LEGAL STANDING OF THIRD PARTY IMPLEADMENT IN ARBITRATION PROCEEDINGS IN INDIA

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The touchstone of any arbitration is consent between the parties. The arbitration agreement between the parties embodies this fundamental principle.[1] It establishes the disputing parties to an arbitration, i.e., the signatory parties who are bound by the terms of the agreement. However, in some circumstances, the agreement may bind a non-signatory to the arbitration agreement. For example, a contract between A and B, specifying that A would employ certain vendors (hereinafter 'C') to carry out the terms of the agreement and A would be bound to pay C. Consequently, A enters a contract with C and does not pay C for their services. However, C (non-signatory to the arbitration agreement) would merely be a third party in any arbitration proceeding instituted by B against A for non-performance (signatory parties). Based on the foregoing hypothetical factual matrix it becomes important to understand whether third parties to an arbitration could be impleaded into the same proceedings. This article seeks to discuss the legal standing of allowing third parties to an arbitration to be impleaded in those proceedings by analyzing the various grounds on which such a proposition could be accepted. Before evaluating the various the grounds for allowing the proposition, the underlying principle must first be examined.

The Group of Companies Doctrine

The Group of Companies Doctrine stems from international commercial arbitration jurisprudence in France. It was propounded in the case of *Dow Chemical France v. ISOVER Saint Gobain (France),* wherein a claim was successfully brought before an ICC Tribunal not only by signatories to an agreement but also their affiliates, viz., their parent company and subsidiaries.[2] The Tribunal considered that the arbitration clause would bind these affiliates "*by virtue of their role in the conclusion, performance and termination of the contracts"*. Consequently, under the 'group of companies' doctrine, when a company, which forms part of a group of companies, enters into an arbitration agreement, it may bind its associate companies which are non-signatories to the arbitration agreement if it is demonstrated that the parties intended to bind both signatory as well as non-signatory companies.[3] It is applied to bind a company's affiliates in relation to an agreement entered by the company.

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[1] Redfern and Hunter, *International Arbitration* (5th edn, OUP 2009).

[2] *Dow Chemical France v ISOVER Saint Gobain (France)* ICC Case No. 4131/1982 (Interim Award) in (1983) 110 J du Droit Intl 899.

[3] *Chloro Control India Pvt Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641, para 71.

Therefore, the two main ingredients for allowing a non-signatory to be bound by an arbitration agreement under this doctrine are that –

i. the non-signatories must be part of a group of companies; and
ii. there must be common intention.

In this context, it is important to understand when the group of companies doctrine is usually applied by courts.

In *MTNL v. Canara Bank and Ors.*, the Supreme Court stated that the 'Group of Companies' Doctrine may be employed to bind a parent company's non-signatory affiliate(s) or to include a third party in an arbitration-related proceeding -

i. if the transaction is of a composite nature, through commonality in subject matter and through a direct relation between the parties (both the signatory and non-signatory parties); or
ii. when there is a cohesive group structure having substantial economic and operational ties, forming a unified economic entity. (For instance, when one corporation's resources are utilised for financially assisting or restructuring its affiliated companies.)[4]

If one were to consider the aforementioned factual matrix, the principal agreement between A and B would not be feasible unless the subsidiary agreement between A and C was fulfilled. Therefore, those transactions would clearly be of a 'composite nature'. In this context, it becomes abundantly clear that the underlying principle for allowing a third party or a non-signatory to be impleaded has been evolved from the 'group of companies' doctrine. Now, let us analyse how the various courts in India have dealt with such 'composite transactions' to allow non-signatory, third parties to be impleaded in arbitration proceedings.

Composite Transaction – An essential element for impleadment of Third Parties?

i. Legal Threshold

The earliest case in which this issue was discussed was *Sukanya Holding v. Jayesh H Pandya and Ors.*[5] Here several disputes were instituted between the parties to the arbitration agreement in relation to the same transaction. However, all the parties were not signatories. The Supreme Court held unequivocally that s.8 of the Arbitration and Conciliation Act, 1996 **[Hereinafter "The Act"]** provides for arbitration procedures exclusively between the parties to the arbitration agreement. As a result, third parties cannot be included in arbitration procedures. However, it is pertinent to

[4] *Mahanagar Telephone Nigam Ltd v Canara Bank* (2019) SCC OnLine SC 995.
[5] *Sukanya Holdings Pvt Ltd v Jayesh H Pandya* (2003) 5 SCC 531.

note that this was the position of law in 2003. It is clear that at that point of time, the Supreme Court placed importance on excluding non-signatories from being bound by arbitration agreements. Notably, the court based its decision on s.8 of the Act. Subsequently, in 2013, nearly a decade after the decision in *Sukanya Holdings,* the Supreme Court explored the possibility of allowing non signatories to be allowed in arbitration proceedings in *Chloro Controls India Ltd. v. Severn Trent Purification Inc.*[6] Interestingly, basis for allowing impleadment in this case was the language of s.45 of the Act.

