2023 INSC 1051

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL / APPELLATE JURISDICTION

Arbitration Petition (Civil) No. 38 of 2020

Cox and Kings Ltd. **…Petitioner**

Versus

SAP India Pvt. Ltd. & Anr. **…Respondents**

With

SLP (C) No. 8607 of 2022

And With

SLP (C) No. 5833 of 2022

J U D G M E N T

Dr. Dhananjaya Y Chandrachud, CJI

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A. The reference

1. More than a century ago, James Joyce published *Ulysses*. Joyce experimented with the narrative technique by extensively using a stream of consciousness. In its modernist narrative technique, Ulysses is feted by literary critics and novelists as a literary masterpiece. Novelists such as Vladimir Nabokov and T S Elliot eulogized it as a divine work of art. However, others such as Virginia Woolf and Aldous Huxley criticized the novel for being technical and boring. Despite the varied criticism, the legacy of *Ulysses* endures particularly because its experimental narrative technique challenged the conventional literary style. Similar is the case of the group of companies doctrine – a modern theory which challenges the conventional notions of arbitration law. It is celebrated by some, reviled by many others. Yet, its legacy continues.

2. Five judges of this Court are called upon to determine the validity of the 'Group of Companies' doctrine in the jurisprudence of Indian arbitration. The doctrine provides that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. This doctrine is called into question purportedly on the ground that it interferes with the established legal principles such as party autonomy, privity of contract, and separate legal personality. The challenge before this Court is to figure out whether there can be a reconciliation between the group of companies doctrine and well settled legal principles of corporate law and contract law.

3. A Bench of three Judges of this Court, while considering an application under Section 11(6) of the Arbitration Act and Conciliation 1996[1], sought to reexamine the validity of the group of companies doctrine in the Indian context on the ground that it is premised more on economic efficiency rather than law. The Bench of three judges (speaking through the majority opinion authored by Chief Justice N. V. Ramana (as he was then), and the concurring opinion by Justice Surya Kant) doubted the correctness of the application of the doctrine by the Indian courts.

4. Chief Justice Ramana criticised the approach of a three-Judge Bench of this Court in **Chloro Controls India (P) Ltd** v. **Severn Trent Water Purification Inc**[2] of relying upon the phrase "claiming through or under" in Section 45 of the Arbitration Act to adopt the group of companies doctrine. He noted that the subsequent decisions of this Court established the doctrine in Sections 8 and 35 without adequately examining the interpretation of the phrase "claiming through or under" appearing in those provisions. These decisions include: **Cheran Properties Ltd** v. **Kasturi and Sons Ltd**[3], **Mahanagar Telephone Nigam Ltd**. v. **Canara Bank**[4], and **Oil and Natural Gas Corporation Ltd** v. **Discovery Enterprises Pvt**. **Ltd**.[5] He also observed that economic concepts such as tight group structure and single economic unit alone cannot be utilized to bind a non-signatory to an arbitration agreement in the absence of an express consent. Consequently, he referred the matter

[1] "Arbitration Act"
[2] (2013) 1 SCC 641
[3] (2018) 16 SCC 413
[4] (2020) 12 SCC 767
[5] (2022) 8 SCC 42

to the larger Bench to seek clarity on the interpretation of the phrase "claiming through or under" appearing under Sections 8, 35, and 45 of the Arbitration Act by formulating the following two questions:

a. Whether the phrase 'claiming through or under' in Sections 8 and 11[6] could be interpreted to include the 'Group of Companies' doctrine; and

b. Whether the 'Group of Companies' doctrine as expounded by **Chloro Controls** Case (supra) and subsequent judgments is valid in law.

5. In a concurring opinion, Justice Surya Kant observed that the decisions of this Court before **Chloro Controls** (supra), rendered in **Sukanya Holdings (P) Ltd** v. **Jayesh H Pandya**[7] and **Indowind Energy Ltd** v. **Wescare (I) Ltd**,[8] adopted a "rigid" and "restrictive" approach by placing undue emphasis on formal consent. Justice Surya Kant traced the evolution of the group of companies doctrine to observe it had gained a firm footing in Indian jurisprudence. However, he opined that that this Court adopted inconsistent approaches while applying the doctrine in India, which needed to be clarified by a larger Bench. Accordingly, he highlighted the following questions of law for determination by the larger Bench:

a. Whether the Group of Companies Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision;

[6] The reference to Section 11 seems inadvertent as the phrase "claiming through or under" is not found in the said provision. Rather, Section 11 ought to be read as Section 45 where the phrase "claiming through or under" appears.
[7] (2003) 5 SCC 531
[8] (2010) 5 SCC 306

b. Whether the Group of Companies Doctrine should continue to be invoked on the basis of the principle of 'single economic reality';

c. Whether the Group of Companies Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties; and

d. Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies Doctrine into operation even in the absence of implied consent.

6. We are not reproducing the factual matrix of the case, as we have been called upon to settle the broader legal issues raised in the reference. In the process, we will answer the above legal issues, as well as other ancillary issues that have been raised before us by counsel.

B. Submissions

7. Mr Hiroo Advani, learned counsel appearing for the petitioner in Arbitration Petition No. 38 of 2020, made the following submissions:

a. The basis for the application of the group of companies doctrine is the tacit or implied consent by the non-signatory to be bound by the arbitration agreement;

b. The definition of "party" under Section 2(1)(h) of the Arbitration Act cannot be restricted to the signatories to an arbitration agreement. The definition should be read expansively to also include non-signatories depending upon the facts and circumstances;

c. Section 7 of the Arbitration Act provides that the defined legal relationship between the parties may be non-contractual as well. Moreover, Section 7(4)(b) indicates that a non-signatory could be bound by an arbitration agreement if in the course of a written communication, it has demonstrated an intention to be bound by the agreement; and

d. The group of companies doctrine should ideally be applied by the arbitral tribunal. At the stage of referral, the court should merely take a *prima facie* view and leave it for the arbitral tribunal to determine the necessity of joining the non-signatories to the arbitration agreement.

8. Mr Darius J Khambata, learned senior counsel appearing for the respondents in SLP (C) No. 8607 of 2022, made the following submissions:

a. The applicability of the group of companies doctrine must be examined from the touchstone of whether a non-signatory could be made a party to the arbitration agreement. The expression “claiming through or under” a party cannot be the basis to apply the doctrine;

b. The doctrine is a consensual theory premised on the existence of a dispute arising from a defined legal relationship and mutual intention of the parties to be bound by the arbitration agreement. The intention of the non-signatory has to be ascertained from the cumulative factors laid down in **Chloro Controls** (supra);

c. The following requirements must be met for the application of the group of companies doctrine to bind the non-signatory as a “veritable” party to the arbitration agreement:

i. mutual intention of all the parties, both signatories and non-signatories, to be bound by the arbitration agreement;

ii. absolute and unqualified acceptance by the non-signatory party to the arbitration agreement; and

iii. such acceptance must either be expressed or implied. In the context of a non-signatory, such acceptance will be implied and manifested in the negotiation, performance, or termination of the contract;

d. Mutual consent of the parties to refer disputes arising out of their defined legal relationship to arbitration is the essential ingredient of an arbitration agreement. It would be against the concept of party autonomy to bind a non-signatory to an arbitration agreement without ascertaining their consent;

e. The concept of “party” to an arbitration agreement is distinct from the concept of “person claiming through or under” a party. The latter expression conveys the notion of a derivative cause of action where the non-signatory steps into the shoes of the party rather than claiming an independent right under the agreement. The typical scenarios where a person claims through or under a party are assignment, subrogation, and novation; and

f. Concepts such as ‘tight group structure’ and ‘single economic unit’ cannot be the sole basis to invoke the group of companies doctrine. This doctrine cannot be applied to bind a non-signatory merely on account of it being under the ownership, control, or supervision of the signatory party;

9. Dr A M Singhvi, learned senior counsel appearing for the interveners in IA No. 92757 of 2022, made the following submissions:

   a. The group of companies doctrine constitutes a true and genuine effectuation of the real intent of the parties to subject both the signatory and non-signatory parties to the arbitration agreement;

   b. The doctrine is a reasonable and natural extension of the principle of piercing the corporate veil. The application of the doctrine is also justified in affixing responsibility when the requisite and sufficient degree of common ownership and control exists;

   c. The intention of the parties cannot be the only basis to join a non-signatory party to an arbitration agreement. The court can also consider non-consensual doctrines such as piercing the corporate veil, alter ego, or tight group structure; and

   d. The Arbitration Act does not prohibit or inhibit the adoption of the group of companies doctrine in Indian arbitration jurisprudence. On the contrary, Section 7 of the Arbitration Act provides an expansive concept of an arbitration agreement. Moreover, the legislature specifically amended Section 8 of the Arbitration Act by inserting the words “any person claiming through or under” to recognize and codify the reality of non-signatories acting through or under the signatory parties.

10. Mr Kapil Sibal, learned senior counsel appearing for the intervener in IA No. 56615 of 2023, made the following submissions:

a. A non-signatory can be impleaded in an arbitration proceeding provided: (i) there is a defined legal relationship between the non-signatory and the parties to the arbitration agreement; and (ii) the non-signatory consented to be bound by the arbitration agreement in terms of Section 7 of the Arbitration Act;

b. The onus to prove the intention of the non-signatory to be bound by the arbitration agreement lies on the party seeking to implead the non-signatory;

c. In view of the requirement under Section 7 of the Arbitration Act, an arbitration agreement has to be in writing and there cannot be an oral agreement to arbitrate. Regardless, the intention of the non-signatory to be bound by the arbitration agreement can be gathered from conduct;

d. Arbitration is in the realm of private law, and a matter of choice and intent of the parties. Therefore, factors such as economic convenience, justice, or equity cannot be grounds for binding non-signatories to an arbitration agreement; and

e. The cumulative factors laid down by this Court in **Discovery Enterprises** (supra) cannot be considered in isolation, and must be applied holistically to determine the applicability of the group of companies doctrine in a given factual matrix.

11. Mr Nakul Dewan, learned senior counsel appearing for the respondent in SLP (C) No. 8607 of 2022, made the following submissions:

a. The group of companies doctrine and single economic entity doctrine are purely economic concepts without any basis in either contract law or company law. Therefore, they cannot be applied to determine the intention of non-signatories to be bound by an arbitration agreement;

b. The decision of a party to not sign the arbitration agreement may form the basis to demonstrate an intent not to be bound by it;

c. The mere factum of multiple agreements or that the non-signatory was involved in the negotiation of the contract cannot form the basis to bind it to the arbitration agreement;

d. The phrase "claiming through or under" which finds mention under Sections 8 and 45 of the Arbitration Act cannot be the basis for the application of the group of companies doctrine; and

e. The determination of the intention of parties to a contract should relate only to the intention held at the time of entering into the contract, which can be gathered objectively from the text of the contract. However, **Chloro Controls** (supra) which considers consequential or subsequent agreements to determine the mutual intention of the parties is incorrect.

12. Mr Ritin Rai, learned senior counsel appearing for the respondent in Arbitration Petition No. 38 of 2020, made the following submissions:

a. Section 7 of the Arbitration Act requires the arbitration agreement to be in writing. Therefore, an arbitration agreement cannot be created on the basis of implied consent of the non-signatory;

b. Complex multi-party contracts are outcomes of detailed negotiations entered into after parties have fully applied their mind. To impute intention to parties in contradiction to the express terms of the agreement would defeat the purpose of the parties' memorializing their understanding in a negotiated, written document;

c. An arbitration agreement which sets out the executing parties and the arbitral procedure agreed among them cannot be read to expand its reach to third parties;

d. The group of companies doctrine cannot be traced to the phrase "claiming through or under" as provided under Sections 8 and 45 of the Arbitration Act; and

e. **Chloro Controls** (supra) erroneously failed to consider whether an implied consent derived from the conduct of a non-signatory satisfied the requirement of a clear intention to arbitrate. Moreover, **Chloro Controls** (supra) wrongly held that the courts have the discretion to refer non-signatory parties to arbitration under Sections 8 or 45 of the Arbitration Act in exceptional cases. The introduction of such a discretion brings in uncertainty in the arbitration practice in India.

13. Mr Tushar Mehta, learned Solicitor General appearing on behalf of the Union of India, made the following submissions:

a. Since India follows the UNCITRAL Model Law, concepts of 'commercial element' and 'business prudence' have to be considered while interpreting the provisions of the Arbitration Act;

b. The group of companies doctrine is inbuilt in the overall scheme of the Arbitration Act. Section 7 uses the broad phrase "defined relationship whether contractual or otherwise" to convey that an arbitration agreement is not restricted to a conventional agreement;

c. The insertion of the words "claiming through or under" in Section 8 of the Arbitration Act is merely in furtherance of the legislative intent to confer locus on yet another category of persons to insist that the judicial authority must refer the dispute before it to arbitration; and

d. If the referral court under Sections 8 and 11 cannot *prima facie* determine the issue of joinder of a non-signatory to the arbitration agreement on the basis of the group of companies doctrine, it can refer the issue to be decided by the arbitral tribunal.

14. Mr Sanjoy Ghose, learned senior counsel appearing on behalf of the petitioner in SLP (C) No. 8607 of 2022, made the following submissions:

a. Section 2(1)(h) uses the term "party" and not "signatory" to account for situations where a non-signatory enters the shoes of a signatory party either by succession, operation of law, assignment, or death; and

b. The group of companies doctrine contravenes the provisions of corporate law by fixing liability on an entity that is not a party to an arbitration agreement. Mere participation in the negotiation or performance of the contract cannot bind a non-signatory to the arbitration agreement in the absence of express consent.

15. Mr Pallav Mongia, learned advocate on behalf of the interveners in IA No. 58168 of 2023, submitted that Section 2(1)(h) of the Arbitration Act does not restrict the definition of parties to “signatories”. Rather, the definition has to be inferred from Section 7. Section 7(4) expands the definition of parties to non-signatories.

16. Ms Meenakshi Arora, learned senior counsel on behalf of the respondent in SLP (C) No. 8607 of 2022, argued for de-tagging of SLP (C) No. 8607 of 2022 from the lead matter, that is Arbitration Petition No. 38 of 2020, as the former deals with power of the courts to issue directions under Section 9 of the Arbitration Act against third parties. Further, the learned senior counsel submitted that the courts can take aid of the group of companies doctrine to issue interim directions against non-signatories to the arbitration agreement.

17. The arguments advanced by advocates on both sides of the aisle indicate that this Constitution Bench has been primarily called upon to determine the validity of the group of companies doctrine in Indian arbitration jurisprudence. However, there are other broad ancillary issues which have been raised by the learned counsel. These include: (i) whether the Arbitration Act allows joinder of a non-signatory as a party to an arbitration agreement; and, (ii) whether Section 7 of the Arbitration Act allows for determination of an intention to arbitrate on the basis of the conduct of the parties. This Bench will address the issues arising out of the order of reference as well as the above-mentioned ancillary issues in due course.

C. Legal background

i. India

18. Before the enactment of the Arbitration Act, the law on arbitration was substantially contained in the Arbitration Act of 1940,[9] the Arbitration (Protocol and Convention) Act of 1937, and the Foreign Awards (Recognition and Enforcement) Act of 1961. In 1978, the Law Commission of India suggested substantive amendments to the 1940 Act. Moreover, the United Nations Commission on International Trade Law[10] adopted the Model Law on International Commercial Arbitration in 1985.[11] The General Assembly of the United Nations recommended all the Member States to adopt the UNCITRAL Model Law in their domestic legislation with a view to uniformize the law of arbitral procedures.[12] The Arbitration Act was enacted to consolidate and amend the law relating to arbitration. It brought the law relating to domestic and international commercial arbitration in consonance with the UNCITRAL Model Law, the New York Convention, and the Geneva Convention.

19. Section 2(1)(h) of the Arbitration Act defines a "party" to mean "a party to an arbitration agreement." An "arbitration agreement" is defined under Section 2(1)(b) to mean "an agreement referred to in Section 7." Section 7 lays down the essential elements of a valid and binding arbitration agreement. It defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise

[9] "1940 Act"
[10] "UNCITRAL"
[11] "UNCITRAL Model Law"
[12] UN General Assembly, Fortieth Session, 'Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law' 40/72 (1985)

between them in respect of a defined legal relationship, whether contractual or not. The provision also mandates that an arbitration agreement shall be in writing. An arbitration agreement is in writing if it is contained in:

(a) a document signed by the parties;

(b) an exchange of letters, telexes, telegrams, or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defense in which the existence of the agreement in alleged by one party and not denied by the other.

Section 7(5) further stipulates that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if two conditions are satisfied. These conditions are first, that the contract is in writing; and second, that the reference is such as to make the arbitration clause part of the contract.

20. An arbitration agreement, being a creature of contract,[13] is based on the consent of parties to submit their disputes to an alternate dispute resolution mechanism. Generally, a party to an arbitration agreement is determined on the basis of persons or entities who are signatories to the arbitration agreement or the underlying contract containing the arbitration agreement. However, over the past two decades the law on joinder of non-signatory parties has evolved substantially. The evolution could roughly be classified

[13] Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd, (2022) 1 SCC 75

into two stages: before **Chloro Controls** (supra) and after **Chloro Controls** (supra).

21. In the pre **Chloro Controls** (supra) era, this Court construed "parties" by limiting it only to the signatories to the arbitration agreement. In **Sukanya Holdings** (supra) the applicant filed an application under Section 8 of the Arbitration Act before the High Court and sought to enforce the arbitration agreement against both the signatories and non-signatories to the agreement. The High Court rejected the application on the ground that the non-signatories were not parties to the arbitration agreement. In appeal, this Court upheld the decision of the High Court by observing that there is no provision under the Arbitration Act stipulating what is required to be done where some parties to the suit are not parties to the arbitration agreement. In **Sumitomo Corporation** v. **CDC Financial Services (Mauritius) Ltd**,[14] this Court, while dealing with an international commercial arbitration held that a "party" to an arbitration agreement means a party to the judicial proceedings. This was expressly held to be erroneous in **Chloro Controls** (supra), where it was held that "party" has to be construed in view of Section 2(1)(h) to mean a party to an arbitration agreement.

22. The interpretation of the expression "party" as defined under Section 2(1)(h) came up for the consideration of this Court in **Indowind Energy Ltd** (supra). In that case, an agreement of sale was entered into by the first and second respondents. The agreement described the second respondent as the 'buyer' and promoter of Indowind, the non-signatory. After a dispute arose, the first

[14] (2008) 4 SCC 91

respondent instituted an application under Section 11(6) of the Arbitration Act against the second respondent and Indowind. Indowind resisted the impleadment on the ground that it was not a party to the underlying sale agreement and, therefore, had not consented to be bound by the arbitration clause. The issue before this Court was whether the arbitration agreement contained in the sale agreement was binding on Indowind. This Court refused to join Indowind to the arbitration agreement on the ground that (i) Indowind was not a signatory to the sale agreement; (ii) Indowind and the promoter company were two independent companies with a separate and distinct legal existence; and (iii) the fact that Indowind did not sign the sale agreement indicated that it was the mutual intention of all the parties to not make it a party to the arbitration agreement.

