agreement.

A three-judge Supreme Court panel led by former Chief Justice N.V. Ramana referred the case to a five-judge Constitution panel on May 6, 2022. The bench expressed doubts over the Arbitration Act's Group of Companies Doctrine's application and whether an arbitral tribunal's jurisdiction could include non-signatories. Along with Justice A.S. Bopanna, Justice Ramana stressed the importance of having a larger bench to properly establish the parameters of the doctrine. In agreement that the matter needed more investigation by a bigger bench, Justice Surya Kant agreed.

ISSUES

The key issues involved in the present case were:

- Can a non-signatories be included in an arbitration agreement as parties?
- If yes, what conditions allow for the inclusion of non-signatories as parties to an arbitration agreement?
- Is the Group of Companies doctrine applicable in the present case?

DECISION

The Supreme Court of India delivered a historic and comprehensive judgment that has far-reaching implications for arbitration law in the country. It ruled the applicability of the group of companies doctrine, affirming its compatibility with international standards while emphasizing the importance of consent in binding non-signatories to arbitration agreements. The Court clarified that the doctrine, rooted in mutual intent and corporate affiliation, does not violate the separate legal personality of entities within a corporate group, nor does it impede the principles of limited liability. The Court directed that determinations regarding the applicability of the group of companies doctrine should be made by the arbitral tribunal and not by a court⁹, ensuring minimal judicial intervention and expediting arbitration proceedings. This decision marks a significant step towards enhancing the efficiency and effectiveness of arbitration in India, aligning it with global arbitration practices.

ANALYSIS

To address the question of whether non-signatory parties could be bound by arbitration agreements, particularly in the context of corporate group structures, the Court embarked on a meticulous analysis of the principles governing arbitration agreements, emphasizing the fundamental importance of consent. While noting that the Arbitration and Conciliation Act 1996 mandates written agreements, it clarified that signatures from all parties are not necessary for an arbitration agreement to be valid and does not exclude the possibility of binding non-signatory parties if there exists a legal relationship¹⁰. It further explained the application of the Group of Companies doctrine and reaffirmed the principle that non-signatories can be bound by an arbitration agreement, on the basis of “harmonious reading of Section 2(1)(h) and Section 7 of the Act”¹¹. By explaining the scope of application of the doctrine, the court cautioned against an overly broad application, noting that Indian courts should not automatically extend arbitration jurisdiction to non-signatory entities solely based on their affiliation within a corporate group. The Court held that, for non-signatories, whether the parties intended or consented to be bound by the arbitration agreement is a critical decision determined by the courts.”¹² It underscored that consent could be inferred from the conduct of the parties involved.

Central to the Court's deliberation was the group of companies doctrine, a legal principle that allows for the inclusion of non-signatory parties in arbitration agreements. It held that the

⁹ Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr., at para 164

¹⁰Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr., at para 78

¹¹ Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 149

¹² Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 78

doctrine is similar to other “consent-based doctrines.”¹³ It reaffirmed the applicability of this doctrine, emphasizing its role in discerning the shared intention of parties engaged in complex commercial transactions within corporate groups. The Court elucidated that the doctrine operates on the basis of mutual intent and does not undermine the distinct legal identities of corporate entities.

The Court outlined various factors to take in consideration while applying the doctrine. These factors include the degree of involvement of the non-signatory in the performance of the contract¹⁴, the nature of the relationship between the non-signatory and the signatory¹⁵, the commonality of subject matter¹⁶, and the participation in a composite transaction¹⁷.

The Court emphasized that the distinct legal identities of entities within a corporate group are not violated by applying the doctrine. It came to the conclusion that a non-signatory who is subject to an arbitration agreement is recognised as a “party”, granting them the ability to seek interim measures from Indian courts under Section 9 of the Arbitration and Conciliation Act, but such relief can only be sought once the arbitral tribunal determines the non-signatory's status as a party to the arbitration agreement¹⁸.

The Court explained that determinations regarding the application of the group of companies doctrine should be made by the arbitral tribunal rather than the court. When parties apply to court for arbitration referral¹⁹ or arbitrator appointment²⁰, courts should only conduct a prima facie assessment of the arbitration agreement's existence²¹. This directive seeks to address concerns about potential delays and undue judicial interference in arbitration proceedings that might arise from the application of the Group of Companies doctrine.

CONCLUSION

In conclusion, the Supreme Court's decision in Cox and Kings represents a historical development in the interpretation of the "Group of Companies" Doctrine within the Arbitration Act. Through a thorough examination of past precedents and legal principles, the Court clarified that the application of the doctrine hinges on the mutual intent of the parties,

¹³ Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 101

¹⁴ Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 118.

¹⁵ Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 114.

¹⁶ Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 115.

¹⁷ Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 116-117.

¹⁸ Cox and Kings v. SAP India Pvt. Ltd. & Anr., at para 152-153

¹⁹ Section 8 of the Act.

²⁰ Section 11 of the Act.

²¹ Cox and Kings v. SAP India Pvt. Ltd. & Anr, at para 164.

rather than solely on specific legal phrases. By emphasizing a case-specific analysis and a contemporary understanding of consent, the Court underscored the Doctrine's role in elucidating the shared intention of parties in binding non-signatories to arbitration agreements. This landmark judgment not only provides clarity on the Doctrine's applicability but also promotes a more efficient arbitration process with minimal judicial intervention.