This case has been invoked as the leading authority for 'composite transaction, composite reference, and group of companies doctrine' in India. It involved a conflict between two parties owing to the nature of numerous interconnected contracts entered by them, each addressing a distinct facet of the parties' business relationship. When the Plaintiff (Severn Trent Water Purification) filed a lawsuit, various third parties were joined as parties to the suit owing to the nature and the interconnectedness of all contracts between the parties. However, the Defendant filed an application under s.8 of the Act and contended during the hearing that, the same issue of involvement of third parties should be addressed under s.45 of the Act. The court, relying upon the findings of the *Sukanya Holdings case*, held that splitting of the cause of action was impermissible, and that jurisdiction under s.8 or 45 could not be exercised. However, on appeal to the Supreme Court, it was clarified that the language of s. 45 of the Act,[7] when read with Schedule 1 of the Act[8] impelled the meaning that 'any person', i.e., not only signatories could refer to arbitration, if the court is satisfied that the agreement is valid, enforceable, and operative. The use of the term 'any person' broadened the meaning of the term beyond that of the term 'the parties' which had been used to refer to signatory parties to the arbitration agreement. In this aspect, the Apex Court stated that although under special circumstances, a non-signatory or third party may be referred to arbitration. It also provided a yardstick to identify these 'exceptional cases' –

> *"The court will examine these exceptions from the direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties must be of a composite nature. An agreement is of a composite nature where performance of the principal agreement may not be feasible without the aid, execution, and performance of supplementary or ancillary agreements for achieving the common object, and collectively having borne on the dispute. It must also be examined whether a composite reference of such parties would serve the ends of justice. For execution of multiple agreement, two*

[6] *Chloro,* n (3).

[7] The Arbitration and Conciliation Act 1996, s 45.

[8] The Arbitration and Conciliation Act 1996, Schedule I.

essential features must exist- 1) All ancillary agreements are relatable to the mother agreement and 2) Performance of one is so intrinsically interlinked with the other agreements that they are incapable of being performed without the performance of the others. The principle of 'composite performance' would have to be gathered from conjoint reading of the principal and supplementary agreements as well as the explicit intention of the parties."[9]

Additionally, the Bombay High Court, in *BSNL v. Siemens Ltd*, noted that under s.9 of the Act, third parties could be impleaded subject to the interdependence and interlinked nature of the contracts.[10] S.9 of the Act provides for interim measures by a court during the arbitration proceedings. Consequently, the scope of s.9 is broad enough to allow for third parties to take part in the arbitration proceedings.

Therefore, the grounds for making a case for third party impleadment is rooted in s.9 and s.45 of the Act. However, this is solely based on the composite nature of transactions between the signatories and non-signatories. The Supreme Court has categorically clarified in the above cases that to determine whether there was a composite transaction two requirements have to be met –

i. The ancillary agreements must be consequential and related to the principal agreement; and
ii. The agreement must be so 'intrinsically connected' that the performance of the all the agreements, i.e., composite performance, would render all the obligations and duties of the parties, discharged.[11]

Having examined the legal standards, it also pertinent to observe the various factual enquiries that are deemed to be important by Indian Courts while allowing such a claim.

ii. Factual Enquiry for determining composite nature of transactions

In *Chloro Controls India Ltd. v. Severn Trent Purification Inc.*,[12] it was observed that all of the contracts were performed on the same date, which bolstered the argument that the parties intended to perform all of these contracts as a single composite transaction.

In *Ameet Lalchand Shah v. Rishabh Enterprises,*[13] the relevant issue was whether four different agreement between the concerned parties are interconnected to refer the parties to arbitration even though there is no arbitration clause in the agreement between Rishabh and Astonfield (Ameet

[9] *Chloro* n (3), para 76.
[10] *Bharat Sanchar Nigam Ltd v Siemens Ltd* (2016) SCC OnLine Bom 5317.
[11] *Chloro* n (3); *Mahanagar* n (4); *Bharat* n (10).
[12] *Chloro* n (3).
[13] *Ameet Lalchand Shah v. Rishabh Enterprises* (2018) 15 SCC 678.

Lalchand is the director of Astonfield). The Supreme Court found that all four agreements were for the single purpose, which was to commission a photovoltaic solar plant at Jhansi, Uttar Pradesh. This indicated that the four agreements were interconnected.[14] Therefore, relying on the decision in Chloro Controls, all parties were held to be covered by the arbitration clause in the principal agreement as the agreements were interconnected.

