ANALYZING THE FEASIBILITY & LEGITIMACY OF THIRD-PARTY EXTENSION OF ARBITRATION AGREEMENT IN THE INDIAN ARBITRATION REGIME

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ABSTRACT

The decision of *Cox & Kings Ltd. v. SAP India Pvt. Ltd.* ***["Cox & Kings Ltd."]*** [1] has brought the issue of incorporating third parties to arbitration in to the foray, by referring this issue to a five-judge bench to decide the matter authoritatively. Several questions, such as, reconciliation of extension of arbitral agreement with party autonomy and other basic tenets of arbitration, and legitimacy of this practice under the scheme of Arbitration and Conciliation Act 1996, have been raised. While the third-party extension is invaluable in the present-day complex structure of transactions, lately the essentials and contours of this practice have been muddled up through various decision of the Apex Court. In this context, the feasibility and legitimacy of 'group of companies' doctrine, which has been questioned in the case of Cox *& Kings Ltd.*, has to be reassessed. In addition to dealing with this issue, the authors will also attempt to delineate the essentials required for the application of this doctrine. Furthermore, this article attempts to point out the flagrant errors committed by Apex Court in 'Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. & Anr. ***["Chloro Control Case"]***[2], wherein a confusion between the concepts of Joinder and Consolidation was apparent. Apart from this, a distressing pattern in application of this doctrine is flagged out in the post *Chloro Control* precedents. In conclusion, the authors are of the view that the five-judge bench referring the matter will have a lot of issues to settle conclusively, while keeping in mind the commercial need of the group of companies' doctrine.

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[1] Cox & Kings Ltd. v. SAP India Pvt. Ltd., Arbitration Petition , (Civil No. 38/2022).

[2] Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

I. INTRODUCTION

The legitimacy of extension of arbitration agreement to a non-signatory has been hotly debated over the course of years. Whereas, its supporters have, at various instances, highlighted its need in present day complex transactions, while its opponents have pointed out its incongruous position in the arbitration regime, which rests on principles of consent and party autonomy.[3] There are many ways in which arbitration agreements are extended to non-signatories such as agency, third-party beneficiary and equitable estoppel.[4] Group of Companies' doctrine is one such principle through which extension of arbitration agreements takes place to the affiliate companies of a group which are not signatories to the arbitration agreement .[5] While this doctrine has met a varying degree of acceptance around different jurisdictions, such as France[6], United States of America[7] and United Kingdom[8], Indian courts have been fairly amenable to application of this doctrine.[9] However, the contours of this doctrine are uncertain due to unclear mandates laid down in the judicial pronouncements.

In this context, a three-judge bench of the Supreme Court in the matters of *Cox & Kings Ltd. v. SAP India Pvt. Ltd.* ***["Cox & Kings Ltd."]***[10] has raised questions on the legitimacy of the doctrine and referred the matter to a five-judge bench to reconsider not only the application of group of companies doctrine but rather the very idea of extending the scope of arbitration agreement to non-signatories. The main argument of the bench against the validity of extension of arbitration agreement to non-signatory was its incompatibility to the arbitration regime, which is based on party autonomy and mutual consent.[11]

This article seeks to frame an argument in favor of the concept of extension of arbitration agreement to non-signatories and also point out the pitfalls in the application of this concept. In

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[3] Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?,* 2009 J. INT'L ARB. 647.
[4] Kushagra Jain &Vasundhara Sharan, *To Compel or not to Compel: Extension of Arbitration Agreements to Non-Signatories,* INDIACORPLAW (21st June 2021), available at https://indiacorplaw.in/2021/07/to-compel-or-not-to-compel-extension-of-arbitration-agreements-to-non-signatories.html ; Also See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (Transnational Publishers, 2nd ed., 2001).
[5] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION p. 1411 (2nd Edn., Kluwer Law International, 2014).
[6] United Steelworkers of America v. American Mfg. Co., 363 US 564 (1960).
[7] Joseph Abela Family Foundation v. Albert Abela Family Foundation et autres, Cour d'appel, 22 May 2008.
[8] Peterson Farms Inc. v. C&M Farming Ltd., (2004) 1 Lloyd's Rep 603 : 2004 EWHC 121 (Comm).
[9] Oil and Natural Gas Corporation Limited v. M/s Discovery Enterprises Pvt. Ltd. & Anr, Civil Appeal No. 2042 of 2022.
[10] Cox & Kings Ltd. v. SAP India Pvt. Ltd, Arbitration Petition, (Civil) No. 38/2020.
[11] *Id* ¶ 47.