23. The pre **Chloro Controls** (supra) position was characterized by three underlying precepts: (i) arbitration could be invoked at the instance of a signatory to the arbitration agreement only in respect to disputes with another signatory party;[15] (ii) the court would adopt a strict interpretation of the provisions of the Arbitration Act, particularly the unamended Section 8 which only allowed reference of "parties" to an arbitration agreement; and (iii) there was an emphasis on formal consent of the parties, thereby excluding any scope for implied consent of the non-signatories to be bound by an arbitration agreement. This position of law underwent a significant change when a Bench of three Judges of this Court in **Chloro Controls** (supra) allowed joinder of

[15] **S N Prasad v. Monnet Finance Ltd, (2011) 1 SCC 320**

non-signatory parties to the arbitration agreement on the basis of the group of companies doctrine.

a. Chloro Controls

24. In **Chloro Controls** (supra) this Court was called upon to determine an arbitral reference in case of multi-party agreements where performance of the ancillary agreements was substantially dependent upon effective execution of the principal agreement. In that case, a foreign entity and an Indian entity incorporated a joint venture company to market and distribute chlorination equipment. With respect to the joint venture, the related companies of both the Indian and foreign entity were also involved. Consequently, the parties concluded several ancillary agreements such as a Shareholders' Agreement which contained an arbitration clause. All the contracting parties were not signatories to all the agreements, including the Shareholders' Agreement. When disputes arose between the parties, the foreign entities sought to terminate the joint venture. The Indian entity filed an application before the High Court seeking a declaration to restrain the foreign entities from repudiating their obligations under the agreements. In response, the foreign entities applied for referring the disputes to arbitration in view of the fact that the agreements were binding on the non-signatories because of the composite nature of the transaction. A Single Judge of the High Court granted the application of the Indian entity, which was set aside by the Division Bench of the High Court. The primary issue before this Court pertained to the ambit and scope of Section 45 of the Arbitration Act. This Court framed the issue in the following terms:

> "1.3. Whether in a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others do not and further the parties are not identically common in proceedings before the court (in a suit) and the arbitration agreement, a reference of disputes as a whole or in part can be made to the Arbitral Tribunal, more particularly, where the parties to an action are claiming under or through a party to the arbitration agreement"

25. Section 45 of the Arbitration Act in its unamended form read as follows:

> "45. Power of judicial authority to refer parties to arbitration.— Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, **shall**, **at the request of one of the parties or any person claiming through or under him,** refer the parties to arbitration, that the said agreement is null and void, inoperative or incapable of being performed."
>
> (emphasis supplied)

In view of the language of Section 45, this Court held that the expression "any person" reflects a legislative intent of enlarging the scope beyond "parties" who are signatories to the arbitration agreement to include non-signatories. However, the court noted that such non-signatory parties are required to claim "through or under the signatory party." Thus, this Court accepted that arbitration is possible between a signatory to an arbitration agreement and a third party or non-signatory claiming through a party.

26. The next issue before this Court was to determine whether there was any legal relationship between the signatory and the non-signatory for the latter to "claim through or under" the former. The court noted that the group of companies doctrine has been developed by courts and tribunals in the international context to bind a non-signatory affiliate or sister concern within the same corporate group as the signatory party, to an arbitration agreement provided there was a mutual intention of all the parties. This court emphasized

that the "intention of the parties" is the underlying principle for the application of the group of companies doctrine. It observed:

> "**72.** This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. **In other words, "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**."
>
> (emphasis supplied)

27. The court held that a non-signatory could be subjected to arbitration "without their prior consent" in "exceptional cases" on the basis of four determinative factors:

(i) A direct relationship to the party which is a signatory to the arbitration agreement;

(ii) A direct commonality of the subject-matter and the agreement between the parties being a composite transaction;

(iii) The transaction being of a composite nature where performance of the mother agreement may not be feasible without the aid, execution, and performance of supplementary or ancillary agreements for achieving the common object and collectively have a bearing on the dispute; and

(iv) A composite reference of such parties will serve the ends of justice.

28. In **Chloro Controls** (supra), this Court acknowledged that cases of composite transactions involving multi-party agreement give rise to peculiar challenges where non-signatories may be implicated in the dispute because of their legal relationship and involvement in the performance of contractual obligations. To remedy such situations, it was held that the group of companies doctrine

could be applied to systematically evaluate the facts and circumstances to determine "a clear intention of the parties to bind both, the signatory as well as the non-signatory parties" to the arbitration agreement.

29. **Chloro Controls** (supra) was dealing with a situation where the success of the joint venture agreement was dependent upon the fulfilment of all the ancillary agreements. In this context, this Court observed that all the ancillary agreements were relatable to the parent agreement and the ancillary agreements were intrinsically linked with each other, to the extent that they could not be severed. This in the view of the court indicated the intention of the parties to refer all disputes arising out of the parent agreement and ancillary agreements to the arbitral tribunal.

30. Furthermore, this Court explained the phrase "legal relationship" to mean the relationship of the signatory party with the person claiming under or through them. It observed that all the agreements were signed by "some parties or their holding companies or the companies into which the signatory company had merged." Although these companies did not put pen to paper for all the agreements, they were descendants in interest or subsidiaries of the signatory parties and therefore would be covered under the expression "claiming through or under" the parties to the agreement. In this context the Court observed that being part of the same corporate group, the interests of the non-signatory companies were not adverse to the interest of the principal company and the joint venture company. Therefore, the group of companies doctrine formed the basis for a non-signatory to claim through or under the signatory. **Chloro Controls** (supra) laid down the ratio that a non-signatory

person or entity could be made a party to an arbitration agreement, as "claiming through or under" a signatory party, if the circumstances demonstrate the mutual intention of the parties on the basis of the composite nature of the transaction, direct commonality of subject-matter, and direct relationship of the non-signatory to the signatory parties.

b. Development of Law after Chloro Controls

31. In the aftermath of **Chloro Controls** (supra), the Law Commission of India published a Report in 2014 recommending amendments to the Arbitration Act. The Commission observed that the phrase "claiming through or under" as used and understood in Section 45 is absent in the corresponding provision of Section 8. To cure this anomaly, it was suggested that the definition of "party" under Section 2(1)(h) be amended to also include the expression "a person claiming through or under such party."[16] In 2016, the legislature amended Section 8 to bring it in line with Section 45 of the Arbitration Act. The unamended Section 8(1) provided that a party to an arbitration agreement could make an application seeking a reference to arbitration. The amended Section 8(1) provided that "a party to an arbitration agreement or any person claiming through or under him" could seek a reference to arbitration. However, the legislature did not bring about any change in the language of Section 2(1)(h) or Section 7 of the Arbitration Act. Since **Chloro Controls** (supra) and the amendment to Section 8, subsequent decisions of this Court have referred

[16] Law Commission of India, 'Amendments to the Arbitration and Conciliation Act 1996', Report No. 246 (August 2014)

to the group of companies doctrine to join non-signatories persons or entities to arbitration agreements.

32. In **Cheran Properties** (supra), the issue before this Court was whether the arbitral award could be enforced under Section 35 of the Arbitration Act against a non-signatory, who was a nominee of one of the signatories to the arbitration agreement and a direct beneficiary of the underlying contract between the signatories. Section 35 of the Arbitration Act postulates that an arbitral award "shall be final and binding on the parties and persons claiming under them respectively." This Court observed that the expression "persons claiming under them" refers to every person whose capacity or position is derived from and is same as a party to the proceedings. It held that the non-signatory, being a nominee of one of the signatory parties, was bound by the arbitral award as it was claiming under the signatory.

33. This Court in **Cheran Properties** (supra) interpreted the group of companies doctrine to hold that its true purport is to enforce the common intention of the parties where the circumstances indicate that both the signatories and non-signatories were intended to be bound. One of us (D Y Chandrachud J) explained the evolution of the group of companies doctrine in the Indian context in the following terms:

> **"23.** As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a

> party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. **The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory**."
>
> (emphasis supplied)

34. The decision in **Cheran Properties** (supra) holds that the group of companies doctrine is applied to bind a non-signatory party upon a construction of the arbitration agreement, circumstances which exist at the time of entering into the contract, and the performance of the underlying contract. Nevertheless, it must be noted that **Cheran Properties** (supra) did not apply the group of companies doctrine to make the non-signatory a party to the arbitration agreement. Rather, this Court made the arbitral award binding on a non-signatory under Section 35 on the ground that it was claiming under a party which was a signatory to the arbitration agreement.

35. In **Ameet Lalchand Shah** v. **Rishabh Enterprises**,[17] a two-Judge Bench of this Court was dealing with an arbitral dispute arising out of four interconnected agreements executed towards a single commercial project. The issue was whether the four agreements were interconnected to refer all the parties to arbitration. In that case, all the parties were not signatories to the main agreement containing the arbitration clause. This Court relied on **Chloro Controls** (supra) to hold that a non-signatory, which is a party to an

[17] (2018) 15 SCC 678

interconnected agreement, would be bound by the arbitration clause in the principal agreement. It observed that in view of the composite nature of the transaction, the disputes between the parties to various agreements could be resolved effectively by referring all of them to arbitration.

36. Over time, this Court has identified certain additional factors for the invocation of the group of companies doctrine. In **Reckitt Benckiser (India) Private Limited** v. **Reynders Label Printing India Private Limited**,[18] a two-Judge Bench of this Court was dealing with an application under Section 11(6) of the Arbitration Act seeking the appointment of an arbitrator. This Court *prima facie* observed that the parties belonged to the same group of companies. Subsequently, the issue before this Court was whether there was a clear intention of the parties to bind both the signatory and non-signatory parties based on their participation in the negotiation of the underlying contract. The court held that the non-signatory party, even though a constituent part of the corporate group, did not have "any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever." Thus, the participation of the non-signatory party in the negotiation and performance of the underlying contract was held to be the key determinant of the intention of the parties to be bound by an arbitration agreement.

37. In **Canara Bank** (supra), this Court emphasized that the group of companies doctrine could be invoked on the basis of the principle of "single economic unit". In that case, the facts were that Canbank Financial Services Ltd[19], a

[18] (2019) 7 SCC 62
[19] "CANFINA"

wholly owned subsidiary of Canara Bank, subscribed to the bonds floated by MTNL. CANFINA subsequently transferred the bonds to Canara Bank. Eventually, MTNL cancelled the bonds which gave rise to the dispute between the parties. Canara Bank filed a writ petition before the Delhi High Court challenging the cancellation of bonds by MTNL. The High Court referred the parties to arbitration, but Canara Bank challenged the impleadment of CANFINA. This Court dismissed Canara Bank's objection on the ground that CANFINA was a necessary and proper party to the arbitral proceedings, being the original purchaser to the bonds. While dealing with the contours of the group of companies doctrine, this Court noted that the doctrine could also be invoked "in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality."

38. The last in the series of decisions dealing with the group of companies doctrine is a three-Judge Bench decision of this Court in **Discovery Enterprises** (supra). In that case, ONGC entered into a contract with Discovery Enterprises for operating a shipping vessel. After a dispute arose between the parties, ONGC invoked the arbitration clause in the contract against Discovery Enterprises and Jindal Drilling and Industries Ltd., a sister company of Discovery Enterprises. The arbitral tribunal refused to proceed with the claim against Jindal Drilling and Industries Ltd. on the ground that it was not a signatory to the arbitration agreement. In an appeal filed by ONGC under Section 37 of the Arbitration Act, the High Court upheld the decision of the tribunal. The High Court's decision was challenged before this Court

under Article 136 of the Constitution. This Court cited **Chloro Controls** (supra) and the subsequent decisions with approval to emphasize that the group of companies doctrine can be applied to bind a company within a group which is not a signatory to the arbitration agreement. The Court held that in addition to the cumulative factors laid down in **Chloro Controls** (supra), the performance of the contract was also an essential factor to be considered by the courts and tribunals to bind a non-signatory to the arbitration agreement. Ultimately, this Court set aside the decision of the arbitral tribunal on the ground that it failed to address the plea raised by ONGC, and remanded the matter back to the tribunal to decide afresh.

ii. France – The Dow Chemicals case

39. The application of the group of companies doctrine in arbitration law mainly originated from the decisions rendered by international arbitral tribunals. Before proceeding to analyze the contours of the doctrine, it is necessary to understand its origin and development in the international context. Such an analysis is particularly relevant because any authoritative determination by this Court with regard to the group of companies doctrine ought to be in tune with the internationally accepted principles on the vexed issue of joining non-signatories to arbitration agreements.

40. The origin of the doctrine is primarily attributed to a number of arbitration awards rendered mainly in France. The most prominent among them remains an interim award delivered more than four decades ago by an ICC tribunal in Case No. 4131,[20] more popularly known as the Dow Chemicals case. In that

[20] Dow Chemical v. Isover Saint Gobain, Interim Award, ICC Case No. 4131, 23 September 1982

case, Dow Chemical (Venezuela) entered into a contract with a French company, which later assigned the rights to Isover Saint Gobain, for distribution of thermal isolation products in France. Dow Chemical (Venezuela) subsequently assigned the contract to Dow Chemical AG, which was a subsidiary of Dow Chemical Company – the holding company. Thereafter, Dow Chemical Europe, a subsidiary of Dow Chemical AG, entered into a similar contract with three companies, which subsequently assigned the contract to Isover Saint Gobain. Both contracts provided that the deliveries of products to the distributors will be made by Dow Chemical France, or any other subsidiary of Dow Chemical Company. Several suits were instituted against the companies of the Dow Chemical group before the French courts. In response, the four companies of the Dow Chemical group (the two formal parties to the contract – Dow Chemical AG and Dow Chemical Europe, and the two non-signatories – Dow Chemical Company and Dow Chemical France) instituted arbitral proceedings against Isover Saint Gobain before the ICC tribunal.

41. The primary issue before the ICC tribunal was to determine its own jurisdiction over the non-signatory parties. The tribunal sought to determine whether there existed a common intention of the parties to be bound by the arbitration agreement. The tribunal established the common intention of the parties by analyzing the factual circumstances underpinning the negotiation, performance, and termination of the contracts. The tribunal held that Dow Chemical France “was a party” to the two contracts, and consequently to the arbitration agreements contained in them, because it played a preponderant

role in the negotiation, performance, and termination of the contract. As for Dow Chemical Company, the tribunal held that the holding company had ownership of the trademarks under which the products were marketed in France and had absolute control over its subsidiaries who were involved in the negotiation, performance, and termination of the two contracts. The tribunal also relied on the fact that Isover Saint Gobain applied for the joinder of the holding company into the court proceedings in France before the Court of Appeal of Paris.

42. After concluding that the non-signatories were also a party to the arbitration agreement, the tribunal proceeded to analyze the factual circumstances of the signatory and non-signatory belonging to the same group of companies. At the outset, the tribunal observed that a group of companies constitutes one and the same economic reality. However, the tribunal emphasized that a non-signatory may be bound by the arbitration agreement entered into by another entity of the same group if the non-signatory appears to be a veritable party to the contracts on the basis of their involvement in the negotiation, performance, and termination of the contracts. The relevant observation is extracted below:

> "Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in their conclusion, performance, or termination of the contracts containing said clause, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise."

43. In **Dow Chemical** (supra), the arbitral tribunal did not base its decision to extend the arbitration agreement to non-signatories solely on the fact that

both the signatory and non-signatory parties were members of the same group. The tribunal emphasized the importance of determining the true parties to the arbitration agreement on the basis of their participation in the negotiation, performance, and termination of the agreement. The Dow Chemical case has been regarded as being instrumental in the transition from a restrictive interpretation of consent focusing only on its express manifestation to a more flexible approach attaching necessary relevance to implied consent to be bound by the arbitration agreement.[21]

44. In a series of subsequent rulings, the Court of Appeal of Paris acknowledged the extension of an arbitration agreement to non-signatories provided there was common intention of all the parties. According to the Court of Appeal, the common intention may be ascertained from the active role played by the non-signatories in the performance of the contract containing the arbitration agreement, which gives rise to the presumption that the non-signatory had knowledge of the arbitration agreement.[22]

45. The French law has been succinctly summarized in an unpublished ICC award in case No. 11405 of 2001 in the following terms:

> "[t]here is no general rule, in French international arbitration law, that would provide that non-signatory parties members of a same group of companies would be bound by an arbitration clause, whether always or in determined circumstances. What is relevant is whether all parties intended non-signatory parties to be bound by the arbitration clause. Not only the signatory parties, but also the non-signatory parties should have intended (or led the other parties to reasonably believe that they intended) to be bound by the arbitration clause."[23]

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[21] Bernard Hanotiau and Leonardo Ohlrogge, '40th Year Anniversary of the Dow Chemical Award' 40(2) ASA Bulletin 300-308.
[22] Paris Court of Appeal, 7 December 1994, V 2000 (formerly Jaguar France) v. Project XS, Rev. Arb. (1996) 67.
[23] Yves Derains, 'Is there a Group of Companies Doctrine?' in Bernard Hanotiau and Eric Schwartz (eds) in Dossier of the ICC Institute of World Business Law, Volume 7, 131-145.

Hence our understanding of the position in French law is that an arbitration agreement can be extended to non-signatory parties if all the parties to the arbitration agreement had a common intention to be bound by the agreement. The subjective intention of the parties is to be inferred on the basis of their objective conduct during the negotiation, performance, and termination of the underlying contract containing the arbitration agreement.

iii. Switzerland

46. Section 178(1) of the Swiss Private International Law Act 1987 states that an "arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text." In 2003, the Swiss Federal Supreme Court held that once there is a valid arbitration clause according to Section 178(1) of the Swiss Act, the issue whether it also extends to non-signatories may be decided by the courts or the arbitral tribunals. As a matter of general rule, the Swiss courts have extended an arbitration agreement to non-signatories typically in cases of assignment of a claim, assumption of debt or delegation of a contract.[24]

47. In a decision rendered in 1996, the Swiss Federal Supreme Court held that the fact that a non-signatory party belonged to the same group of companies as the signatory party to the arbitration agreement was not a sufficient justification for binding the non-signatory to the arbitration agreement.[25] However, the Swiss Courts are not averse to extending an arbitration agreement to non-signatory parties if there is an independent and formally

[24] A, B, C v. D and State of Libya, 4A_636/2018
[25] Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd, unpublished ICC Interim Award of 25 October 1994, confirmed by DFT on 29 January 1996, ASA Bulletin (1996) Vol 3 p 496.

valid manifestation of consent of the non-signatory party to the arbitration agreement.