In understanding the factual threshold, it is pertinent to note the case of *Duro Felguera, S.A. v. Gangavaram Port Ltd* as well.[15] In this case there were five separate contracts, pertaining to five different subject matters. Each of these five contracts had their own arbitration clauses. Additionally, Duro Felguera had executed a Corporate Guarantee, for performance of all works under the other 5 contracts.[16] The court noted that the Supreme Court or the High Court's authority was limited to determining the existence of an arbitration agreement.[17] A general reference to any contract within the contract under consideration was found to be insufficient to incorporate the arbitration clause from the referenced contract.[18] Rather, a particular reference must be made showing the parties' common intent to integrate the arbitration provision from another instrument into the contract.[19] The exception to this rule is where the relevant document is not another contract but a standard form of terms and conditions published or distributed by trade associations or regulatory authorities for the benefit of their members or those who choose to adopt them.[20] Therefore the Supreme Court denied a single reference of arbitration as it could not be construed to be a composite transaction emanating from a principal agreement.

Other Grounds for allowing third party impleadment

In addition to the principle of composite transaction as a ground for allowing third parties to be impleaded, courts have also considered other grounds while considering such a claim.

In *Narayan Manik Patil v. Jaywant Patil*, the Bombay High Court held, in the context of adjudication of third-party rights, that where the decision of the court is likely to impinge upon the rights of third parties, such parties must be given an opportunity of being heard.[21]

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[14] *Ameet* n (13), para 24.
[15] *Duro Felguera, SA v Gangavaram Port Ltd* (2017) 9 SCC 729.
[16] *Duro* n (15), para 27.
[17] *Duro* n (15), para 23.
[18] *Duro* n (15), para 21.
[19] *Duro* n (15), para 31.
[20] *Duro* n (15), para 35.
[21] *Narayan Manik Patil v Jaywant Patil* Notice of Motion No 3479 of 2004 in Suit No 1212 of 1991.

Similarly, the Jammu & Kashmir High Court also made a pertinent observation under s.9 of the Act by stating that excluding a party that has a "*vital interest*" in the subject-matter from the arbitration proceedings is likely to lead to an unjust outcome.[22] The court remarked that where a person is significantly and substantially concerned with the subject matter of the arbitration agreement and is likely to be genuinely impacted by the order arising from said arbitration, s.9 of the Act could be construed to include the a non-signatory party to be impleaded into to the arbitral proceedings. In this context the court stated that -

> *"A person having vital interest in the subject matter of arbitration agreement cannot be asked to watch proceedings from the fence and leave the arena for the parties to the arbitration agreement to cut swords, when the victim of the outcome of the dispute is non else but the person pushed to the fence. After all, what is endgame in proceedings before the Court. The Court is required to arrive at just conclusion and do justice between the parties. In order to enable the Court to discharge its mandate, it is necessary to a person who is interested in the subject matter of arbitration agreement and is in a position to render assistance to the Court is allowed to become a party to the proceedings. The case in hand is an illustrative instance of injustice that may be the result, if a person though stranger to arbitration agreement, is not allowed to become a party to the proceedings under Section 9 of the Act…The Court has ample powers to implead a person as a party to the proceedings under Section 9 of the Act where a person asking for impleadment is in a position to convince the Court that he is proper and necessary party to the proceedings and his presence before the Court, is bound to enable the Court to pass just and proper order."*[23]

From the above decisions it becomes clear that various Courts in India have also considered fairness and equity as additional grounds for allowing impleading third parties in arbitration proceedings under s.9 of the Act. They have highlighted the fundamental rule of law that where the rights of third parties are affected in any proceeding between two parties, they must be afforded an opportunity to be heard. They found the mere fact that such an intervention is not allowed in an arbitration, could not leave the third-party remedy less.

CONCLUSION

Based on the forgoing discussion, it becomes apparent third parties do have rights to be impleaded into arbitration proceedings in India. The Supreme Court has clearly noted the significance of this issue, so much so that it has even recognised the right of third parties to file an appeal against an

[22] *Mohammad Ishaq Bhat v Tariq Ahmad Sofi & Anr* (2010) SCC OnLine J&K 41.
[23] *Mohammed* n (22).

order of an arbitral tribunal under s. 37 of the Act.[24] Concomitantly, it must also be noted that Indian jurisprudence on this issue is clearly deviant from the norm. Different jurisdictions, for example, the courts in Switzerland and England, have refused to accept that a third party may be bound by an arbitration agreement merely because it has a commercial or legal connection with the parties.[25] However, various arbitral tribunals often recognise the rights of non-disputing parties to make *amici curiae* submissions in Treaty-based investment disputes and WTO disputes.[26] In this context, the importance of allowing such participation by non-signatories cannot be understated. Further, there exists sound legal basis under Indian Arbitration law for allowing the same.

[24] *Prabhat Steel Traders Pvt Ltd v Excel Metal Processors Pvt Ltd* (2018) SCC OnLine Bom 2347.

[25] *Peterson Farms Inc v C & M Farming Ltd* (2004) EWHC 121; *City of London v Sancheti* (2008) EWCA Civ 1283; *Redfern and Hunter* n (1), para 2.45.

[26] Gary Born and Stephanie Forest, 'Amicus Curiae Participation in Investment Arbitration' (2019) 34 ICSID Review Foreign Investment Law Journal 626.