order to do so the article, in Part II will seek to trace the jurisprudence of the Group of Companies doctrine leading up to the *Chloro Control Case* which established the Group of Companies doctrine in the Indian regime, which is currently being looked at by the five-judge bench, and will explain the distinction between the Group of Companies doctrine on basis of which joinder of parties can be achieved from the consolidation of arbitration agreements (multi claim arbitration).[12] Notably, this distinction was blurred in the case of *Chloro Control Case*. Part III will explain the judgment of *Chloro Control* and analyze the legislative response to it. In Part IV, the article will seek to trace the journey of this doctrine from the pronouncement of *Chloro Controls Case* and discover the ambiguities created in the application of this doctrine. Lastly, in Part V the article will conclude, by providing a brief analysis on the validity and need of this doctrine in the Indian regime.

II. BACKGROUND TO THE GROUP OF COMPANIES' DOCTRINE

The Group of Companies' doctrine has been cited by arbitral tribunals and courts to either 'extend' the arbitration agreement or 'bind' a non-signatory affiliate company of the contracting party to the arbitration agreement.[13]

This doctrine originally finds its inception in the case of *Dow Chemical Company v. Isover Saint Gobain*, (ICC Case No. 4131) ***["Dow Chemicals"]***.[14] The International Chamber of Commerce held that arbitration agreements could be extended to a third party on the basis of the "three-fold test" wherein the court has to look for three conjunctive requirements which are as follows:

I. Firstly, the parties have to establish a "tight group structure" that is to show a significant control of the parent company on the working of its group entities through organizational or financial links.

[12] *Id* ¶ 50.
[13] Darshini Prasad & Charlie Caher*., Group of Companies Doctrine - Assessing the Indian Approach*, 9 (2) INDIAN JOURNAL OF ARBITRATION LAW (2020) 33-50.
[14] Dow Chemical v. Isover-Saint-Gobain, ICC Award No. 4131.

II. Secondly, an active role and participation of the third party is to be established. This can be ascertained from the circumstances wherein the third party plays an active role in the negotiation, performance and termination of the parent contract.[15]

III. Thirdly, the facts in correspondence are to demonstrate the "common intent of the parties" to be bound by the arbitration agreement. The implied consent has to be demonstrated, by evidence such as exchange of letters, emails, invoices to ascertain the mutual intent of the third party to be a part of the arbitral agreement.

This test demonstrates that Group of Companies operating as a 'single economic entity', can be bound to an arbitration agreement by virtue of their collective role in the performance of contract and mutual intent. Thus, despite being a non-signatory, the third party can be joined to the arbitral proceedings basis the doctrine laid down in *Dow Chemical Case*.[16]

In the Indian context, multi-party arbitration first came under the radar of the Supreme Court in *Indowind Energy Ltd. v. Wescare (I) Ltd.**["Indowind Case"]***[17] In that case, the court refused to refer all the parties to single and composite arbitration owing to the non-signatory status of the third party and relied upon Section 8 of the Arbitration and Conciliation Act, 1996 (prior to its 2015 Amendment**)["A&C act"]**.[18] The court held that under the existing language of Section 8, only the *"parties"* to the agreement could be referred to arbitration. Therefore, the definition of the term *"party"* under Section 2(1)(h) restricted the scope of Section 8 only to the parties that had signed the agreement.

The restrictive approach taken by the court in *Indowind Case* was also reflected in the decision of *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya **["Sukanya Holdings"]***.[19] The Apex Court, in the said case, held that third parties cannot be subjected to the arbitration proceedings without formal consent to an arbitration agreement. Since, the third party is not a signatory to the arbitral agreement, until ratification, approval, adoption or confirmation of the agreement, no claim or no dispute can be the subject-matter of reference to the arbitration. Hence, these two cases completely eliminated the scope for extension of arbitral agreement to non-signatories.