48. In Swiss law, the consent of the parties to be bound by an arbitration agreement may be express or implied by conduct. In a 2008 decision, the Swiss Federal Court held that certain behavior or conduct may substitute compliance with a formal requirement of an arbitration agreement.[26] To determine the implied consent, it was held that the courts or tribunals may take into consideration the fact whether the non-signatory party was involved in the negotiation and performance of the contract, and thereby expressed its willingness to be bound by the arbitration agreement.[27] Thus, the subjective element of willingness to be bound by an arbitration agreement ought to be expressed through an objective element in the form of negotiation or performance of the contract.

iv. England

49. The English courts have generally taken a conservative approach to binding non-signatory parties to arbitration agreements. Section 82(2) of the English Arbitration Act 1996 defines a "party to arbitration agreement" to include "any person claiming under or through a party to the agreement." The English law envisages that even non-signatory parties may be bound by an arbitration agreement but only if they are claiming under or through the original party to the agreement. The English courts have adopted an approach which favors a strict adherence to the doctrine of privity. Under English law, an arbitration

[26] Decision 4A_376/2008 of 5 December 2008.
[27] X v. Y Engineering S.p.A. and Y S.p.A., 4A_450/2013, ASA Bull., 160 (2015).

agreement is extended to non-signatory parties on the basis of traditional contractual principles and doctrines such as agency, novation, assignment, operation of law, and merger and succession.[28] However, the English law has explicitly rejected other doctrines such as piercing the corporate veil, equitable estoppel, and group of companies as a basis for extending an arbitration agreement to non-signatory parties.

50. In **Peterson Farms INC** v. **C & M Farming Limited**,[29] a claim for damages was brought against Peterson Farms by the respondent C & M Farming for damages suffered by several C & M group entities, some of them being non-signatories to the arbitration agreement. The arbitral tribunal applied the group of companies doctrine to hold that C & M Farming contracted on behalf of the entire C & M group entities, and therefore was entitled to claim all the damages suffered by the C & M group entities arising out of the contractual relationship with Peterson. In appeal, the Commercial Court held that the chosen proper law of the Agreement - Arkansas law – is similar to the English law which excludes the application of the group of companies doctrine. Thus, the English law does not favor the application of the group of companies doctrine for extending an arbitration agreement to non-signatory parties.

51. The English precedents have also dealt with the meaning of the phrase "claiming through or under", which was referred to by this Court in **Chloro Controls** (supra). In **Roussel-Uclaf** v. **G D Searle and Co Ltd**[30], the issue

[28] Audley William Sheppard, 'Third Party Non-Signatories in English Arbitration Law' in Stavros Brekoulakis, Julian Lew, et al (eds) The Evolution and Future of International Arbitration (Kluwer Law International, 2016) 183-198.
[29] [2004] EWHC 121 (Comm)
[30] [1978] 1 Lloyd's Rep

before the Court of Chancery Division was whether a wholly owned subsidiary company could claim to be a party to an arbitration agreement between the parent company and a third party. The Court was called upon to interpret Section 1 of the Arbitration Act of 1975 which allowed any party to an arbitration agreement "or any person claiming through or under him" to apply to a court to stay proceedings where an arbitration agreement existed. It was held that the subsidiary can claim the benefit of the arbitration agreement because the parent company and the subsidiary were "so closely related" that it could be said that the subsidiary was "claiming through or under" the parent company. In **City of London** v. **Sancheti**,[31] the Court of Appeal overturned **Roussel-Uclaf** (supra) on the ground that an entity cannot be considered to be claiming through or under merely because there is a "legal or commercial connection" between them.

52. Section 5 of the English Arbitration Act, 1996 requires an arbitration agreement to be in writing. Further, Section 5(2)(a) provides that it is not necessary for the parties to sign the arbitration agreement. In such situations, the critical question that arises before the English courts is whether a non-signatory party is bound by an arbitration agreement. The English law position is that "contracts are not to be lightly implied" and the court "must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for."[32] However,

[31] The Mayoralty and Commonalty & Citizens of the City of London v. Ashok Sancheti, [2008] EWCA Civ 1283
[32] Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council, [1990] 1 WLR 1195

in limited situations, a contract is implied if the parties conducted themselves in a manner as if they have formally entered into a contract.[33]

53. In **Dallah Real Estate and Tourism Holding Company** v. **The Ministry of Religious Affairs, Government of Pakistan**[34], the Government of Pakistan entered into a Memorandum of Understanding with Dallah Real Estate and Tourism Holding Company[35] for construction of housing facilities in Mecca, Saudi Arabia. Subsequently, an agreement was executed between Dallah and the Awami Hajj Trust, which was established by the Government through an Ordinance. However, the trust ceased to exist as a legal entity because the Ordinance was not laid before Parliament and no further ordinance was promulgated. Dallah commenced arbitral proceedings against the Government. The UK Supreme Court had to determine whether there was a common intention on behalf of the Government and Dallah to make the former a party to the agreement. The Court observed that the "common intention of the parties means their subjective intention derived from the objective evidence." It was held that there was no evidence to conclude that the Government's behavior showed that it always considered itself to be a true party to the agreement.

v. Singapore

54. In **Manuchar Steel Hong Kong Limited** v. **Star Pacific Line Pte Ltd**,[36] the Singapore High Court expressly rejected the group of companies doctrine to

[33] Chitty on Contracts, Hugh Beale (ed), (32nd edn, Sweet and Maxwell, 2015) para 2-169.
[34] [2010] UKSC 46
[35] "Dallah"
[36] [2014] SGHC 181

bind non-signatories to arbitration agreement. The High Court reasoned that the group of companies doctrine was: first, anathema to the logic of consensual basis of an agreement to arbitrate; and second, ordering of companies within a broader group did not mean one could dispense with separate legal entity. The Singapore High Court relied on position of law taken in **Peterson Farms INC** (supra) to observe that enforceable obligations cannot be imposed on "strangers" to an arbitration agreement.

vi. United States of America

55. The Federal Arbitration Act is silent on the aspect of the joinder of non-signatory parties to the arbitration agreement. Nevertheless, the US courts have often used the general principles of contract law such as incorporation by reference, assumption, agency, veil piercing or alter ego, and estoppel for binding non-signatories to arbitration agreements.[37] Although the United States follow a pro-arbitration policy, an important issue that often comes up for deliberation is whether the domestic doctrines could be applied for binding non-signatories in cases of international arbitration.

56. In **G E Energy Power Conversion France SAS** v. **Outokumpu Stainless**,[38] the issue before the United States Supreme Court was whether the New York Convention precludes a non-signatory to an international arbitration agreement from compelling arbitration by invoking domestic doctrines such as equitable estoppel. In that case, the Eleventh Circuit Court refused to apply the domestic doctrine of equitable estoppel on the ground that it conflicts with

[37] Andrijana Misovic, 'Binding non-signatories to arbitrate: the United States approach' (2021) 37(3) Arbitration International 749-768.
[38] 140 S. Ct. 1637 (2020)

the signature requirements under the New York Convention. The Circuit Court observed that Article II of the New York Convention contains a strict requirement that the parties "actually sign" the arbitration agreement in order to compel the parties to arbitration. The US Supreme Court held that the Article II of the New York Convention does not restrict the contracting states from applying domestic law to refer parties to arbitration agreements. Moreover, it was observed that "the provisions of Article II contemplate the use of domestic doctrines to fill gaps in the Convention." Thus, it was held that the New York Convention does not set out a comprehensive regime to preclude the use of domestic law to enforce arbitration agreements.

57. Unlike the English courts, the US Courts have used non-consensual doctrines to extend arbitration agreements to non-signatory parties. For instance, the US Courts have pierced the corporate veil and held the alter ego liable in exceptional circumstances where the parent company exercised complete control over the subsidiary with respect to the transaction at issue.[39] Similarly, the doctrine of arbitral estoppel has been developed by the US Courts to bind non-signatory parties to an arbitration agreement. The doctrine of arbitral estoppel suggests that a party is estopped from denying its obligation to arbitrate when it received a 'direct benefit' from a contract containing an arbitration agreement.[40] The second type of arbitral estoppel developed by the US courts places emphasis on the substantial interdependent relationship between the signatory and non-signatory party.[41] In a situation where claims

[39] American Fuel Corp v. Utah Energy Development Co, Inc, 122 F.3d 130, 134 (2d Cir 1997)
[40] American Bureau, Shipping v. Tencara Shipyard, 170 F.3d 349, 353 (2d Cir 1999)
[41] Sunkist Soft Drinks, Inc v. Sunkist Growers, Inc, 10 F.3d 753, 757 (11th Cir 1993)

of concerted misconduct were raised against both the signatory and non-signatory to the contract, the courts have resorted to the doctrine of equitable estoppel to further the policy of pro-arbitration.[42]

58. The above discussion shows that international jurisdictions, in some form or the other, have moved beyond the formalistic requirement of consent to bind a non-signatory to an arbitration agreement. The primary conclusion is that the issue of binding a non-signatory to an arbitration agreement is more of a fact-specific aspect.[43] In jurisdictions such as France and Switzerland, there is a broad consensus that consent or subjective intention of a non-signatory to arbitrate may be proved by conduct. Such subjective intention could be derived from the objective evidence in the form of participation of the non-signatory in the negotiation, performance, or termination of the underlying contract containing the arbitration agreement. However, the group of companies doctrine has not been universally accepted by all jurisdictions.

In jurisdictions such as France where the doctrine has gained acceptance, group of companies is one of the several factors that a court or tribunal considers to determine the mutual intention of all the parties to join the non-signatory to the arbitration agreement. Keeping in mind the above background, we now move on to analyze the applicability of the group of companies doctrine in the Indian context.

[42] Grigson v. Creative Artists Agency, LLC, 210 F.3d 524 (2000)
[43] Bernard Hanotiau, 'May an Arbitration Clause be Extended to Non-signatories: Individuals, States or Other Companies of the Group?' in Complex Arbitrations: Multi-party, multi-contract, Multi-issue – A comparative study' Bernard Hanotiau (eds) (2nd edn, 2020) 95, 194.

D. Arbitration Agreement

i. Consent as the basis for arbitration

59. Arbitration is an alternative dispute resolution mechanism where parties consensually decide to submit a dispute between them to an arbitral tribunal to the exclusion of domestic courts.[44] Arbitration provides a neutral, efficient, and expert process for dispute resolution at a single forum whose decision is final and binding on the parties. The principle of party autonomy underpins the arbitration process as it allows the parties to dispense with technical formalities and agree upon substantive and procedural laws and rules applicable to the merits of the dispute.[45] Party autonomy allows the parties to choose the seat of arbitration, number of arbitrators, procedure for appointment of arbitrators, rules governing the arbitral procedure, and the institution which will administer the arbitration. An arbitration proceeding is broadly divided into two stages: The first stage commences with an arbitration agreement and ends with the making of an arbitral award. The second stage pertains to the enforcement of the arbitral award.[46]

60. Consent forms the cornerstone of arbitration. An arbitration agreement records the consent of the parties to submit their disputes to arbitration. A two-Judge Bench of this Court in **Bihar State Mineral Development Corporation** v. **Encon Builders (I) Pvt. Ltd.** [47] laid down four essential elements of an arbitration agreement:

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[44] Gary Born, International Arbitration Law and Practice (3rd ed, 2021) 2.
[45] **Bharat Aluminium Company v Kaiser Aluminium Technical Services, (2016) 4 SCC 126**
[46] **Satish Kumar v. Surinder Kumar, (1969) 2 SCR 244**
[47] (2003) 7 SCC 418

(i) There must be a present or a future difference in connection with some contemplated affair

(ii) The parties must intend to settle such difference by a private tribunal

(iii) The parties must agree in writing to be bound by the decision of such tribunal.

(iv) The parties must be *ad idem*.

61. An arbitration agreement is a contractual undertaking by two or more parties to resolve their disputes by the process of arbitration, even if the disputes themselves are not based on contractual obligations. An arbitration agreement is a conclusive proof that the parties have consented to submit their dispute to an arbitral tribunal to the exclusion of domestic courts. The basis for an arbitration agreement is generally traced to the contractual freedom of parties to codify their intention to consensually submit their disputes to an alternative dispute resolution process.

62. According to Section 10 of the Code of Civil Procedure of 1908, the courts have jurisdiction to try all suits of a civil nature except suits whose cognizance is expressly or impliedly barred. The said provision gives a right to any person to file a civil suit before a court of competent jurisdiction. Moreover, Section 28 of the Indian Contract Act of 1872[48] provides that any agreement restraining a party from enforcing their rights under a contract before courts or tribunals is void to that extent. However, the provision specifically saves a contract by which two or more persons agree that any dispute, which may

[48] "Contract Act"

arise between them, in respect of any subject or class of subjects shall be referred to arbitration. Thus, arbitration agreements are granted a statutory exception under Section 28 of the Contract Act. In **Dhulabhai** v. **State of Madhya Pradesh** a Constitution Bench of this Court held that the jurisdiction of civil courts may be excluded by an express provision of law or by clear intendment arising from such law.[49] In **Chloro Controls** (supra), this Court observed that Section 45 of the Arbitration Act shall prevail over the provisions of the Code of Civil Procedure, 1908 in case of a valid arbitration agreement. Considering the fact that an arbitration agreement excludes the jurisdiction of civil courts, such an agreement ought to be valid and enforceable.

63. An arbitration agreement must satisfy the principles of contract law laid down under the Contract Act, in addition to satisfying other requirements stipulated under Section 7 of the Arbitration Act, to qualify as a valid agreement.[50] Section 2(e) of the Contract Act defines an agreement as every promise and every set of promises forming the consideration for each other. An agreement enforceable by law is a contract. An agreement should satisfy the mandate of Section 10 of the Contract Act to be enforceable by law. Section 10 provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object. According to Section 13, two or more persons are said to consent when they agree upon the same thing in the same sense. Thus, consensus

[49] (1968) 3 SCR 662
[50] **Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1**

ad idem between the parties forms the essential basis to constitute a valid arbitration agreement.

64. Being a creature of a contract, an arbitration agreement is also bound by the general principles of contract law, including the doctrine of privity. The doctrine of privity means that a contract cannot confer rights or impose liabilities on any person except the parties to the contract. This doctrine has two aspects: first, only the parties to the contract are entitled under it or bound by it; and second, the parties to the contract cannot impose a liability on a third party. As a corollary, a third party cannot acquire rights and entitlements under a contract. In **M C Chacko** v. **State Bank of Travancore**, this Court held it as a settled principle of law that a person who is not party to a contract cannot enforce the terms of the contract, subject to certain well-recognised exceptions such as trust, family arrangement, and assignment.[51] The principle that only the parties to an arbitration agreement are either bound or benefited by such an agreement is fundamental to arbitration.[52] This principle is uniformly reflected in international arbitration conventions as well as the Arbitration Act. For instance, Section 7 of the UNCITRAL Model Law defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise **between them** in respect of a defined legal relationship, whether contractual or not." (emphasis supplied)

[51] (1969) 2 SCC 343
[52] Gary Born (n 44) 1518.

65. It is a generally accepted legal proposition that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which they have not agreed so to submit.[53] Since consent forms the cornerstone of arbitration, a non-signatory cannot be forcibly made a "party" to an arbitration agreement as doing so would violate the sacrosanct principles of privity of contract and party autonomy. However, In case of multi-party contracts, the courts and tribunals are often called upon to determine the parties to an arbitration agreement.

ii. Parties to Arbitration Agreement

66. The general method to figure out the parties to an arbitration agreement is to look for the entities who are named in the recitals and have signed the agreement. The signature of a party on the agreement is the most profound expression of the consent of a person or entity to submit to the jurisdiction of an arbitral tribunal. However, the corollary that persons or entities who have not signed the agreement are not bound by it may not always be correct. A written contract does not necessarily require that parties put their signatures to the document embodying the terms of the agreement.[54] Therefore, the term "non-signatories", instead of the traditional "third parties", seems the most suitable to describe situations where consent to arbitration is expressed through means other than signature. A non-signatory is a person or entity that is implicated in a dispute which is the subject matter of an arbitration, although it has not formally entered into an arbitration agreement.[55] The important

[53] United Steelworkers of America v. Warrior and Gulf Navigation, (1960) 363 US 574, 582
[54] Pollock and Mulla, The Indian Contract and Specific Reliefs Act (14th edn, 2016) 235.
[55] Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610.

determination is whether such a non-signatory intended to effect legal relations with the signatory parties and be bound by the arbitration agreement. There may arise situations where persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may intend to be bound by the terms of the agreement. In other words, the issue of who is a "party" to an arbitration agreement is primarily an issue of consent.

67. Section 2 of the Contract Act provides that when a person signifies their willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, is said to make a proposal. The proposal is said to be accepted when the person to whom the proposal is made signifies their assent. A proposal becomes promise upon acceptance. Every promise and every set of promises, forming the consideration for each other, is an agreement. Importantly, Section 9 provides that a promise is said to be express if the proposal or acceptance of any promise is made in words, while a promise is said to be implied if such proposal or acceptance is "made otherwise than in words." Thus, a contract may either be express or implied.

68. Chitty on Contracts explains the difference between express and implied contracts as follows:

> "Contracts may either be express or implied. **The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated**, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination.[…] **Express and implied contracts are both contracts in the true sense of the term, for they both arise from**

> **the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct**. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts has little importance."[56]

69. The above exposition gives rise to the inference that in case of an implied contract, the question revolves around the determination of the consent of the parties to be bound by the terms of the contract. Such determination is manifested through the acts or conduct. The theory of implied contract by conduct has also been accepted by this Court. In **Haji Mohammed Ishaq** v. **Mohamad Iqbal**,[57] the plaintiff supplied tobacco to the defendant. Although there was no express agreement between the parties, the defendant accepted the goods, but allegedly failed to clear the outstanding dues despite repeated demands raised by the plaintiff. A Bench of three Judges of this Court observed that the conduct of the defendants in accepting the goods and not repudiating any of the demand letters raised by the plaintiff "clearly showed that a direct contract which in law is called an implied contract by conduct was brough about between them." Under the Indian contract law, it is posited that actions or conduct can be an indicator of consent of a party to be bound by a contract. This also applies to an arbitration agreement considering the fact that it is a creature of contract. However, an arbitration agreement also has to meet the requirements laid down under the Arbitration Act to be valid and enforceable.

[56] Chitty on Contracts, Hugh Beale (ed) (32nd edn, Sweet and Maxwell, 2015) para 1-104.
[57] (1978) 2 SCC 493

70. Section 2(h) of the Arbitration Act defines a "party" to mean a party to an arbitration agreement. Section 7 defines an arbitration agreement to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a "defined legal relationship." Section 7 requires that an arbitration agreement has to be in writing. Section 7 indicates the circumstances in which it is regarded as an agreement in writing. Such an agreement may be embodied in a document, an exchange of communications, including in the electronic form, or in a statement of claim which is not traversed in the defence. In **Vidya Drolia** v. **Durga Trading Corporation**,[58] this Court observed that a legal relationship means a relationship which gives rise to legal obligations and duties, and confers a right. Such a right may be contractual or non-contractual. In case of a non-contractual legal relationship, the cause of action arises in tort, restitution, breach of statutory duty, or some other non-contractual cause of action. Thus, the legislative intent underlying Section 7 suggests that any legal relationship, including relationships where there is no contract between the persons or entities, but whose actions or conduct has given rise to a relationship, could form a subject matter of an arbitration agreement under Section 7. This approach is in line with the observations of Lord Hoffman in **Fiona Trust and Holding Company** v. **Privalov** where it was observed that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or

[58] (2021) 2 SCC 1

purported to enter to be decided by the same tribunal."[59] (emphasis supplied)

71. Section 7(3) requires an arbitration agreement to be in writing. Section 7(4) lays down three circumstances to elaborate when an arbitration agreement can be said to be in writing. According to the first circumstance laid down under Section 7(4)(a), an arbitration agreement is in writing if it is signed by the parties. This circumstance refers to a situation where the parties have formally executed and expressly assumed the status of parties by attesting their signatures to the arbitration agreement or the underlying contract containing the arbitration agreement. In such situations, the courts or tribunals only need to refer to the signature page or the recitals to figure out the parties to the arbitration agreement.

72. Section 7(4)(b) provides the second circumstance, according to which an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement. According to this provision, the existence of an arbitration agreement can be inferred from various documents duly approved by the parties.[60] Section 7(4)(b) dispenses with the conventional sense of an agreement as a document with signatories. Rather, it emphasizes on the manifestation of the consent of persons or entities through their actions of exchanging documents. However, the important aspect of the said provision

[59] [2007] UKHL 40
[60] **Shakti Bhog Foods Limited v. Kola Shipping Ltd, (2009) 2 SCC 134; Trimex International FZE Ltd v. Vedanta Aluminium Ltd, (2010) 3 SCC 1**

lies in the fact that the parties should be able to record their agreement through a documentary record of evidence. In **Great Offshore Ltd**. v. **Iranian Offshore Engineering and Construction Company**, this Court observed that Section 7(4)(b) requires the court to ask whether a record of agreement is found in the exchange of letters, telex, telegrams, or other means of telecommunication.[61] Thus, the act of agreeing by the persons or entities has to be inferred or derived by the courts or tribunals from the relevant documents and communication, neither of which can be equated with a conventional contract.

73. The third circumstance is provided under Section 7(4)(c), according to which an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. A two-Judge Bench of this Court clarified in **S N Prasad** v. **Monnet Finance Limited**[62] that there will be an "exchange of statements of claim and defence" for the purposes of Section 7(4)(c) if there is an assertion of the existence of an arbitration agreement in any suit, petition or application filed before any court or tribunal, and if there is no denial of it in the defence, counter, or written statement. Thus, in the third circumstance the court proceeds on the assumption that the conduct of the person or entity in not denying the existence of an arbitration agreement leads to the conclusive proof of its existence. All the three circumstances

[61] (2008) 14 SCC 240
[62] (2011) 1 SCC 320

contained in Section 7(4) are geared towards determining the mutual intention of the parties to be bound by the arbitration agreement.

74. Section 7 of the Arbitration Act contains two aspects: a substantive aspect and a formal aspect. The substantive aspect is contained is Section 7(1) which allows parties to submit disputes arising between them in respect of a defined legal relationship to arbitration. The legal relationships between and among parties could either be contractual or non-contractual. For legal relations to be contractual in nature, they ought to meet the requirements of the Indian contract law as contained in the Contract Act. It has been shown in the preceding paragraphs that a contract can either be express or implied, which is inferred on the basis of action or conduct of the parties. Thus, it is not necessary for the persons or entities to be signatories to a contract to enter into a legal relationship – the only important aspect to be determined is whether they intended or consented to enter into the legal relationship by the dint of their action or conduct.

75. The second aspect is contained in Section 7(3) which stipulates the requirement of a written arbitration agreement. A written arbitration agreement need not be signed by the parties if there is a record of agreement.[63] The mandatory requirement of a written arbitration agreement is merely to ensure that there is a clearly established record of the consent of the parties to refer their disputes to arbitration to the exclusion of the domestic courts.

[63] **Govind Rubber Ltd v. M/s Louis Dreyfus Commodities, (2015) 13 SCC 477**

76. Section 2(h) read with Section 7 does not expressly require the "party" to be a signatory to an arbitration agreement or the underlying contract containing the arbitration agreement. This interpretation is in line with the general trend in national and international legislations that a signature is not necessary for an arbitration agreement. The UNCITRAL Model Law as amended in 2006 lays down the writing requirement for an arbitration agreement under Article 7 in the following terms:

> "(3) An arbitration agreement is in writing if its content is recorded in any form, **whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means**."

The above provision states that an arbitration agreement may be entered into in any form, for example orally or tacitly, as long as the content of the agreement is recorded. It eliminates the requirement of the signature of parties or an exchange of messages between the parties.

77. Article II paragraph 2 of the New York Convention defines "agreement in writing" to include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Article 7 of the UNCITRAL Model Law establishes a more favourable requirement for a written arbitration agreement. In 2006, UNCITRAL recommended that the circumstances described in Article II paragraph 2 of the New York Convention "be applied recognizing that the circumstances described therein are not exhaustive."[64] Additionally, it also recommended that Article 7 paragraph 1 of the UNCITRAL Model Law should be applied "to

[64] UNCITRAL Model Law on International Commercial Arbitration, Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, (adopted by the UNCITRAL on 7 July 2006) 39.

allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement." The Arbitration Act is largely based on the UNCITRAL Model Law. Therefore, the UNCITRAL Model Law could be referred to while construing the provisions of the Arbitration Act.[65] Although the amended Section 7 of the UNCITRAL Model Law has not been adopted in the Indian law, it reflects the modern commercial reality where substance is given precedence over technical legal formalities.[66]

78. Reading Section 7 of the Arbitration Act in view of the above discussion gives rise to the following conclusions: first, arbitration agreements arise out of a legal relationship between or among persons or entities which may be contractual or otherwise; second, in situations where the legal relationship is contractual in nature, the nature of relationship can be determined on the basis of general contract law principles; third, it is not necessary for the persons or entities to be signatories to the arbitration agreement to be bound by it; fourth, in case of non-signatory parties, the important determination for the courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct; fifth, the requirement of a written arbitration agreement has to be adhered to strictly, but the form in which such agreement is recorded is irrelevant; sixth, the requirement of a

[65] **Sundaram Finance Ltd v. NEPC India Ltd, (1999) 2 SCC 479, para 9; P Manohar Reddy and Bros v. Maharashtra Krishna Valley Development Corporation, (2009) 2 SCC 494, para 27.**
[66] Redfern and Hunter on International Arbitration (7th edn, Oxford University Press, 2023) para 2.23.

written arbitration agreement does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties; and seventh, once the validity of an arbitration agreement is established, the court or tribunal can determine the issue of which parties are bound by such agreement.

79. It is presumed that the formal signatories to an arbitration agreement are parties who will be bound by it. However, in exceptional cases persons or entities who have not signed or formally assented to a written arbitration agreement or the underlying contract containing the arbitration agreement may be held to be bound by such agreement. As mentioned in the preceding paragraphs, the doctrine of privity limits the imposition of rights and liabilities on third parties to a contract. Generally, only the parties to an arbitration agreement can be subject to the full effects of the agreement in terms of the reliefs and remedies because they consented to be bound by the arbitration agreement. Therefore, the decisive question before the courts or tribunals is whether a non-signatory consented to be bound by the arbitration agreement. To determine whether a non-signatory is bound by an arbitration agreement, the courts and tribunals apply typical principles of contract law and corporate law. The legal doctrines provide a framework for evaluating the specific contractual language and the factual settings to determine the intentions of the parties to be bound by the arbitration agreement.[67]

80. Gary Born suggests that the legal theories and doctrines provide a basis for determining the real intent of parties to be bound by an arbitration agreement.

[67] Gary Born (n 44) 1531.

Therefore, it is incorrect to use terminologies such as 'extension' of an arbitration agreement to non-signatories or 'third parties':

> "Judicial case law and commentary on international arbitration sometimes make reference to the "extension" of an arbitration agreement to non-signatories, or to "third parties" on the basis of one or more of the foregoing theories. These expression are inaccurate, in that they imply that an entity which is not a party to an arbitration agreement is nonetheless subject to that agreement's effects, by virtue of something other than the parties' consent. Contrary to the references to "extension" or "third parties", most of the theories […] provide a basis for concluding that an entity is in reality a party to the arbitration agreement – which therefore does not need to be "extended" to a "third party" – because that party's actions constitute consent to the agreement, or otherwise bind it to the agreement, notwithstanding the lack of its formal execution of the agreement. The arbitration agreement is therefore not ordinarily "extended", but rather the true parties that have consented to the arbitration agreement are identified."

81. Courts and tribunals across the world have been applying traditional contractual and commercial doctrines to determine the consent of the non-signatory parties to be bound by the arbitration agreement. Generally, consent based theories such as agency, novation, assignment, operation of law, merger and succession, and third party beneficiaries have been applied in different jurisdictions. In exceptional circumstances, non-consensual theories such as piercing the corporate veil or alter ego and estoppel have also been applied to bind to bind a non-signatory party to an arbitration agreement. The group of companies doctrine is one such consent-based doctrine which has been applied, albeit controversially, for identifying the real intention of the parties to bind a non-signatory to an arbitration agreement.

E. Group of Companies Doctrine

i. Separate legal personality

82. The phenomenon of group companies is the modern reality of economic life and business organisation. Group companies are a set of separate firms linked together in formal or informal structures under the control of a parent company. The group companies can be defined in the Indian context as "an 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."[68] A group company involving the parent and subsidiary companies are created for myriad purposes such as limiting the liability of the parent corporation, facilitating international trade, entering into business ventures with investors, establishing domestic corporate residence, and avoiding tax liability.

83. The principle of separate legal personality has been the cornerstone of corporate law. In **Salomon** v. **Salomon**,[69] the House of Lords famously observed that a company is at law a different person altogether from the promoters, directors, shareholders, and employees. The principle of separate legal personality equally applies to corporate groups. A parent company is not generally held to be liable for the actions of the subsidiary company of which

[68] Jayati Sarkar, 'Business Groups in India' in Asli Coplan, Takashi Hikino, and James Lincoln (eds) The Oxford Handbook of Business Groups (2010) 299
[69] [1897] AC 22

it is a direct or indirect shareholder. The Companies Act, 2013[70] has statutorily recognized a subsidiary company as a separate legal entity.[71] Section 2(46) of the 2013 Act defines a holding company as a company of which one or more other companies are subsidiary companies. Section 2(87) defines "subsidiary company" to mean a company in which the holding company exercises control over the composition of the Board of Directors and has a controlling interest of at least 50 percent over the voting rights. Although a holding company owns a controlling interest in the subsidiary company, they are considered as separate legal entities. Group companies' structures allow multinational corporations to structure their businesses at both the national and international level to leverage better returns for the investors and ensure business growth of the corporation.

84. A Bench of three Judges of this Court in **Vodafone International Holding BV** v. **Union of India**[72] emphasized the principles of corporate separateness in the following terms:

> 101. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent has nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and its parent company, would get hold of the assets of the subsidiary. In none of the authorities have the assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be gained."

[70] "2013 Act"
[71] **Balwant Rai Saluja v. Air India, (2014) 9 SCC 407**
[72] (2012) 6 SCC 613

85. The separateness of corporate personality will be ignored by courts in exceptional situations where a company is used as a means by the members and shareholders to carry out fraud or evade tax liabilities. If the court, on the basis of factual evidence, determines that the company was acting as an agent of the members or shareholders, it will ignore the separate personality of the company to attribute liability to the individuals. In **Tata Engineering and Locomotive Co Ltd** v. **State of Bihar**[73], the issue before a Constitution Bench of this Court was whether a company could be treated as a citizen for the purposes of maintaining a writ petition under Article 32 of the Constitution. The company urged that the corporate veil should be lifted to treat the petition as one filed by the shareholders. This Court held that the veil of a corporation can be lifted where fraud is intended to be prevented or trading with an enemy is sought to be defeated.

86. In case of group companies, there may arise situations where a holding company completely dominates the affairs of the subsidiary company, to the extent of misusing its control, to avoid or conceal liability. In such situations, the courts apply the doctrine of “alter ego” or piercing the corporate veil to disregard the corporate separateness between the two companies and treat them as a single entity.[74] In **LIC** v. **Escorts Ltd**,[75] a Constitution Bench of this Court noted that the principle of distinct legal personality may be ignored where the associate companies are inextricably connected as to be, in reality,

[73] (1964) 6 SCR 885
[74] Gary Born (n 44) 1545.
[75] (1986) 1 SCC 264

part of one concern. Speaking for the Bench, Justice O Chinnappa Reddy observed:

> "90. […] Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud, or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricable connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."

87. The application of the doctrine of lifting the corporate veil rests on the overriding considerations of justice and equity.[76] Often, the courts pierce the corporate veil when maintaining the separateness of corporate personality is found opposed to justice, convenience, and public interests.[77] In **Balwant Rai Saluja** v. **Air India**,[78] this Court cautioned that the principle of piercing the corporate veil should be applied in a restrictive manner and only in scenarios where it is evident that the subsidiary company was a mere camouflage deliberately created by the holding company for the purpose of avoiding liability. It was further observed that the intent of piercing the corporate veil must be such that would seek to remedy a wrong done by the holding company. In the context of arbitration, the principle of piercing the corporate veil has been sparingly used because it disregards the intention of the parties by emphasizing on the overriding considerations of good faith and equity to bind the non-signatories to an arbitration agreement.

[76] **Delhi Development Authority v. Skipper Construction Co. (P) Ltd., (1996) 4 SCC 662**
[77] **Kapila Hingorani v. State of Bihar, (2003) 6 SCC 1**
[78] (2014) 9 SCC 407

88. Moreover, since the companies in a group have separate legal personality, the presence of common shareholders or directors cannot lead to the conclusion that the subsidiary company will be bound by the acts of the holding company. The statements or representations made by promoters or directors in their personal capacity would not bind a company. Similarly, the mere fact that the two companies have common shareholders or a common Board of Directors will not constitute a sufficient ground to conclude that they are a single economic entity. The single economic entity or the single economic unit theory imposes general enterprise liability on the corporate group. In **D H N Food Distributors Ltd** v. **Tower Hamlets London Borough Council**[79], Lord Denning held that a group of three companies should be treated as a single economic entity on the basis of two factors: first, the parent company owned all the shares of the subsidiary companies to the extent that it controlled every movement of the given subsidiary companies; and second, all the three companies in the group virtually acted as partners and could not be treated separately. Thus, the determination of whether two or more companies constitute a single economic entity depends upon the concerted efforts of the companies to act in pursuance of a common endeavour or enterprise.

89. From the above discussion, we can infer that entities within a corporate group have separate legal personality, which cannot be ignored save in exceptional circumstances such as fraud. The distinction between a parent company and its subsidiary is fundamental, and cannot be easily abridged by taking

[79] [1976] 1 WLR 852 (2)

recourse to economic convenience.[80] Legally, the rights and liabilities of a parent company cannot be transferred to the subsidiary company, and vice versa, unless, there is a strong legal basis for doing so.

ii. Adopting a pragmatic approach to consent

90. In the context of arbitration law, the intention of the parties has to be derived from the words used in the arbitration agreement. While construing the arbitration agreement, it is the duty of the court to not delve deep into the intricacies of the human mind, but only consider the expressed intentions of the parties.[81] The words used in the contract reflect the commercial understanding between the parties. The intention of the parties has to be ascertained from the words used in the contract, considered in light of the surrounding circumstances and the object of such contract.[82]

91. An arbitration agreement encapsulates the commercial understanding of business entities as regards to the mode and manner of settlement of disputes that may arise between them in respect of their legal relationship. In most situations, the language of the contract is only suggestive of the intention of the signatories to such contract and not the non-signatories. However, there may arise situations where a person or entity may not sign an arbitration agreement, yet give the appearance of being a veritable party to such arbitration agreement due to their legal relationship with the signatory parties and involvement in the performance of the underlying contract. Especially in

[80] **Bank of Tokyo v. Karoon, (1986) 3 All ER 468**
[81] **Kamla Devi v. Takhatmal Land, AIR 1964 SC 859; Bangalore Electricity Supply Co Ltd v. E S Solar Power (P) Ltd, (2021) 6 SCC 718**
[82] **Bank of India v. K Mohandas, (2009) 5 SCC 313; M Dayanand Reddy v. A P Industrial Infrastructure Corporation Ltd, (1993) 3 SCC 137**

cases involving complex transactions involving multiple parties and contracts, a non-signatory may be substantially involved in the negotiation or performance of the contractual obligations without formally consenting to be bound by the ensuing burdens, including arbitration.

92. Modern commercial reality suggests that there often arise situations where a company which has signed the contract containing the arbitration clause is not always the one to negotiate or perform the underlying contractual obligations. In such situations, emphasis on formal consent will lead to the exclusion of such non-signatories from the ambit of the arbitration agreement, leading to multiplicity of proceedings and fragmentation of disputes. In **A Ayyasamy** v. **A Paramsivam**,[83] this Court observed that it is the duty of the courts "to impart to that commercial understanding a sense of business efficacy." The courts must interpret contracts in a manner that would give them a sense of efficacy rather than invalidating the commercial interests of the parties. The meaning of the contract must be gathered by adopting a common sense approach, which should "not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation."[84] Therefore, there is a need to adopt a modern approach to consent, which takes into consideration the circumstances, apparent conduct, and commercial facets of business transactions.

93. As Professor Hanotiau suggests, there is a need to adopt a modern and pragmatic approach to consent:

[83] (2016) 10 SCC 386
[84] **Union of India v. D N Revri, (1976) 4 SCC 147**

> "I would suggest that it is more accurate to refer to a modern approach to consent; an approach that is more pragmatic, more focussed on an analysis of facts, which places an emphasis on commercial practice, economic reality, trade usages, and the complex and multifaceted dimensions of large projects involving group of companies and connected agreements in multiparty multi-contract scenarios; an approach that is no longer restricted to express consent but that takes into consideration all its various expressions and tends to give much more importance than before to the conduct of the individuals or companies concerned."[85]

94. It has been urged before us that where a written arbitration agreement clearly sets out the parties to it, the courts or tribunals cannot read into the agreement an intention to bind persons or entities other than the signatory parties. Reliance was placed on **Roop Kumar** v. **Mohan Thedani**,[86] where this Court observed that "wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them." Consequently, it was urged that the courts or tribunals cannot interpret the arbitration agreement in a manner so as to expand its reach to parties not named in the agreement.