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[15] *Id*; Also See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (Transnational Publishers, 2nd ed.,2001).
[16] *Id.*
[17] Indowind Energy Ltd. v. Wescare (I) Ltd., (2010) 5 SCC 306 ¶ 10.
[18], Arbitration and Conciliation Act, 1996, Section 8.
[19] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors., (2003) 5 SCC 351 ¶ 15.

At this juncture, it is necessary to distinguish the "Group of Companies" doctrine from the concept of "Group of Contracts". The "Group of Companies" doctrine can be applied to extend the arbitration agreement to third parties on basis of their role in contract negotiation and tight group structure. "Group of contracts" refers to arbitration agreements in separate contracts which could be referred to same tribunal on the basis of the fact that they form a part of same composite transaction.

Notably, even since the earlier days, courts took an accommodative approach towards 'multi-claim arbitration' (where two or more parties who enter into multiple contracts forming a composite transaction are referred to single arbitration) in *Olympus Superstructure Pvt. Ltd. v. Meena Vijay* Khetan ***["Olympus Superstructure Case"]***.[20] In this case, parties had entered into 6 agreements, i.e., 3 main agreements and 3 ancillary agreements, each having an arbitral clause. The main agreements were terminated due to dispute between the parties, which was later referred for arbitration. Further disputes also arose under the ancillary agreements. The Apex Court had to determine whether the disputes under the ancillary agreements were subject to independent arbitration agreements or whether they can be combined into a single and composite arbitration finding reference from the main agreement. The court noted that parties had entered into a complex transaction by executing multiple agreements towards a common object and purpose. It was noted that, since the Group of Contracts are inseparable and form a single composite transaction, the arbitration in these contracts can be referred to a single tribunal. So as to avoid a situation of conflicting awards on issue, which overlapped between the two arbitration agreements. Hence, the court fundamentally referred the parties to a single and composite arbitration owing to the fact that all agreements formed part of the same transaction.

The Apex Court also accepted 'multi-claim arbitration' in *P. R. Shah v. B.H.H. Securities*,[21] where it reasoned that arbitration agreements from multiple contracts could be consolidated and referred to a single composite proceeding in order to avoid a multiplicity of proceedings and conflicting decisions. This position was reiterated by the High Court of Delhi in *Global Infonet v. Lenovo*,[22] wherein the court consolidated the claims arising from 3 separate agreements

[20] Olympus Superstructure Pvt Ltd v. Meena Vijay Khetan, (1999) 5 SCC 651.
[21] P R Shah, Shares & Stock Brokers (P). Ltd v B H Securities (P) Ltd, (2012) 1 SCC 594.
[22] Global Infonet Distribution Pvt. Ltd. v. Lenovo (India) Pvt. Ltd., 2019 SCC Online Del 9980.

executed between 4 different parties into a single and composite arbitration since they formed a part of a single economic transaction.

This clearly demonstrates that before the decision of *Chloro Controls*, the Indian courts maintained a distinction between the concept of 'joinder' in multi-party arbitration and 'consolidation' in multi-claim arbitration.

III. CHLORO CONTROL V. SEVERN TRENT WATER PURIFICATION - A PARADIGM SHIFT IN THE TREATMENT ACCORDED TO THIRD PARTIES IN ARBITRATION

The melting point of all the aforesaid case laws and the group of companies doctrine by which joinder can be effected to consolidation, can be seen in *Chloro Controls Case* .[23] This case altered the position in *Sukanya Holdings* and the *Indowind case* and devised the position of law regarding joinder of non-signatory.

In the *Chloro Controls case*,[24] a dispute arose between an Indian party and a few foreign entities, who had entered into multiple contracts as part of a composite transaction, with arbitration seated in London. The main issue before the court was whether all these parties to the dispute could be referred to a single and composite arbitral tribunal. As the arbitration was seated in foreign jurisdiction, the Court had to invoke *Section 45* of the A&C act, which deals with *"***Power of judicial authority to refer parties to arbitration***"*.[25] Section 45 of the Arbitration Act provides courts with the authority to refer the dispute to arbitration "*at the request of one of the parties or any person claiming through or under him*" pursuant to a legal relationship, either encapsulated under an arbitration agreement or not.[26]

The court first compared Section 45 to Section 8 of the A&C act and outlined the substantial variance in language. In doing so, the court distinguished the decision in *Sukanya Holdings***,** which was a case of domestic arbitration decided under Section 8 of the A&C act, whereas the instant case was a foreign seated arbitration dealt under Section 45, which had a much wider scope.