95. Arbitration law is an autonomous legal field. While the main purpose of corporate law and contract law is imputation of substantive legal liability, the main purpose behind the law of arbitration is to determine whether an arbitral tribunal has jurisdiction over the dispute arising between parties to an arbitration agreement. On the one hand, the courts and tribunals cannot lightly brush aside the decision of the parties to not make a person or entity a

[85] Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?' (2011) 27(4) Arbitration International 539, 554
[86] (2003) 6 SCC 595

party to the arbitration agreement. The fact that the non-signatory did not put pen to paper may be an indicator of its intention to not assume any rights or responsibilities under the arbitration agreement. On the other hand, courts and tribunals cannot adopt a rigid approach to exclude all persons or entities who, through their conduct and relationship with the signatory parties, intended to be bound by the underlying contract containing the arbitration agreement. The area of arbitration law not only concerns domestic law, but it also encompasses the international law, particularly when it pertains to the enforcement of international arbitral awards. Therefore, this Court ought to adopt a balanced approach without comprising on the basic principles of arbitration law, contract law, and company law to ensure that the resultant legal framework is consistent with internationally accepted practices and principles.

96. A formalistic construction of an arbitration agreement would suggest that the decision of a party to not sign an arbitration agreement should be construed to mean that the mutual intention of the parties was to exclude that party from the ambit of the arbitration agreement. Indeed, corporate entities have the commercial and contractual freedom to structure their businesses in a manner to limit their liability. However, there have been situations where a corporate entity deliberately made an effort to be not bound by the underlying contract containing the arbitration agreement, but was actively involved in the negotiation and performance of the contract. The level of the non-signatory party's involvement was to the extent of making the other party believe that it was a veritable party to the contract, and the arbitration agreement contained

under it. Therefore, the group of companies doctrine is applied to ascertain the intentions of the parties by analysing the factual circumstances surrounding the contractual arrangements.[87]

97. Increasingly, multinational groups often adopt new and sophisticated corporate structures for execution and delivery of complex commercial transactions such as construction contracts, concession contracts, license agreements, long-term supply contracts, banking and financial transactions, and maritime contracts. For the execution of such contracts, corporate structures may take the form of groups based on equity, joint ventures, and informal alliances.[88] A multi-corporate structure helps a group in adopting commercially effective models of operation as different companies can get involved at different stages of a single transaction. Often, persons or entities, who are not signatories to the underlying contract containing the arbitration agreement, are involved in the negotiation, performance, or termination of the contract. In the context of arbitration law, the challenge arises when only one member of the group signs the arbitration agreement, to the exclusion of other members. Should the non-signatories be excluded from the arbitration proceedings, even though they were implicated in the dispute which forms the subject matter of arbitration? As a response to this challenge, arbitration law has developed and adopted the group of companies doctrine, to allow or compel a non-signatory party to be bound by an arbitration agreement.

[87] Gary Born (n 44) 1568.
[88] Stavros Brekoulakis, 'Parties in International Arbitration: Consent v. Commercial Reality' in Stavros Brekoulakis, Julian DM Lew, et al (eds) in 'The Evolution and Future of International Arbitration' (2016) 119, 120.

iii. Group of companies doctrine – a fact based doctrine

98. The group of companies doctrine is used in the context of companies which are related to each other by virtue of their being a part of the same corporate group. Since every company in a group has a separate legal personality, a contract formally entered by one member of a group will not be binding on the other members by virtue of the limited liability principle. The group of companies doctrine is used to bind a non-signatory company within a group to an arbitration agreement which has been signed by other member of the group.[89] The underlying basis of the group of companies doctrine 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. In other words, the group of companies doctrine is a means of identifying the common intention of the parties to bind a non-signatory to arbitration agreement by emphasizing and analysing the corporate affiliation of the distinct legal entities.[90]

99. The group of companies doctrine has been a subject of rigorous academic debate among practitioners of arbitration law and academics with domain expertise. The first view questions the necessity of adopting the doctrine by suggesting that the determination of consent in complex multi-party arbitration can be done on the basis of traditional contractual and commercial law theories. Professor Bernard Hanotiau suggests that the group of companies doctrine should be discarded because it has been used as a "shortcut to avoid

[89] UNCITRAL, 'Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form of arbitration agreement: Report of the Secretary General' A/CN.9/WG.II/WP.108/Add.1 (26 January 2000)
[90] Gary Born (n 44) 1563.

legal reasoning" leading to a distorted approach by courts and arbitral tribunals.[91] However, Professor Hanotiau does concede that the existence of a group of companies may be a relevant factual element to determine whether the conduct of a non-signatory party amounts to consent.

100. In contrast, the second view suggests that the group of companies doctrine is an integral aspect of arbitration law. According to this view, the existence of specific patterns of corporate structure could be a useful factual indicator to determine the common intention of the parties to make the non-signatory a party to the arbitration agreement.[92] For instance, the active involvement of a non-signatory group company in the facilitation and performance of a commercial project helmed by other signatory companies of the group can be considered as an indication that the non-signatory party also consented to arbitrate. Moreover, Gary Born also suggests that the group of companies doctrine is helpful because it allows the courts to go beyond the objective intentions of the parties to determine their dynamic subjective intentions both before, during, and after the execution of the contract.[93] According to Born, the doctrine also promotes efficacy of arbitration agreements by prohibiting circumvention of arbitration through satellite litigation by non-signatory parties within a group. We are broadly in agreement with this view for the reasons to follow.

[91] Hanotiau (n 85) 546.
[92] Stavros Brekoulakis, 'Parties in International Arbitration: Consent v. Commercial Reality' in Stavros Brekoulakis, Julian DM Lew, et al (eds) 'The Evolution and Future of International Arbitration' (2016) 119, 137.
[93] Gary Born (n 44) 1568.

101. The group of companies doctrine was developed by international arbitral tribunals specifically in the context of arbitration, and is not generally used in other areas of law.[94] Although the existence of a group of companies is a necessary condition, it is not the sufficient condition to determine the intention of the parties. In almost all formulations, the courts and tribunals have cautioned that the mere membership of a non-signatory in a group of companies is not enough to bind it to the arbitration agreement. Rather, the courts need to determine: first, the existence of a group of companies; and second, the conduct of the signatory and non-signatory parties which indicate their common intention to make the non-signatory a party to the arbitration agreement.[95] Thus, the group of companies doctrine is similar to other consent based doctrines such as agency, assignment, assumption, and guarantee to the extent that it is ordinarily applied as a means of identifying the common intention of the parties to bind the non-signatory to the arbitration agreement.

102. The above position was explicitly adopted by the ICC Tribunal in **Dow Chemicals** (supra) where it held that an arbitration agreement signed by certain companies of a corporate group will bind the other non-signatory members only where all the parties intended and understood the non-signatories to be the "veritable parties" to the underlying contract containing the arbitration agreement based on their participation in the "conclusion, performance, or termination of the contracts". Thus, the existence of a group

[94] Gary Born (n 44) 1559.
[95] Gary Born (n 44) 1562.

of companies is a factual element that the court or tribunal has to consider when analysing the consent of the parties. It inevitably adds an extra layer of criteria to an exercise which at its core is preponderant on determining the consent of the parties in case of complex transactions involving multiple parties and agreements.

103. In **Chloro Control** (supra), this Court rightly observed that a non-signatory could be subjected to arbitration provided the underlying transactions were with a group of companies and there was a clear intention of the parties to bind both the signatory as well as non-signatory parties to the arbitration agreement. This legal proposition has been reiterated in a series of subsequent decisions of this Court including **Canara Bank** (supra) and **Discovery Enterprises** (supra). Further, this Court in **Cheran Properties** (supra) held that the group of companies doctrine helps in decoding the layered structure of commercial arrangements to unravel the true intention of the parties to bind someone who is not formally a signatory to the contract, but has "assumed" the obligation to be bound by the actions of a signatory. This court explained the purport of the doctrine to discern the "true" party in interest:

> "25. […] The group of companies doctrine has been applied to pierce the corporate veil to locate the "true" party in interest, and more significantly, to target the creditworthy member of a group of companies. Through the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract."

104. In **Cox and Kings** (supra), Surya Kant, J questioned whether the principles of alter ego or piercing the corporate veil can alone justify the application of

the group of companies doctrine even in the absence of implied consent. This Court in **Cheran Properties** (supra) clarified that there is an important distinction between the group of companies doctrine and the principle of veil piercing or alter ego. The principle of alter ego disregards the corporate separateness and the intentions of the parties in view of the overriding considerations of equity and good faith. In contrast, the group of companies doctrine facilitates the identification of the intention of the parties to determine the true parties to the arbitration agreement without disturbing the legal personality of the entity in question. Therefore, the principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine.

iv. The determination of mutual intention

105. In multi-party agreements, the courts or tribunals will have to examine the corporate structure to determine whether both the signatory and non-signatory parties belong to the same group. This evaluation is fact specific and must be carried out in accordance with the appropriate principles of company law. Once the existence of the corporate group is established, the next step is the determination of whether there was a mutual intention of all the parties to bind the non-signatory to the arbitration agreement.

106. The group of companies doctrine requires the courts and tribunals to consider the commercial circumstances and the conduct of the parties to evince the common intention of the parties to arbitrate. It is important to note that the group of companies doctrine concerns only the parties to the arbitration

agreement and not the underlying commercial contract.[96] Consequently, a non-signatory could be held to be a party to the arbitration agreement without becoming a formal party to the underlying contract. The existence of a group companies is one of the essential factors to determine whether the conduct amounts to consent but membership of a group is not sufficient in itself. This has been the consistent position of law, starting from the **Dow Chemicals** (supra) award, where it was observed that the common intention of the parties to bind the non-signatory party to the arbitration can be inferred from the ”circumstances that surround the conclusion and characterize the performance and later the termination of the contracts.” In other words, it was held that a non-signatory party could be considered as a “true party” to the arbitration agreement on the basis of their role in the conclusion, performance, or termination of the underlying contract containing the arbitration agreement.

107. This Court in **Chloro Controls** (supra) laid down four factual indices that the courts or tribunals should consider to bind a non-signatory party to arbitration agreement. It is important to extract the relevant paragraphs in full:

> “72. This evolves the principle that a non-signatory could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. **In other words, “intention of the parties” is a very significant feature which must be established before the scope of the arbitration can be said to include the signatory as well as the non-signatory party.**”
>
> 73. A non-signatory or third party could be subjected to arbitration **without their prior consent**, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the

[96] Gary Born (n 44) 1567

> agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."
>
> (emphasis supplied)

108. In **Cox and Kings** (supra), Justice Surya Kant observed a contradiction in terms of the above extracted paragraphs 72 and 73 of **Chloro Controls** (supra). According to Justice Surya Kant, on the one hand, **Chloro Controls** (supra) emphasizes on the "intention of the parties", while on the other hand it allows joinder of non-signatory parties to arbitration proceedings "without their prior consent". Justice Surya Kant is indeed correct in noticing this inconsistency in the observations in the above two paragraphs. Para 72 underlines mutual intent while para 73 seems to move away from it by suggesting an absence of prior consent as well. We would like to clarify that the phrase "without their prior consent" has to be construed as "without prior formal consent to the arbitration agreement or the underlying contract containing the arbitration agreement." Reading the above two paragraphs harmoniously, it is evident that paragraph 72 emphasizes on determining the "intention of the parties" to bind a non-signatory party to an arbitration agreement. In paragraph 73, the Court deals with the tests for joining a non-signatory party which has not formally consented to the arbitration agreement. Furthermore, the said paragraph enlist the cumulative factors for deciphering the mutual intention of the parties to join non-signatory parties to the

arbitration agreement. In view of the above clarification, we are of the opinion that so construed there would be no inconsistency between paragraphs 72 and 73 of **Chloro Controls** (supra).

109. One of the contentions that has been raised before us pertains to the observations in paragraph 73 of **Chloro Controls** (supra) that the composite reference of all the parties should "serve the ends of justice". It was contended that the equity jurisdiction doesn't generally apply to arbitration agreements because they are in the realm of private law. Since arbitration is a matter of consent, interests of justice and equity cannot be the sole grounds for invoking arbitration agreement. The primary test to apply the group of companies doctrine is by determining the intention of the parties on the basis of the underlying factual circumstances. The application of the group of companies doctrine will serve to stymie satellite litigation by non-signatory members of the corporate group, thereby ensuring the efficacy of the agreement between the parties. Avoiding multiplicity of proceedings and fragmentation of disputes is certainly in the interests of justice. However, it can never be the sole consideration to invoke the group of companies doctrine.

110. In **Discovery Enterprises** (supra), this Court refined and clarified the cumulative factors that the courts and tribunals should consider in deciding whether a company within a group of companies is bound by the arbitration agreement:

> "40. 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 transactions; and

(v) The performance of the contract."

111. Since the group of companies doctrine is a consent based theory, its application depends upon the consideration of a variety of factual elements to establish the mutual intention of all the parties involved. In other words, the group of companies doctrine is a means to infer the mutual intentions of both the signatory and non-signatory parties to be bound by the arbitration agreement. The relationship between and among the legal entities within the corporate group structure and the involvement of the parties in the performance of the underlying contractual obligations are indicators to determine the mutual intentions of the parties. The other factors such as the commonality of the subject matter, composite nature of the transactions, and the performance of the contract ought to be cumulatively considered and analysed by courts and tribunals to identify the intention of the parties to bind the non-signatory party to the arbitration agreement. The party seeking joinder of a non-signatory bears the burden of proof of satisfying the above factors to the satisfaction of the court or tribunal, as the case may be.

112. Section 7 of the Arbitration Act broadly talks about an agreement by the parties in respect of a defined legal relationship, whether contractual or not. Such a legal relationship must give rise to legal obligations and duties. In a corporate group, a company may have various related companies. The legal

relationship must be analysed in the context of the underlying contract containing the arbitration agreement. The nature of the contractual relationship can either be formally encrusted in the underlying contract, or it can also be inferred from the conduct of the signatory and non-signatory parties with respect to such contract. However, we clarify that mere presence of a commercial relationship between the signatory and non-signatory parties is not sufficient to infer "legal relationship" between and among the parties. If this factor is applied solely, any related entity or company may be impleaded even when it does not have any rights or obligations under the underlying contract and did not take part in the performance of the contract. The group of companies doctrine cannot be applied to abrogate party consent and autonomy. The doctrine, properly conceptualised and applied, gives effect to mutual intent and autonomy.

113. In **Canara Bank** (supra), this Court observed that the group of companies doctrine can also be invoked in cases where a "tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality." In **Cox and Kings** (supra), Justice Surya Kant observed that applying this approach has the tendency to overlook the principle of corporate separateness and dispense with the consent of the parties. There is weight in the caution expressed by Justice Surya Kant. The presence of commercial relationships between a party and a non-signatory cannot be the sole criteria to bind non-signatory parties to the arbitration agreement. Adopting such an approach would bind all the non-signatories within a corporate group, even though they are not related to the contractual

obligations under consideration, to the arbitration agreement. Consequently, such an approach will lead to the violation of the basic legal tenet of arbitration – the necessity of consent, either express or implied, to be bound by an arbitration agreement. Moreover, the imposition of liability on a non-signatory company within a group for the acts of other members of the group merely on the basis of the fact that they belong to a "single economic unit" will ride roughshod over the principle of distinct corporate personality. The objective of the group of companies doctrine is to identify the mutual intentions of the parties without disregarding the legal personality of the entities.

114. In **Dow Chemicals** (supra), it was held that a group of companies constitutes the same economic reality, which has to be considered by the arbitral tribunal while deciding on its jurisdiction. According to the tribunal, the presence of the group of companies is merely an additional factor that the tribunal may consider to determine the mutual intention of the parties. In **Canara Bank** (supra), this Court did not apply the group of companies doctrine solely on the basis that the companies belonged to a single economic unit. Rather, it was held that there was an implied or tacit consent by the non-signatory party (CANFINA) to being impleaded in the arbitral proceedings. The presence of strong organizational links and financial links between the signatory and non-signatory parties is only one of the factual elements that the court or tribunal may consider to determine the legal relationship between the signatory and non-signatory parties. We accordingly clarify that the principle of "single economic entity" cannot be used as a sole basis to invoke the group of companies doctrine.

115. In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator. An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.

116. In case of a composite transaction involving multiple agreements, it would be incumbent for the courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in **Canara Bank** (supra) observed that a composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.

117. The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences “in connection with” the main agreement and also disputes “connected with” the subject-matter of the principal agreement.[97] In **Chloro**

[97] **Olympus Superstructures (P) Ltd v. Meena Vijay Khetan, (1999) 5 SCC 651**

Controls (supra), this Court clarified that the principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the signatory and non-signatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement. Thus, the application of the group of companies doctrine in case of composite transactions ensures accountability of all parties who have materially participated in the negotiation and performance of the transaction and by doing so have evinced a mutual intent to be bound by the agreement to arbitrate.

118. The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the courts and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement. The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle of International Commercial Contract, 2016[98] provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:

[98] UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned; and

(f) usages.

119. In **Dow Chemicals** (supra), consent of the non-signatory parties to arbitrate was implied primarily in view of their predominant participation in the conclusion, performance, and termination of contracts. Similarly, this Court in **Canara Bank** (supra) observed that a non-signatory entity may be bound by an arbitration agreement where a parent or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity of the group has been engaged in the negotiation or performance of the commercial contract.

120. In **Reckitt Benckiser** (supra), this Court was called upon to determine whether the representation of a purported promoter of a non-signatory entity would bind it to the said representation. In that case, the applicant entered into an agreement with an Indian company for the supply of packing materials. During the stage of negotiation, the applicant circulated a draft of the agreement by email with the Indian company. This email was reverted by one Mr. Frederick Reynders, who the applicant claimed was the promoter of a Belgian sister company of the Indian company. The Belgian company was a

non-signatory to the agreement. Yet, the applicant sought to implead the Belgian company on the basis that it had participated during the negotiations preceding the execution of the agreement. This Court refused to allow the joinder of the Belgian company to the arbitration agreement on the grounds that Mr. Reynders was not the promoter of the Belgian company, and was therefore not acting in that capacity on or behalf of the company and the applicant failed to discharge its burden to prove that the Belgian company consented to the arbitration agreement.

121. Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a number of reasons. First, by being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement; second, the conduct of the non-signatory may be in harmony with the conduct of the other members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other party has legitimate reasons to rely on the appearance created by the non-signatory party so as to bind it to the arbitration agreement.

v. Threshold standard

122. In **Cox and Kings** (supra), Justice Surya Kant observed that **Reckitt Benckiser** (supra) fixed a higher threshold of evidence for the application of the group of companies doctrine as compared to earlier decisions of this Court. This Court's approach is **Reckitt Benckiser** (supra) is indicative of the fact that the mere presence of a group of companies is not the sole or

determinative factor to bind a non-signatory to an arbitration agreement. Rather, the courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. The nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence.

123. An arbitration agreement is a distinct and separate agreement from the substantive commercial contract which contains the arbitration agreement. An arbitration agreement is independent of the other terms of the contract, to the extent that nullification of the contract will not lead to invalidation of the arbitration agreement.[99] The concept of separability of the arbitration agreement from the underlying contract ensures that the intention of the parties to resolve the disputes through arbitration does not vanish merely because of a challenge to the legal validity of the underlying contract.[100] To

[99] **Reliance Industries Ltd v. Union of India, (2014) 7 SCC 603**
[100] **Enercon (India) Ltd v. Enercon Gmbh, (2014) 5 SCC 1**

join a non-signatory to arbitration, the decisive question that has to be answered is whether a non-signatory consented to the arbitration agreement, as distinct from the underlying contract containing the arbitration agreement.[101]

124. Stavros Brekoulakis argues that the application of legal theories such as group of companies doctrine rests on an assumption that an arbitration agreement requires "less consent" or "less evidence of consent" than the underlying contract containing the arbitration agreement.[102] Brekoulakis further notes that the assumption that implied consent of a non-signatory to the underlying contract is sufficient to constitute consent to the arbitration agreement contained in such contract militates against the principle of separability of contracts.[103]

125. The non-signatory's participation in the negotiation, performance, or termination of the contract can give rise to the implied consent of it being bound by the contract. Brekoulakis rightly points out an anomalous situation where the legal theories such as the group of companies doctrine treat consent as a functional legal construct without actually determining the main question – whether the arbitral tribunal has jurisdiction over the parties (and non-signatory parties) to resolve the disputes?[104]

126. The involvement of a non-signatory in the negotiation, performance, or termination of the underlying contract could be an important indicator of the

[101] Gary Born (n 44) 1545.
[102] Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610, 621.
[103] Stavros Brekoulakis, 'Parties in International Arbitration: Consent v. Commercial Reality' in Stavros Brekoulakis, Julian DM Lew, et al (eds) 'The Evolution and Future of International Arbitration' (2016) 119, 148.
[104] Ibid, at 121.

fact that such non-signatory accepted to be bound by the contract. However, transposition of such consent to an arbitration agreement is a legal fiction to accommodate commercial reality. The contemporary commercial reality suggests that different companies within a group often become involved in different stages of execution and performance of a contractual transaction. For instance, a non-signatory may merely participate in the performance of a contract to carry out a specific task or assist the parent company. Such incidental involvement in the contractual performance is insufficient to constitute consent to the underlying contract, let alone the arbitration agreement. Rather, it has been suggested that it should also be considered whether the commercial dispute sufficiently implicates the non-signatory party for the arbitral tribunal to exercise its jurisdiction.[105] The emphasis on the scope of the jurisdiction of the arbitral tribunal with respect to the subject matter of the dispute between the signatory parties would ensure effective arbitration and prevent unnecessary fragmentation of disputes. It also adequately accounts for the lack of formal consent on behalf of the non-signatory to the arbitration agreement (and the ensuing procedural aspects such as the constitution of arbitral tribunal) by considering facts and circumstances, such as close relationship and composite transactions, which indicates that there was a mutual understanding or convergence among all the parties to treat non-signatory as parties to the arbitration agreement.[106]

[105] Brekoulakis (n 102) 629.
[106] Karim Youssef, 'The Limits of Consent: The Right or Obligation to Arbitrate of Non-Signatories in Group of Companies' in Multiparty Arbitration: Dossiers of the ICC Institute of Worlds Business Law, Volume 7 (2010) 71, 79.

127. We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if the factors laid down under **Discovery Enterprises** (supra) are applied holistically. For instance, the involvement of the non-signatory in the performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is an important aspect. Other factors such as the composite nature of transaction and commonality of subject matter would suggest that the claims against the non-signatory were strongly inter-linked with the subject matter of the tribunal's jurisdiction. Looking at the factors holistically, it could be inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial obligations which are intricately linked to the subject matter, are not actually strangers to the dispute between the signatory parties.

128. We hold that all the cumulative factors laid down in **Discovery Enterprises** (supra) must be considered while determining the applicability of the group of companies doctrine. However, the application of the above factors has to be fact-specific, and this Court cannot tie the hands of the courts or tribunals by laying down how much weightage they ought to give to the above factors. This approach ensures that a dogmatic emphasis on express consent is eschewed in favour of a modern approach to consent which focuses on the factual analysis, complexity of commercial projects, and thereby increases

the relevance of arbitration in multi-party disputes. Moreover, it is also keeping in line with the objectives of the Arbitration Act which aims to make the Indian arbitration law more responsive to the contemporary requirements.

F. The group of companies doctrine has independent existence

129. In **Cox and Kings** (supra), Chief Justice Ramana observed that **Chloro Controls** (supra), and the series of subsequent decisions, have not appropriately dealt with the scope and ambit of the phrase "claiming through or under" as appearing under Sections 8 and 45 of the Arbitration Act. Connectedly, one of the issues that arises for the consideration of this Court is whether the phrase "claiming through or under" could be interpreted to include the group of companies doctrine.

130. The Arbitration Act does not define the phrase "person claiming through or under" a party. A person "claiming through or under" a party is not a signatory to the contract or agreement, but can assert a right through or under the signatory party. *Russel on Arbitration* states that an assignee can invoke the arbitration agreement as a person "claiming through or under" a party to the arbitration agreement.[107] An assignee takes the assigned right under a contract with both the benefit and burden of the arbitration clause.[108] Similarly, the English courts have held that a transferee or subrogate can claim through or under a party to the arbitration agreement.[109] Under the English law, the typical scenarios where a person or entity can claim through or under a party

[107] Russel on Arbitration (23rd edn, 2007) 99 para 3-018.
[108] **Schiffahrts–gesellschaft Detlev von Appen v Voest Alpine Intertrading, [1997] EWCA Civ 1420.**
[109] **Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd, [2005] EWHC 455 (Comm); West Tankers Inc. v. Allianz Spa, [2012] EWCA Civ 27.**

are assignment, subrogation, and novation. In these situations, the assignees or representatives become successors to the signatory party's interests under the arbitration agreement. They step into the shoes of the signatory party, from whom they derive the right to arbitrate, rather than claiming an independent right under the arbitration agreement.

131. The scope of an arbitration agreement under the English law is limited to the parties who entered into it and those claiming through or under them.[110] In **Roussel-Uclaf** (supra), it was held that a subsidiary company can invoke the arbitration agreement on the basis that it is "claiming through or under" the parent company because of the close relationship between the two companies. However, **Roussel-Uclaf** (supra) was expressly overruled by the Court of Appeal in **Sancheti** (supra) on the ground that a mere legal or commercial connection is not sufficient for a person to claim through or under a party to an arbitration agreement.

132. The scope of the phrase "claiming through or under" has been evaluated by other common law jurisdictions. In **Tanning Research Laboratories Inc** v**. O'Brien**,[111] the issue before the High Court of Australia was whether a liquidator could be regarded as a person "claiming through or under" a party to an arbitration agreement. The High Court construed the words "through" or "under" to hold that the liquidator had a derivative interest through the company. The relevant observation is extracted below:

> "[T]he prepositions "through" or "under" convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other

[110] Section 82(2) of the English Arbitration Act, 1996
[111] [1990] HCA 8

> words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt."

The test of derivative action conveys that a third party's cause of action is derived from the original party to the arbitration agreement. The third party cannot be saddled with new duties and liabilities to which it has not consented. They can only be held liable or entitled to the extent they derive their rights or entitlements from the original party to the agreement.

133. The above formulation was further clarified by the Australian High Court in **Rinehart** v. **Hancock Prospecting Pty Ltd**[112], where it observed that the ultimate test in **Tanning Research** (supra) was whether an essential element of the defence was or is vested in or exercisable by the party to the arbitration agreement. In **Rinehart** (supra), the Court was dealing with a situation where a signatory party had assigned mining tenements in breach of trust. It was held that assignees stand in the same position vis-à-vis the claimant as the assignor since the "assignee [took] its stand upon a ground which [was] available to the assignor." The Court concluded that the assignees were persons claiming through or under the signatory parties on the basis that the parties to the arbitration agreement had agreed that any dispute as to the beneficial title to the mining tenements would be determined by arbitration. Since the third parties accepted the benefits of the agreement, it was held

[112] [2019] HCA 13

that they must also accept the burdens of its stipulated conditions, including arbitration.

134. In **Rinehart** (supra), the Australian High Court's approach is similar to the doctrine of equitable estoppel developed by the US Courts, to the effect that a non-signatory party who elects to take the benefit of some aspects of the contract, must also accept the burden of it.[113] However, we cannot adopt the **Rinehart** (supra) position in the context of the phrase "claiming through or under" as doing so would be contrary to the common law position and the legislative intent underpinning the Arbitration Act, as will be discussed below.

135. An analysis of the cases cited above establishes the following propositions of law: first, the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation, and novation; second, a person "claiming through or under" can assert a right in a derivative capacity, that is through the party to the arbitration agreement, to participate in the agreement; third, the persons claiming through or under do not possess an independent right to stand as parties to an arbitration agreement, but as successors to the signatory parties' interest; and fourth, mere legal or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party.

i. Party and Persons "claiming through or under" are different

136. The 246th Law Commission suggested that the definition of "party" under section 2(1)(h) of the Arbitration Act be amended to include the words "or any persons claiming through or under such party". The Commission reasoned

[113] Vicky Priskich, 'Binding non-signatories to arbitration agreements – who are person 'claiming through or under' a party?' (2019) 35(3) Arbitration International 375-386.

that in appropriate contexts, a party also include persons "claiming through or under" a signatory party such as successors-in-interest. However, the suggested amendment was not carried out by Parliament.

137. The word "claim" is of very extensive significance embracing every species of legal demand. In the ordinary sense, it means to demand as one's own or as one's right.[114] A "claim" also means assertion of a cause of action.[115] The expression "through" connotes "by means of, in consequence of, by reason of."[116] The term "under" is used with reference to an inferior or subordinate position. P Ramanatha Aiyar's Law Lexicon defines "claiming under" or "claiming under him" to denote a person putting forward a claim under derived rights.[117] When the above definitions are read harmoniously, it gives rise to an inference that a person "claiming through or under" is asserting their legal demand or cause of action in an intermediate or derivative capacity. We can also conclude that a person "claiming through or under" has inferior or subordinate rights in comparison to the party from which it is deriving its claim or right. Therefore, a person "claiming through or under" cannot be a "party" to an arbitration agreement on its own terms because it only stands in the shoes of the original signatory party.

138. An arbitration is founded upon the consent of the parties to refer their disputes to an alternative dispute resolution mechanism. Consequently, third parties typically cannot be compelled to arbitrate based on an agreement to which

[114] Black's Law Dictionary (5th edn, 1979) 224
[115] P Ramanatha Aiyar's, The Law Lexicon (1997) 330
[116] Black's Law Dictionary (5th edn, 1979) 1328
[117] P Ramanatha Aiyar's, The Law Lexicon (1997) 331

they have not consented. The phrase "claiming through or under" has not been used either in Section 2(1)(h) or Section 7 of the Arbitration Act. This is because those provisions are based on the concept of party autonomy and party independence, which requires the party to provide consent to submit their disputes to arbitration. On the contrary, a person claiming through or under a party to an arbitration agreement is merely standing in the shoes of the original party to the extent that it is merely agitating the right of the original party to the arbitration agreement.

139. The phrase "claiming through or under" has been used in Sections 8, 35, and 45 in their specific contexts. Section 8 contains a mandate that when an action is brought before a judicial authority which is the subject of an arbitration agreement, the dispute shall be referred to arbitration on an application made by a party or any person claiming through or under him. As mentioned above, the phrase "claiming through or under" was inserted in Section 8 to bring it in line with Section 45. Sections 8 and 45 are peremptory in nature mandating the court to refer the parties to arbitration if there is a valid arbitration agreement.[118] In **A Ayyasamy** (supra), it was held that Section 8 imposes an affirmative obligation on every judicial authority to "hold down parties to the terms of the agreement entered into between them to refer disputes to arbitration."[119] Thus, the legislative intent behind Sections 8 and 45 is to ensure that parties fulfil their mutual intention of settling disputes arising between or among them by way of arbitration.

[118] **Agri Gold Exims Ltd v. Sri Lakshmi Knits & Wovens, (2007) 3 SCC 686**
[119] (2016) 10 SCC 386

140. Section 35 of the Arbitration Act provides that an arbitral award shall be final and binding on the parties *and* persons claiming under them respectively. In **Cheran Properties** (supra), this Court rightly observed that the expression "persons claiming under them" is "a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings." It was further observed that "[h]aving derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it." Similarly, Section 73 also provides that a settlement agreement signed by the parties shall be final and binding "on the parties *and* persons claiming under them respectively."

141. Sections 8, 35, and 45 use the phrase "parties or any person claiming through or under". The word "or" is used in Section 8 and 45 as a disjunctive particle to express an alternative or give a choice between "parties" or "any person claiming through or under". Consequently, either the party to an arbitration agreement or any person claiming through or under the party can make an application to the judicial authority to refer the dispute to arbitration. It is in the interest of respecting the intention of the parties and promoting commercial efficacy, that the above provisions allow either the party or any person "claiming through or under him" to refer the disputes to arbitration.

142. On the other hand, Sections 35 and 73 use the phrase "parties and persons claiming under them". The use of the word "and" in Sections 35 and 73 conveys the idea that "parties" is to be added or taken together with the subsequent phrase "any person claiming through or under." The above

provisions provide that an arbitration award binds not only the parties but also all such persons who derive their capacity from the party to the arbitration agreement. Again, the foundational basis for this provision is commercial efficacy as it ensures that an arbitral award leads to finality, such that both the parties and all persons claiming through or under them do not reagitate the claims. Moreover, the use of the word "and" in Sections 35 and 73 leads to an unmistakable conclusion that under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement.

ii. The approach adopted by this Court in Chloro Controls is Incorrect

143. This Court in **Chloro Controls** (supra) observed: first, that the use of the expression "any person" reflects the legislative intent of enlarging the scope of the words beyond the "parties" who are signatory to the arbitration agreement; second, a signatory party to an arbitration agreement may have a legal relationship with the party claiming through or under the party on the basis of the group of companies doctrine; and third, in case of a multi-party contract, a subsidiary company which "derives" its basic interest from the parent contract would be covered under the expression "claiming though or under."

144. The first proposition of law relies on the construction of the expression "any person" to conclude that the language of Section 45 has wider import. However, the expression "any person" cannot be singled out and construed devoid of its context. The context, in terms of Section 8 and 45, is provided by the subsequent phrase – "claiming through or under". Therefore, such "any

persons" are acting only in a derivative capacity. Since an arbitration agreement excludes the jurisdiction of national courts, it is essential that the parties consent, either expressly or impliedly, to submit their dispute to the arbitral tribunal.

145. The second and third proposition of law states that a non-signatory party may claim through or under a signatory party by virtue of its legal or commercial relationship with the latter. However, this proposition is contrary to the common law position as evidenced in **Sancheti** (supra) and **Tanning Research Laboratories** (supra) according to which a mere legal or commercial connection is not sufficient to allow a non-signatory to claim through or under a party to the arbitration agreement. In **A Ayyasamy** (supra), this Court observed that the Arbitration Act should be interpreted "so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world." Therefore, even though a subsidiary derives interests or benefits from a contract entered into by the company within a group, they would not be covered under the expression "claiming through or under" merely on the basis that it shares a legal or commercial relationship with the parties.

146. One of the questions that has been referred before us is whether the phrase "claiming through or under" in Section 8 could be interpreted to include the group of companies doctrine. The group of companies doctrine is founded on the mutual intention of the parties to determine if the non-signatory entity within a group could be made a party to the arbitration agreement in its own right. Such non-signatory entity is not "claiming through or under" a signatory

party. As mentioned above, the phrase "claiming through or under" is used in the context of successors in interest that act in a derivative capacity and substitute the signatory party to the arbitration agreement. To the contrary, the group of companies doctrine is used to bind the non-signatory to the arbitration agreement so that it can agitate the benefits and be subject to the burdens that it derived or is conferred in the course of the performance of the contract. The doctrine can be used to bind a non-signatory party to the arbitration agreement regardless of the phrase "claiming through or under" as appearing in Sections 8 and 45 of the Arbitration Act.

147. In **Chloro Controls** (supra), this Court joined the non-signatory entities as parties to the arbitration agreement in their own rights on the basis that they were signatories to ancillary agreements which were closely interlinked with the performance of the principal agreement containing the arbitration agreement. This Court in **Chloro Controls** (supra) reasoned that the non-signatory entities, being part of the same corporate group as the signatory parties, were subsidiaries in interest or subsidiary companies, and therefore were "claiming through or under" the signatory parties. As held above, the phrase "claiming through or under" only applies to entities acting in a derivative capacity and not with respect to joinder of parties in their own right. Therefore, we hold that the approach of this Court in **Chloro Controls** (supra) to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract and commercial law. As observed above, the existence

of the group of companies doctrine is intrinsically found on the principle of the mutual intent of parties to a commercial bargain.

148. Chief Justice N. V. Ramana also sought our consideration on the question of whether the "group of companies doctrine" as expounded by **Chloro Controls** (supra) and subsequent judgments is valid in law. The group of companies doctrine has important utility in determining the mutual intention of the parties in the context of complex transactions involving multiple parties and multiple agreements. Moreover, the doctrine has been substantively entrenched in the Indian arbitration jurisprudence. We are aware of the fact that the group of companies doctrine has not found favor in some other jurisdictions, including in English law. However, we deem it appropriate to retain the doctrine which has held the field in Indian jurisprudence though by firmly establishing it within the realm of the mutual consent or the mutual intent of the parties to a commercial bargain. This will ensure on the one hand that Indian arbitration law retains a sense of dynamism so as to respond to contemporary challenges. At the same time, structuring the doctrine in the manner suggested so as to ground it in settled principles governing the elucidation of mutual intent is necessary. This will ensure that the doctrine has a jurisprudential foundation in party autonomy and consent to arbitrate.