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[23] Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
[24] *Id.*
[25] Arbitration and Conciliation Act, 1996, Section 45.
[26] *Id.*

It observed that the expression "*any person claiming through or under him*" in Section 45 clearly represents the legislative intention to enlarge the scope of the words beyond "the parties" who are signatories to the arbitration agreement. Arbitration, accordingly, could be possible between a signatory and a party who is not originally named in the arbitration agreement.[27]

The party which seeks to argue in favor of such extension needs to prove that the non-signatory is claiming *"through or under"* the signatory party. Towards this end, the court installed the Group of Companies' doctrine, in the Indian context, as a sufficient basis to establish a legal relationship between the non-signatory and the party to the arbitration agreement. It is to be noted that the court laid special emphasis on the requirement of 'implied consent' of the parties for application of Group of Companies doctrine. The implied consent can be discerned from a variety of factors such as conduct of the third party during performance, negotiation or termination of contract or agency, joint venture relations between the parties of the contract with the supposed third party.

Interestingly, the court in the *Chloro Controls case*[28] also provided for an exception wherein a third party could be subjected to arbitration without even the implied consent of the signatories. This being possible in case of composite transactions where performance of the mother agreement may not be feasible without aid and performance of the supplementary agreements, for achieving the common object. In such a case, the reference to arbitration would be falling within the scope of the exception. Despite citing it as an exception, the court surprisingly, in the later part of its judgment, conjointly read the principle of 'composite performance' with the Group of Companies' doctrine, which blurred the clear boundaries earlier set between them.

IV. THE 2015 AMENDMENT: A LEGISLATIVE MISADVENTURE

It is important to note that despite pointing out the need for an arbitration regime to accommodate the idea of invocation of arbitration against non-signatories and in reference to multi-party agreements, the Apex court in the *Chloro Control Case* only incorporated the Group of Companies' doctrine with respect to the arbitrations seated in foreign jurisdictions.[29] The finding that non-signatories to the arbitration agreement can be bound by an arbitration

[27] *Supra* Note 23.
[28] *Id.*
[29] *Id.*

agreement hinged on the wording of Section 45, which clearly mentioned the "*the parties or any person claiming through or under him*", thus providing the court a clear reason to extend the application of the provision to non-signatories, however no such phrase existed in Part I which dealt with domestic seated arbitrations.

> *"The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sections 44 and 45 read with Schedule* I."[30]

This created an anomalous position where arbitration agreements could be consolidated or extended to non-signatories to meet the commercial realities of multi-party commercial disputes in cases of foreign seated arbitrations. However, in cases of domestic arbitrations, the courts and tribunals were helpless. The exasperation of courts to apply two different standards for domestic and foreign seated arbitrations was evident in the matters of *R.K. Productions v. N.K. Theaters*[31] and *Supreme Megha Constructions LLP v. Symphony Co-operative Housing Society Ltd*.[32] where they had to apply the ratio of the *Sukanya Holdings* as the doctrine of extension of arbitration agreement to non-signatories did not apply to domestic arbitrations.

This anomaly was flagged out in the 246th Law Commission Report, which recommended legislature to amend the definition of '*party'* under Section 2(1)(h) of the A&C act, to include the phrase *"person claiming through or under [a party]"* so that non-signatories can also be referred to the arbitration agreements under domestic arbitration.[33] However, the legislature overlooked this recommendation and instead amended Section 8 of the A&C act. The amended provision read as *"a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him……refer the parties to arbitration".*[34]

This amendment, rather than curing the aforementioned anomaly, further complicated the matters. As of now while Section 8 of the A&C act extends the arbitration agreement to non-