149. Although the issue before us largely concerns the application of the group of companies doctrine in the Indian context, this Court cannot be oblivious to the changing currents in the international arbitration jurisprudence. In deciding the contours of the group of companies doctrine, we have reiterated the general legal proposition that non-signatory persons or entities can also be

bound by an arbitration agreement. The basis for such joinder stems from the harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act. Since the scope of this judgment was limited to the group of companies doctrine, any authoritative determination given by this Court in the course of this judgment should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to arbitration agreements. However, we also need to be mindful of the fact that the Indian courts and tribunals should not adopt an overzealous approach to extending the jurisdiction of arbitral tribunals to non-signatory parties merely on the ground that they are part of a corporate group.

150. In **Cheran Properties** (supra), this Court found the non-signatory to be "claiming through or under" the signatory party to the arbitration agreement and not as a "party" to the arbitration agreement. In that case, this Court was dealing with an issue pertaining to enforcement of an arbitral award. On the available facts and circumstances, the Court held that the non-signatory was a nominee of the signatory party under the underlying commercial contract, and therefore was acting in a derivative capacity. In **Canara Bank** (supra) this Court indirectly adopted the principle of estoppel to bind the non-signatory on the basis that it had already participated in the judicial proceedings before the High Court, and cannot subsequently deny being a party to the proceedings before the arbitral tribunal. In **Discovery Enterprises** (supra), this Court remanded the matter back to the arbitral tribunal to decide afresh the application for discovery and inspection by applying the group of companies doctrine. Therefore, we can conclude that the observations pertaining to the

group of companies doctrine were rendered in the facts and circumstances of each case. We have harmonized the divergent strands of law emanating from these judgments in the preceding paragraphs.

151. In *Law's Empire*, Ronald Dworkin proposed a hypothetical where a group of novelists write a novel seriatim, each novelist interpreting the chapters given to them to write a new chapter.[120] The novelists are expected to "take their responsibilities of continuity more seriously" to create "a single unified novel that is the best it can be."[121] **Chloro Controls** (supra) was the first chapter in the group of companies doctrine in Indian arbitration jurisprudence. The series of subsequent judgments starting from **Cheran Properties** (supra) and ending with **Cox and Kings** (supra) were the incremental chapters – each adding further dimensions to the theory already propounded in the previous chapters. In this case, we have added another chapter to the theory of group of companies doctrine. Our aim was to make further progress in the course of evolution of arbitration law. In the process, we have tweaked the plotline to make the novel a more coherent read, instead of rewriting or discarding the previous chapters.

iii. Power of the Courts to issue directions under Section 9

152. In **Cox and Kings** (supra), Chief Justice Ramana observed that establishing the group of companies doctrine in the phrase "claiming through or under" creates an anomalous situation where a party "claiming through or under" could be referred to an arbitration agreement, but would not have a right to

[120] Ronald Dworkin, Law's Empire (Belknap Press, Harvard University Press 1986) 229.
[121] Ibid.

seek relief under Section 9 of the Arbitration Act. Section 9 allows a "party" to approach the court to seek interim measures such as appointment of a guardian for a minor or person of unsound mind, custody or sale of any goods which are the subject matter of the arbitration agreement, and appointment of receiver.

153. The group of companies doctrine is based on determining the mutual intention to join the non-signatory as a "veritable" party to the arbitration agreement. Once a tribunal comes to the determination that a non-signatory is a party to the arbitration agreement, such non-signatory party can apply for interim measures under Section 9 of the Arbitration Act. Establishing the legal basis for the application of the group of companies doctrine in the definition of "party" under Section 2(1)(h) read with Section 7 of the Arbitration Act resolves the anomality pointed out by Chief Justice Ramana.

G. The standard of determination at the referral stage – Sections 8 and 11

154. The last but not the least issue that arises for our consideration pertains to the stage of applicability of the group of companies doctrine under the Arbitration Act. In **Cox and Kings** (supra), Chief Justice Ramana observed that there is a need to have a relook at the scope of judicial reference at the stage of Sections 8 and 11 of the Arbitration Act considering the ambit of the unamended Section 2(1)(h). Section 5 of the Arbitration Act provides that "no judicial authority shall intervene except where so provided in this Part." The context for "so provided" is contained in Sections 8 and 11 which mandate the courts to refer the parties to arbitration. Under Section 8, the court has to

"prima facie" ascertain the existence of a valid arbitration agreement before referring the parties to arbitration. Section 11 empowers the Supreme Court and High Courts to appoint arbitrators on the failure of the parties to comply with the agreed arbitration procedure. Section 11 could be invoked in situation where a dispute has arisen and one of the parties to the arbitration agreement unsuccessfully invoked the agreed procedure for the appointment of an arbitrator due to the non-cooperation of the other party.

155. In **SBP & Co** v. **Patel Engineering Ltd**,[122] a seven-Judge Bench of this Court was called upon to determine the scope of the powers of the Chief Justice or their designate under Section 11 of the Arbitration Act. It was held that the Chief Justice or the designated judge will have the powers to determine the jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence of a live claim, the existence of the condition for the exercise of their powers, and the qualifications of the arbitrators. Furthermore, it was held that the Chief Justice has to decide whether there is an arbitration agreement as defined under the Arbitration Act and whether the person who has made a request is party to such an agreement.

156. In 2015, the Arbitration Act was amended to insert Section 11(6-A). The said provision reads as follows:

> "(6A) The Supreme Court, or as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or (sub-section (6), shall, notwithstanding any judgment, decree, or order of any Court, **confine to the examination of the existence of an arbitration agreement**."

[122] (2005) 8 SCC 618

By virtue of non-obstante clause, Section 11(6A) has set out a new position, which takes away the basis of the position laid down in **Patel Engineering** (supra). In 2019, the Parliament passed the Arbitration and Conciliation (Amendment) Act, 2019 omitting Section 11(6-A). However, the amendment to Section 11(6-A) is yet to be notified. Till such time, Section 11 as amended in 2015 will continue to remain in force.

157. When deciding the referral issue, the scope of reference under both Sections 8 and 11 is limited. Where Section 8 requires the referral court to look into the **prima facie** existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the existence of the **examination** of an arbitration agreement.

158. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the arbitral tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal.[123] The doctrine of competence-competence is intended to minimize judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal.

159. In **Vidya Drolia** (supra), Justice N. V. Ramana (as the learned Chief Justice then was) held that the amendment to Section 8 rectified the shortcomings

[123] **Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field, (2020) 2 SCC 455**

pointed out in **Chloro Controls** (supra) with respect to domestic arbitration. He further observed that the issue of determination of parties to an arbitration agreement is a complicated exercise, and should best be left to the arbitral tribunals:

> "239. […] 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."

160. In **Pravin Electricals Pvt Ltd** v. **Galaxy Infra and Engineering Pvt Ltd**,[124] a Bench of three Judges of this Court was called upon to decide an appeal arising out of a petition filed under Section 11(6) of the Arbitration Act for appointment of sole arbitrator. The issue before the Court was the determination of existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. This Court prima facie opined that there was no conclusive evidence to infer the existence of a valid arbitration agreement between the parties. Therefore, the issue of existence of a valid arbitration agreement was referred to be decided by the arbitral tribunal after conducting a detailed examination of documentary evidence and cross-examination of witnesses.

161. The above position of law leads us to the inevitable conclusion that at the referral stage, the court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal. The referral court should not

[124] (2021) 5 SCC 671

unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction. In **Shin-Etsu Chemical Co Ltd** v. **Aksh Optifibre Ltd**,[125] this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the tribunal:

> 74. […] Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceedings to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration."

162. In **Chloro Controls** (supra), this Court held that it is the legislative intent of Section 45 of the Arbitration Act to give a finding on whether an arbitration agreement is "null and void, inoperative and incapable of being performed" before referring the parties to arbitration. In 2019, the expression "unless it prima facie finds" was inserted in Section 45. In view of the legislative amendment, the basis of the above holding of **Chloro Controls** (supra) has been expressly taken away. The present position of law is that the referral court only needs to give a prima facie finding on the validity or existence of an arbitration agreement.

163. In **Deutsche Post Bank Home Finance Ltd** v. **Taduri Sridhar**,[126] a two-Judge Bench of this Court held that when a third party is impleaded in a petition under Section 11(6) of the Arbitration Act, the referral court should

[125] (2005) 7 SCC 234
[126] (2011) 11 SCC 375

delete or exclude such third party from the array of parties before referring the matter to the tribunal. This observation was made prior to the decision of this Court in **Chloro Controls** (supra) and is no longer relevant in light of the current position of law. Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement.

164. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge: first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the arbitral tribunal. This interpretation also gives

true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by arbitral tribunal under Section 16.

H. Conclusions

165. In view of the discussion above, we arrive at the following conclusions:

a. The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;

b. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;

c. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;

d. Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement;

e. The underlying basis for the application of the group of companies doctrine 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;

f. The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine;

g. The group of companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act;

h. To apply the group of companies doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in **Discovery Enterprises** (supra). Resultantly, the principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine;

i. The persons "claiming through or under" can only assert a right in a derivative capacity;

j. The approach of this Court in **Chloro Controls** (supra) to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract law and corporate law;

k. The group of companies doctrine 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;

l. 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

m. In the course of this judgment, any authoritative determination given by this Court pertaining to the group of companies doctrine should not be

interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.

166. We answer the questions of law referred to this Constitution Bench in the above terms. The Registry shall place the matters before the Regular Bench for disposal after obtaining the directions of the Chief Justice of India on the administrative side.

.....CJI
[Dr Dhananjaya Y Chandrachud]

.....J
[Hrishikesh Roy]

.....J
[J B Pardiwala]

.....J
[Manoj Misra]

New Delhi;
December 06, 2023

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Arbitration Petition (Civil) No. 38 of 2020

Cox and Kings Ltd. …Petitioner (s)

Versus

SAP India Pvt. Ltd. & Anr. …Respondent (s)

With

SLP (C) No. 8607 of 2022

SLP (C) No. 5833 of 2022

J U D G M E N T

Index

PAMIDIGHANTAM SRI NARASIMHA, J.

A. Introduction

1. The reference to this Constitution Bench is for an authoritative determination of the applicability of the 'Group of Companies doctrine' to proceedings under the Arbitration and Conciliation Act, 1996,[1] and if found to be applicable and statutorily anchored, to delineate its precise contours.

2. In the reference order, Chief Justice N.V. Ramana highlighted the variations in the exposition and application of the doctrine as it has evolved in India. He questioned the statutory source of the doctrine in the phrase "*claiming through or under*", which appears in Sections 8 and 45 of the Act. He also cautioned that maintaining the separate legal identities of members within the same group of companies is a fundamental principle of corporate and contract law. In this light, the specific questions formulated and referred to this Constitution Bench by Chief Justice N.V. Ramana,[2] are as follows:

> "(a) Whether phrase "claiming through or under" in Sections 8 and 11[3] could be interpreted to include "Group of Companies" doctrine?

[1] Hereinafter referred to as the Act.
[2] For himself and for Justice A.S. Bopanna.
[3] The phrase "claiming through or under" does not appear in Section 11. Rather, the reference to Section 11 must be read as Section 45 that contains this phrase.

> (b) Whether the "Group of Companies" doctrine as expounded by Chloro Controls case[4] and subsequent judgments are valid in law?"[5]

3. Justice Surya Kant concurred with Chief Justice Ramana and supplemented his reasons for reference. At the outset, he emphasised the need to retain the doctrine in India to keep pace with the complexity of multi-party business transactions, where certain persons do not formally sign the contract but are involved in its negotiation and performance. Especially in India, with large number of family-run business groups, he expressed that the inclusion of the non-signatory company is essential for effective and complete dispute resolution through arbitration. However, he also indicated the need to iron out inconsistencies in the formulation of the doctrine. He questioned the reliance on equity considerations and 'single economic reality' to determine non-signatories to be parties, as these undermine well-entrenched principles of party autonomy and separate legal entity. In this light, for an authoritative determination of the contours of the doctrine, he framed the following questions:

> "(a) Whether the Group of Companies doctrine should be read into Section 8 of the Act or whether it can exist in

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[4] *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.,* (2013) 1 SCC 641 [2012 INSC 436].
[5] *Cox and Kings Ltd* v. *SAP India Pvt Ltd*, (2022) 8 SCC 1, para 54 [2022 INSC 523].

> Indian jurisprudence independent of any statutory provision?
> (b) Whether the Group of Companies doctrine should continue to be invoked on the basis of the principle of "single economic reality"?
> (c) Whether the Group of Companies doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?
> (d) Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies doctrine into operation even in the absence of implied consent?"[6]

4. I have had the advantage of going through the erudite and comprehensive opinion of the learned Chief Justice. While I agree with his reasoning and conclusions, I consider it necessary to supplement them with my own reasoning on some important aspects. The broad question before us relates to the 'parties' to an 'arbitration agreement'. This question must take us to Section 7 of the Act that defines an 'arbitration agreement' as under:

> **"7. Arbitration agreement**.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
> (3) An arbitration agreement shall be in writing.
> (4) An arbitration agreement is in writing if it is contained in—
> (a) a document signed by the parties;

[6] ibid, para 104.

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

5. It is evident from the above-referred statutory prescription that an 'arbitration agreement' is described in sub-section (1) of Section 7 as, "*an agreement by the parties*". Both these expressions, 'agreement' and 'parties' are important for our consideration. For a proper understanding of these expressions, it is necessary to examine the place of arbitration as a dispute redressal mechanism in the larger body of institutional remedies in civil law.

B. Civil Remedy and Arbitration

6. In our legal system, access to civil courts is a standard judicial remedy. Civil courts have the jurisdiction to try all civil suits,[7] and any agreement to restrict the remedy is declared void

[7] Section 9 of the Code of Civil Procedure, 1908 reads:

"**9. Courts to try all civil suits unless barred.** —The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
Explanation I.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

under Section 28 of the Indian Contract Act, 1872.[8] However, exceptions to Section 28 save a "*contract to refer to arbitration*" any dispute that has arisen or may arise between two or more persons.[9] Thus, a restriction on accessing civil remedy is saved under Section 28 of the Contract Act, if there is a *contract* to arbitrate.

7. A 'contract' is defined under the Contract Act as an agreement enforceable by law.[10] Agreement[11] is formed when a *promise* or *mutual promises* (defined in Section 2(b))[12] are

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Explanation II. —For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place."

[8] Hereinafter the 'Contract Act'. The relevant portion of Section 28, Indian Contract Act, 1872 reads:

"**28. Agreements in restraint of legal proceedings, void**. —Every agreement, —
(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent."

[9] The relevant portion of Section 28, Indian Contract Act, 1872 reads:

"Exception 1. —**Saving of contract to refer to arbitration dispute that may arise.** —This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.
Exception 2. —**Saving of contract to refer questions that have already arisen.** —Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration."

[10] Section 2(h) of the Indian Contract Act, 1872 reads:

"(h) An agreement enforceable by law is a contract;"

[11] Section 2(e), Indian Contract Act 1872 reads:

"(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;"

[12] Section 2(b), Indian Contract Act 1872 reads:

"(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;"

reciprocated with a *consideration* (defined in Section 2(d))[13], and these promises can either be express (when its proposal or acceptance is in words) or implied (when its proposal or acceptance is otherwise than in words).[14] An agreement is legally enforceable as a contract if it is formed with the free consent of parties who are competent to contract, for a lawful consideration and lawful object.[15]

i. Arbitration Agreement is a Contract

8. An arbitration agreement is more specifically defined in Section 7(1) of the 1996 Act as an "*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*" The use of the phrase 'whether contractual or not' qualifies the *dispute*, not the agreement; an arbitration agreement must always be a contract, but

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[13] Section 2(d), Indian Contract Act 1872 reads:
"(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;"

[14] Section 9, Indian Contract Act 1872 reads:
"**9. Promises, express and implied**.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

[15] Section 10, Indian Contract Act 1872 reads:
"**10. What agreements are contracts.** —All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

the dispute that is referred to arbitration need not necessarily be contractual, suffice it to be arising out of a "*defined legal relationship*".[16]

9. *Arbitration Agreement must be in writing, as against an oral agreement. However, it need not be signed document*: India has adopted the UNCITRAL model[17] which lays emphasis on the substance of an agreement, rather than its form, to determine the existence of the agreement to arbitrate. Sub-Section (2) of Section 7 incorporates this principle and recognises an agreement, either in the form of an arbitration clause in the contract or in the form of a separate agreement.

10. Section 7(3) mandates that an arbitration agreement shall be in writing, meaning that the arbitration agreement must be in *express* terms. Subsequently, Section 7(4) declares that an arbitration agreement "is in writing" if it is contained in: (a) a document signed by the parties; (b) exchange of correspondence that provides the record of the agreement; and (c) admission in the proceedings, i.e., the statement of claim and defence. It is evident from the deliberate language of Section 7 that the arbitration

[16] *Vidya Drolia* v. *Durga Trading Corporation,* (2021) 2 SCC 1, para 24 [2020 INSC 697]; *Gemini Bay Transcription Pvt Ltd* v. *Integrated Sales Service Ltd,* (2022) 1 SCC 753, para 30 [2021 INSC 392].
[17] UNCITRAL Model Law on International Commercial Arbitration, 1985.

agreement must be in a written form, in contradistinction to an oral agreement, and at the same time, that it is not necessary for it to be signed by the parties.[18] A signed document containing the arbitration agreement is only one of the written forms, where the signature of the party is absolute proof for the existence and privity of the contract.

11. Section 7 therefore comprehensively defines *what* an arbitration agreement is and also from *where* it is to be identified. The referral court under Sections 8, 11 or 45 of the Act, or the arbitral tribunal, is the forum that identifies and deciphers the existence of an arbitration agreement and its parties. The real question, however, is *how* must the court or tribunal make this determination, particularly when a non-signatory seeks to initiate arbitration, or is sought to be made party by a signatory. Apart from the standard methods of drawing inferences by interpreting the express language employed in the agreement, what are the other external aids to assist the court or the arbitral tribunal in constructing the existence of the arbitration agreement with the non-signatory, is the question that we are called upon to answer.