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[30] *Id ¶ 167.*
[31] R.K. Productions v. N.K. Theaters, (2012) SCC OnLine Mad 5029.
[32] Supreme Megha Constructions LLP v. Symphony Co-operative Housing Society Ltd., Notice of Motion (L) No. 2410 of 2014.
[33] 246th Law Commission Report, Amendments to the Arbitration and Conciliation Act 1996 (2014).
[34] Arbitration and Conciliation Act,1996, Section 8.

signatories in domestic seated arbitration, however no right under other provisions is accorded to such non-signatory under the Act. For instance, non-signatories do not have the jurisdiction to approach for interim relief under Section 9 of the A&C act .[35] They also do not have the jurisdiction to file an application to set aside an award under Section 34, despite the award being binding to them under Section 35 of the A&C act .[36] The regime has also completely foreclosed their right to appeal against the order of the arbitral tribunal by denying them the right to appeal any decision under Section 37 of the A&C act. [37]

So, while the 2015 Amendment provides validity to the Group of Companies doctrine under the Indian arbitration regime, shoddy drafting by the legislators have put the non-signatories at disadvantage by declaring arbitration decisions binding on them but denying them any right under the process.[38] This also casts a doubt on the validity of doctrine as observed by the three judge bench in the matters of *Cox & Kings Ltd.,*[39] where the Court has questioned if mere addition of words *"claiming through or under"* in Section 8 would justify inclusion of non-signatory in an arbitration agreement. While the legislative history of the 2015 amendment clearly establishes the intent of the legislators to consolidate the doctrine in Indian context, the poor drafting has put it in uncertainty.

V. PLACING THE ROLE OF CONSENT IN EXTENSION OF ARBITRATION AGREEMENTS TO NON-SIGNATORIES

As pointed out in the introduction, the main argument against the validity of the practice of extending the scope of arbitration agreements to non-signatories was based in its apparent conflict with the concepts of mutual consent, party autonomy and separate legal entity. However, this argument falls flat to its face on a detailed scrutiny of the *Chloro Control Case***,** where the consent was read to be a *sine qua non* for joining a non-signatory to an arbitration agreement.

Although the decision in *Chloro Control* validated the practice of extending arbitration agreement to non-signatories, however such extension was not unregulated but was deeply rooted in the concept of consent. So, in order to extend the scope of arbitration to a non-signatory,

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[35] Mikuni Corporation v. UCAL Fuel Systems, 2008 (1) Arb LR 503 (Delhi).
[36] Gatx India v. Arshiya Rail Infrastructure, (2014) SCCOnline Delhi 4181.
[37] Prabhat Steel Traders Pvt. Ltd. v. Excel Metal Processors Pvt Ltd., Arbitration Petition No. 619/2017.
[38] *Supra* Note 10.
[39] *Id.*

its intention to be bound by the arbitration agreement by explicit or implicit manner was necessary. Towards this end, the parties need to establish by application of the Group of Companies doctrine, the implied consent of third parties by their conduct that can be ascertained from its active role in the negotiation while entering into contract, or performance to imply the will of such company to be a party to that contract.[40] Accordingly, the entire rationale of the judgment is deeply grounded on a consent-based analysis, where the *"'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties".*[41] This strong reliance on consent-based analysis essentially defeats the argument of the three-judge bench in case of *Cox & Kings Ltd.,* which challenged the validity of the doctrine for diluting the concept of party autonomy and consent.

VI. THE RAMIFICATIONS OF BLURRING THE DIFFERENCE BETWEEN JOINDER AND CONSOLIDATION

As discussed in the previous section, the court in the matters of *Chloro Control case* alluded to the importance of consent for extending the scope of arbitration agreement to non-signatories. However, the court also carved an exception in this consent-based extension. The court was of the opinion that in cases of composite transactions, the arbitration agreement in the main contractual agreement will apply to all the ancillary agreements without a consent-based analysis.[42] Interestingly, the court termed this exception to be a part of "Group of Companies" doctrine instead of distinguishing this concept as consolidation of arbitration agreements, thereby creating a confusion between these two concepts. This essentially has two-fold problems. *Firstly*, it muddles up the original standards for application of the Group of Companies' doctrine. *Secondly*, reading down the exception as an integral part of the doctrine contradicts the court's own stance regarding the role of consent in application of the Group of Companies' doctrine.

At this juncture it is important to understand the difference between 'joinder' and 'consolidation' of arbitration.[43] Herein, 'joinder' or 'multi-party' arbitration, as seen from *Sukanya Holdings* and *Indowind cases*, involves a third party or non-signatory, joining or intervening, an ongoing

[40] ICC Case No. 5894 at ¶ 27.
[41] *Supra* Note 23 ¶ 67.
[42] *Id* ¶ 68.
[43] Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions under Leading Arbitral Rules*, VOLUME 35(2) JOURNAL OF INTERNATIONAL ARBITRATION (2018) 173-202.

arbitration proceeding on the basis of its implicit consent to be bound by the arbitration agreement. Whereas, 'consolidation' or 'multi-claim' arbitration, as seen from *Olympus Superstructure case*, involves amalgamation of two or more arbitrations, running through multiple contracts, into one single proceedings on the basis of commonality of subject matter. However, the distinction between these concepts was blurred by the court in the matters of *Chloro Control*, wherein the court conflated the distinct concepts of 'consolidation' or 'multi-claim' arbitration with Group of Companies' doctrine (in the form of exception of 'composite performance') which is a manifestation of 'joinder' or 'multi-party' arbitration.

This confusion created in *Chloro Control* regarding the essentials required for extending arbitration agreement to non-signatories was also evident in the matters of *Ameet Lalchand v. Rishabh Enterprises* ***["Ameet Lalchand"]***,[44] where the court extended the applicability of arbitration agreement between Rishabh Enterprises and Dante to a third party Astonfield. Interestingly, this was done without the consent-based analysis and tight group structure. In this case, the extension was effectuated merely because the lease agreement between Rishabh Enterprises and Dante was the main agreement in the transaction of setting up a solar plant in Uttar Pradesh, and the purchase agreement between Rishabh Enterprises and Astonfield was an ancillary agreement essential for smooth operation of the main agreement. This judgment paves a dangerous way where courts might extend arbitration agreements to non-signatories without even looking at the implied consent by conduct, thereby eroding the consensual nature and notions of party autonomy in the arbitration regime.

The decision in the matters of *Chloro Control* is to be blamed for muddling up the standard required for extension of arbitration agreement and blurring the distinction between consolidation and joinder by employment of Group of Companies' doctrine.

VII. ENQUIRY FOR APPLICATION OF THE GROUP OF COMPANIES' DOCTRINE AT THE STAGE OF REFERENCE

Another very potent objection which was raised by the Apex Court in the matter of *Cox & Kings Ltd.*[45] was regarding the desirability of extending a roving enquiry into the merits of the case at the reference stage for application of Group of Companies' doctrine. It is to be noted that the

[44] Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678.
[45] *Supra* Note 10.

current limited scope of jurisdiction is a result of umpteen number of judicial and legislative interferences, which included around a dozen Judgments and a set of two amendments. The jurisprudence culminated with the recent judgment of *Vidya Drolia v. Durga Trading Corporation* ***["Vidya Drolia"]***,[46] where apart from ruling on the limited jurisdiction of courts at pre-reference stage to examine the arbitrability of the dispute, the Supreme Court also cautioned against the growing trend of courts delving into the merits of the dispute to decide on the issue of joinder and application of Group of Companies doctrine.

> *Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group- company doctrine or good faith, etc., in a multi -party arbitration raises complicated factual questions, which are best left for the tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference.*[47]

Therefore, the enquiry about the nature of contracts and their role in the underlying transaction, which is necessary for consolidation and joinder of parties in arbitration, falls foul of the dictum of *Vidya Drolia*. However, it is notable to observe that application of Group of Companies' doctrine requires the court to delve into finding the commercial intent and merits of the case, which might be considered to be akin to a creeping overreach of jurisdiction at reference stage.

A solution to this apparent conflict could be reached if courts relinquish the jurisdiction to extend the arbitration agreement to non-signatory in favor of the tribunal in cases of complex facts and circumstances. This would allow courts to maintain a non-interventionist approach at the reference stage.

VIII. THE PRINCIPLE OF NATURAL JUSTICE - A COLLATERAL DAMAGE IN THE EXTENSION OF ARBITRATION AGREEMENTS TO NON-SIGNATORIES?

Almost six years after the first iteration of the Group of Companies' doctrine, a three-judge bench was constituted to decide upon a set of peculiar facts and circumstances in the matters of

[46] Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1.
[47] *Id* ¶ 239.

Cheran Properties v. Kasturi & Sons Limited ***["Cheran Properties"]***.[48] In this case the question arose whether the award can be enforced against a subsidiary of a signatory which has not been heard during the arbitration proceedings. Answering in affirmative, the Supreme Court in this case held that Section 35 of the A&C act ,which declares arbitral award to be final and binding on the parties and "*persons claiming under them respectively",*[49] has a broad and a liberal scope where even the non-signatories to the arbitration agreement can be bound by the award. The judgment postulates that even in the case where the non-signatory has not been heard during the arbitration proceeding, they are bound by the award only because of their relation with the signatory to the agreement.[50] This not only stretches the scope of the Group of Companies' doctrine beyond logic and reason, but also runs contrary to the notions of natural justice and equal treatment of parties.

IX. CONCLUSION

The extension of arbitration agreement to a non-signatory has had a tumultuous run in the Indian context. The treatment of this issue, right from the decision in *Sukanya Holdings* to the ruling in *Chloro Controls case***,** forms the background in which the recent judgment in *Cox & Kings ltd.***,** has referred pertinent questions on legitimacy of the very idea of extension of arbitration agreement, to a constitutional bench.

The doubts in this case revolved around the apparent conflict between extension of arbitration agreement to third parties and the notion of party autonomy and mutual consent in the arbitration regime. However, on critical examination this argument falls flat owing to the special emphasis on consent while extending the arbitration agreement under current jurisprudence.

Considering the present-day complex structure of transactions between the parties, it becomes important to include third parties in arbitration proceedings despite their non-signatory status. Therefore, a complete renunciation of the idea of the extension of an arbitration agreement is not warranted. However, the authors agree that certain creases need to be ironed out to streamline the application of this idea. Similar sentiments also echoed in the opinion of Justice Surya Kant in

[48] Cheran Properties Limited v. Kasturi & Sons Limited, (2018) 16 SCC 413.
[49] Arbitration and Conciliation Act, 1996, Section 35.
[50] See Cox & Kings ¶ 30, (Civil) No. 38/2020, Justice Suryakant's separate opinion.

Cox & Kings Ltd., where he advocated for a relook, not into the legitimacy of extension, but rather its manner of application in the Indian context.

> *"While at the outset, I concur that the contours of the Group of Companies Doctrine need to be settled by a larger bench, my thoughts are oriented in favour of the Doctrine as an integral part of Indian arbitral jurisprudence."*[51]

While the case of *Cox & Kings Ltd.* claims to only discuss the idea of Group of Companies' doctrine, its arguments are focused against the broader concept of extension of arbitration agreements to third parties. In this context, it is necessary to distinguish the concept of 'joinder' of parties to the arbitration, where 'Group of Companies' doctrine is applicable, from the concept of 'consolidation' of arbitration agreement, where completely different considerations apply.

Regardless, the Indian judiciary, in a cavalier manner, has failed to maintain the distinction between the two concepts. Right from *Chloro Controls* where the court needlessly incorporated the principle of 'composite performance of agreements' in the 'Group of Companies' doctrine, to later decisions such as *Cheran Properties* and *Ameet Lalchand* reflect similar confusion.

Adding cherry on the cake, the legislature had its fair share in ensuring this train wreck. Despite the suggestions from the 246th Law Commission Report, an incomplete incorporation of third-party rights solely in Section 8, without reciprocal changes in the definition of parties under Section 2(1)(h), has complicated this problem.

It will be interesting to see how the five-judge bench of the Supreme Court deals with the myriad of issues surrounding the Group of Companies' doctrine. The authors are hopeful that while the doctrine stands retained in the Indian arbitration landscape, its application is tailored to suit the modern-day commercial needs.

[51] Cox & Kings ¶1, (Civil) No. 38/2020, Justice Surya Kant Separate Opinion.