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[18] *Jugal Kishore Rameshwardas* v. *Goolbai Hormusji,* (1955) 2 SCR 857, para 7 [1955 INSC 22]; *Caravel Shipping Services (P) Ltd* v. *Premier Sea Foods Exim (P) Ltd,* (2019) 11 SCC 461, para 8 [2018 INSC 1008].

ii. Section 7(4)(b)

12. An arbitration agreement with non-signatories is to be inferred from the record of the agreement consisting the exchange of correspondence such as letters, telex, telegrams, and other telecommunication and electronic communication, wherein it "*unequivocally and clearly emerge(s) that the parties were ad idem*".[19] In *Rickmers Verwaltung Gmbh* v. *Indian Oil Corporation Ltd*,[20] this Court referred to the role of courts while considering the existence of an arbitration agreement as under:

> "*12. …The question, however, is: can any agreement be spelt out from the correspondence between the parties in the instant case?*
> *13. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in*

[19] *Rickmers Verwaltung Gmbh* v. *Indian Oil Corporation Ltd*, (1999) 1 SCC 1, para 13 [1998 INSC 436].
[20] ibid; also see *MTNL* v. *Canara Bank*, (2020) 12 SCC 767, para 9.3 [2019 INSC 881].

> *case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.*
> *14. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between the parties and no concluded enforceable and binding agreement came into existence between them. Apart from the correspondence relied upon by the learned Single Judge of the High Court, the fax messages exchanged between the parties, referred to above, go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract…*"

Further in *Babanrao Rajaram Pund* v. *Samarth Builders and Developers*,[21] this Court held:

> "*29. It is thus imperative upon the courts to give greater emphasis to the substance of the clause, predicated upon the evident intent and objectives of the parties to choose a specific form of dispute resolution to manage conflicts between them. The intention of the parties that flows from the substance of the agreement to resolve their dispute by arbitration are to be given due weightage. It is crystal clear to us that Clause 18, in this case, contemplates a binding*

[21] (2022) 9 SCC 691 [2022 INSC 935].

> *reference to arbitration between the parties and it ought to have been given full effect by the High Court.*"

The parties must mutually intend to refer their differences to arbitration as consent is the source of the arbitral tribunal's jurisdiction over them.[22]

13. The settled jurisprudence under Section 7(4)(b) is that the non-signatory's consent to an arbitration agreement can be made out from its conduct by way of exchange of letters, telegrams and other forms of written communication.[23] These correspondences constitute the written record of the agreement. In *Smita Conductors* v. *Euro Alloys*,[24] this Court was tasked with determining whether certain correspondences by the appellant therein, that were not addressed to the respondent, showed the appellant's consent to arbitration as per the Article II(2) of the New York Convention, under the Foreign Awards (Recognition and Enforcement) Act, 1961. The Court noted that the contracts containing the arbitration clause were not signed by the appellant, nor were there any letters or telegrams between the appellant and respondent where the appellant expressly assented to these contracts. Rather, it relied on

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[22] *KK Modi* v. *KN Modi*, (1998) 3 SCC 573, para 17 [1998 INSC 63]; *Bihar State Mineral Development Corporation* v. *Encon Builders (I) Pvt Ltd,* (2003) 7 SCC 418, para 13 [2003 INSC 409].
[23] *Shakti Bhog Foods* v. *Kola Shipping Ltd,* (2009) 2 SCC 134, para 17 [2008 INSC 1081].
[24] (2001) 7 SCC 728 [2001 INSC 417].

correspondences by the appellant to a bank where it acted in pursuance of the terms of the contract, as providing a record of the arbitration agreement.[25] Therefore, even in the absence of a signature, the non-signatory's consent to arbitration can be gathered from its written correspondence (even with third parties) that shows its conduct pursuant to the contract containing the arbitration agreement.

14. This principle has been consistently applied by the Court to determine whether the non-signatory is a party to an arbitration agreement in accordance with Section 7(4)(b).[26] Our courts and tribunals have sufficiently developed the interpretive tools to determine the intention of the parties to refer disputes to arbitration by construing the express language in the correspondence. It has also been held that once the terms of the contract show that there is an intention to refer disputes to arbitration, parties cannot "*wriggle out*" of the arbitration agreement.[27]

15. Having considered the statutory scheme and also the consistent approach of this Court in interpreting and construing

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[25] ibid, paras 6-7.
[26] *Unissi (India) Pvt Ltd* v. *Post Graduate Institute of Medical Education and Research,* (2009) 1 SCC 107 [2008 INSC 1111]; *Powertech World Wide Ltd* v. *Delvin international General Trading LLC,* (2012) 1 SCC 361 [2011 INSC 799]; *Govind Rubber* v. *Louids Dreyfus Commodities Asia Pvt Ltd*, (2015) 13 SCC 477 [2014 INSC 1042].
[27] *Unissi (India)* (supra), paras 16-19; *Govind Rubber* (supra), paras 21-22.

the existence or lack of intention to arbitrate, the following principle can be restated:

i. An arbitration agreement is a contract. It must meet the requirements of an agreement enforceable by law under the Indian Contract Act, 1872.[28]

ii. Section 7(2) of the Arbitration and Conciliation Act, 1996 recognises the existence of an arbitration agreement in substance, rather than in form.[29] The agreement may be in the form of an arbitration clause in a contract or it may be in the form of a separate agreement.

iii. Section 7(3) mandates that the arbitration agreement shall be in writing, as against an oral agreement. However, the written form of the document evidencing the agreement need not be signed by the parties.[30]

iv. 'Party' is defined in Section 2(1)(h) as "a party to an arbitration agreement". The determination of the arbitration agreement and its parties are inextricably connected with one another, their existence is based on the written agreement.

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[28] *Vidya Drolia* (supra), para 21.
[29] *Nimet Resources Inc* v. *Essar Steels Ltd*, (2000) 7 SCC 497, para 5; *Babanrao Rajaram Pund* (supra), paras 15 and 29.
[30] *Jugal Kishore Rameshwardas* (supra), para 7; *Rickmers Verwaltung Gmbh* (supra), para 12; *Shakti Bhog Foods Ltd* (supra), para 17; *Caravel Shipping Services (P) Ltd* (supra), para 8.

v. If the arbitration agreement is evidenced in the written form as contained in a document signed by the parties (Section 7(4)(a)), the parties to the agreement are evidently those who have signed the agreement.

vi. If the arbitration agreement is evidenced in the written form as contained as admissions in pleadings comprising statements of claim and defence (Section 7(4)(c)), parties to this agreement would be evident from the statements of claim and defence and the admissions made therein.

vii. The arbitration agreement may also be in writing if it is contained in the *record of the agreement* comprising exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means (Section 7(4)(b)). In these instances, parties to the agreement as well as the existence of the arbitration agreement is a matter of interpretation and construction by the referral court or arbitral tribunal. The inquiry under Section 7(4)(b) is to determine whether there exists an agreement for referring the matter to arbitration, and who are the parties to such an agreement.

viii. The referral court or the arbitral tribunal, while considering the claim of a non-signatory for reference, or the objection of a non-signatory to the inclusion in an arbitration, will primarily examine the record of agreement under Section 7(4)(b) and consider the express language employed by the parties.

ix. Once the express terms are ascertained,[31] their meaning is a matter of construction by the court or arbitral tribunal. The object of such construction is to discover the intention of the parties.[32] Intention must always be ascertained through the words actually used, for there is no intention independent of the language employed by the parties.

x. For the purpose of ascertaining the true meaning of the express words, the court or tribunal may also look into the surrounding circumstances such as the nature and object of the contract,[33] and conduct of the parties during the formation, implementation, and discharge of the contract.[34]

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[31] *Rickmers Verwaltung Gmbh* (supra), para 13; *MTNL* v. *Canara Bank* (supra), para 9.3.
[32] *Bangalore Electricity Supply Company Ltd (BESCOM)* v. *E.S. Solar Power Pvt Ltd* (2021) 6 SCC 718, paras 16 and 17; *Food Corporation of India* v. *Abhijit Paul* 2022 SCC OnLine SC 1605, para 27 [2022 INSC 1216]; Lewison, *The Interpretation of Contracts* (6th edn, Sweet and Maxwell 2016) para 2.01, 27.
[33] *Bank of India* v. *K. Mohandas* (2009) 5 SCC 313, para 28 [2009 INSC 417].
[34] *Godhra Electricity Co Ltd* v. *State of Gujarat* (1975) 1 SCC 199, paras 11, 16 [1974 INSC 174]; *McDermott International Inc* v. *Burn Standard Co Ltd* (2006) 11 SCC 181, para 112 [2006 INSC 326].

Trade practices also assume importance in determining the meaning of the language employed by the parties.[35] While interpreting the contract, courts or tribunals adopt well-established principles of construction. These principles are in the nature of guidelines for the court to presume the intention of the parties.

xi. As the arbitration agreement is confined to a written document contained in the material specified in Section 7(4)(b) and the interpretation and construction is based on its text, Sections 91 and 92 of the Indian Evidence Act, 1872 disable adducing of oral evidence.[36] This is necessary to prevent a referral proceeding from being converted into a full-fledged trial. If the arbitration agreement cannot be deduced from the record of agreement as provided in Section 7(4)(b), the inquiry must conclude. This approach is in consonance with the requirement of a written agreement and also subserves the important policy consideration as surmised in Section 5 of the Act.

16. It is in the context of the above referred legal regime, statutory as well as precedential, that we need to consider the questions

[35] *ONGC* v. *Saw Pipes Ltd* (2003) 5 SCC 705, para 13 [2003 INSC 241].
[36] See *Roop Kumar* v. *Mohan Thedani* (2003) 6 SCC 595, paras 13, 16-18 [2003 INSC 206].

referred to this Constitution Bench – whether the Group of Companies Doctrine is part of Indian arbitration jurisprudence and whether it has any statutory basis.

C. Group of Companies Doctrine

i. International Perspectives

17. I am in complete agreement with the opinion of the learned Chief Justice, who has in his scholarly exposition considered this matter in great detail. He has examined the precedents on the applicability of the doctrine in France, England, Switzerland, and the USA.

18. The Group of Companies Doctrine was formulated and initially applied by international arbitral tribunals to determine whether a person who has not formally signed an arbitration agreement can be made party to it. It is one of the various legal theories used to determine whether a non-signatory is a party to the arbitration agreement. Before we proceed to the doctrine itself, it may be relevant for us to briefly set out the other legal bases, so as to locate the doctrine in the broader jurisprudence on non-signatories being a party.

19. The legal bases for making a non-signatory a party can be classified as consensual and non-consensual. The consensual theories that are focused on determining the mutual intent of the parties include agency, implied consent, and assignment and transfer of contractual rights, and the non-consensual theories that are based on equity considerations include alter ego/ piercing the corporate veil, estoppel, succession, and apparent authority.[37] The formulation of these principles, whether consensual or non-consensual, is not new. They are derived from general principles of contractual law and corporate law.[38]

20. The Group of Companies doctrine was formulated and theorised exclusively in international arbitration jurisprudence to specifically determine whether a company which is a non-signatory is party to the arbitration agreement. Gary Born clarifies that this principle is not evoked outside the context of arbitration.[39]

21. With this background, I will now discuss the doctrine along with other considerations and legal tests that guide its application.

22. The doctrine was first developed by a French arbitral tribunal in an interim award by the International Chamber of Commerce in

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[37] Gary Born, *International Commercial Arbitration*, vol 1 (3rd edn, Kluwer Law International 2021) 1531.
[38] ibid 1525.
[39] ibid 1559.

Dow Chemical v. *Isover Saint Gobain*.[40] In this case, Dow Chemical A.G. and Dow Chemical Europe (fully-owned subsidiaries of Dow Chemical Company (USA)) were signatories to two separate agreements containing arbitration clauses with Isover Saint Gobain. Dow Chemical France, a non-signatory to these agreements but a member of the Dow group, effectuated the deliveries under these agreements. When disputes arose and Isover instituted suits in the French courts against all four Dow companies, both the signatory and the non-signatory Dow companies instituted arbitral proceedings. Isover objected to the arbitral tribunal's jurisdiction to render an award with respect to Dow Chemical France and Dow Chemical Company (USA), as they were non-signatories. On the other hand, the non-signatory companies argued that they can invoke arbitration due to their involvement in the conclusion and performance of these contracts, and by virtue of them being in the same group of companies.

23. The Arbitral Tribunal applied French law to determine whether the non-signatories are parties "*by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterize the*

[40] ICC Case No. 4131, 23 September 1982.

performance and later the termination of the contracts in which they appear". It held that Dow Chemical France and Dow Chemical Company (USA) were central to the negotiation and conclusion of both contracts. Further, they were also involved in the performance of the contracts and their subsequent termination since Dow Chemical France effected the deliveries and Dow Chemical Company (USA) owned the trademarks for the goods and also exercised absolute control over its subsidiaries. Relying on these facts, the Tribunal concluded that both companies participated in the conclusion, performance, and termination of the contracts. It held:

> "*Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une réalité économique unique) of which the arbitral tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules.*
>
> *Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.*"[41]

[41] ibid.

24. From the above extracts, it is clear that membership in the same group of companies or "*same economic reality*" were neither the sole nor the guiding factors to hold that the non-signatory companies were parties. Rather, the Tribunal's emphasis was on the mutual intent of the parties, gathered from their conduct in the conclusion, performance, and termination of the contracts.[42]

25. The subsequent exposition and application of the doctrine by French arbitral tribunals and courts also largely reflects a focus on mutual intent, rather than mere membership in the same group, which has been held to be insufficient in and of itself to make the non-signatory a party.[43] In *Dallah Real Estate and Tourism Holding Co.* v. *Ministry of Religious Affairs, Government of Pakistan*, the Paris Court of Appeal enforced the arbitral award against the Pakistan government (non-signatory) as its conduct through involvement in the negotiation and performance of the contract reflected common will to be a party to the arbitration.[44] Common will must be ascertained according to the principles of good faith (parties must not be allowed to evade commitments) and

[42] Also see Born (supra) 1561; Bernard Hanotiau, 'Chapter 14: Group of Companies in International Arbitration' in Loukas A. Mistelis and Julian D.M. Lew (ed), *Pervasive Problems in International Arbitration*, vol 15 (Kluwer Law International 2006), 286.
[43] Born (supra) 1562-1563.
[44] Case No. 9-28533, dated 17 February 2011 (Paris Cour d'Appel).

effectiveness (when parties insert an arbitration clause, it must be presumed that their intent is to be governed by the arbitration).[45]

26. The focus on mutual intention reflects a fundamental difference between the Group of Companies doctrine and 'piercing the veil' or alter ego. In veil-piercing, the separate legal identities of the parent and subsidiary companies are disregarded or nullified on equity and fairness considerations (such as to prevent fraud). Application of the Group of Companies doctrine does not result in lifting the corporate veil, and is rather based on identifying the mutual intention of the parties.[46]

27. The doctrine has not been accepted in the same terms across the world.

28. In UK, in *Peterson Farms Inc* v. *C&M Farming Ltd*,[47] the Court rejected the applicability of the doctrine in English law. The separate legal identities of the parent and subsidiary companies is held to be a fundamental legal tenet.[48] In the *Dallah* case, the UK Supreme Court differed from the Paris Court of Appeal on enforcing the arbitral award against the Government of Pakistan (non-

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[45] *Malakoff Corporation Berhad and TLEMCEN Desalination Investment Company v. Algerian Energy Company SA and Hyflux Limited*, Case No. 21-07296, dated 13 June 2023 (Paris Cour d'Appel).
[46] Born (supra) 1563.
[47] [2004] EWHC 121 (Comm); *Mayor and Commonalty & Citizens of the City of London* v. *Ashok Sancheti*, [2008] EWCA Civ 1283.
[48] *Bank of Tokyo Ltd* v. *Karoon*, [1987] AC 45.

signatory). Even after applying French law to determine when a non-signatory is a party, based on the material before it, the Court held there was no mutual intention in this case to make the Government of Pakistan a party.[49] Similarly, in *Kabab-Ji SAL (Lebanon)* v. *Kout Food Group (Kuwait)*,[50] the UK Supreme Court did not enforce the arbitral award against the non-signatory company as there was no material to show that it was a party as per the terms of the contract.

29. Similarly, Singapore courts have also rejected the applicability of the Group of Companies doctrine by emphasising the fundamental corporate law principle of separate legal identities.[51]

30. Swiss courts, on the other hand, have allowed for non-signatories to be made party to the arbitration agreement based on their conduct, manifesting implied consent. The Swiss Federal Court has held that an arbitration agreement must itself be in writing as per Article 178 of the Swiss Private International Law Act. However, the question of whether a non-signatory is a party to such written arbitration agreement can be determined by reference

[49] [2010] UKSC 46.
[50] [2021] UKSC 48.
[51] *Manuchar Steel Hong Kong Ltd* v. *Star Pacific Line Pte Ltd* [2014] SGHC 181.

to its involvement in the preparation and performance of the contract containing the arbitration clause, which reflects its intent to be party to such arbitration agreement.[52]

31. American courts also do not expressly rely on the Group of Companies doctrine to determine whether a non-signatory is a party. Rather, they use principles such as equitable estoppel, assumption, piercing the corporate veil, alter ego, and waiver.[53] In the recent decision in *GE Energy Power Conversion* v. *Outokumpu Stainless*, the US Supreme Court relied on equitable estoppel to hold that a non-signatory can compel arbitration where a signatory is relying on terms of the contract to make its claim against the non-signatory.[54] American courts have also relied on implied consent,[55] third party beneficiary,[56] and general contractual and agency law principles to hold that a non-signatory is a party.[57]

32. This comparative perspective makes it clear that a determination of parties to an arbitration agreement that is based on mutual intention can take place without reference to whether

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[52] X._____ et al v. Z._____, 4A_115/2003; A._____, v. B._____ Ltd., 4A_376/2008; X._____ v. Y._____ Engineering and Y._____ S.p.A., 4A_450/2013.
[53] *GE Energy Power Conversion France SAS Corp., FKA Converteam SAS* v. *Outokumpu Stainless USA, LLC, et al.*, Case No. 18-1048 (1 June 2020).
[54] ibid.
[55] *McBro Planning & Dev. Co.* v. *Triangle Elec. Constr. Co. Inc.*, 741 F.2d 342 (11th Cir. 1984).
[56] *Nauru Phosphate Royalties, Inc.* v. *Drago Daic Interests, Inc.* 138 F.3d 160 (5th Cir. 1998).
[57] *Sarhank Group* v. *Oracle Corp*, 404 F. 3d 657 (2nd Cir. 2005).

the non-signatory is a part of the group of companies. In fact, Bernard Hanotiau, an international arbitration scholar, argues that the award in *Dow Chemical* has been misinterpreted to give rise to the Group of Companies doctrine. Rather, he emphasises that the real implication of *Dow* is that it enables us to determine whether a non-signatory is a party by reference to its conduct that reflects its consent. In this light, he argues that any reference to a group of companies is unnecessary as membership within the same group is not a determinative factor in the inquiry of who is a party to the arbitration agreement.[58]

33. The conclusions from the above analysis can be succinctly put forth as follows:

i. Various jurisdictions use both consensual and non-consensual legal principles to determine whether a non-signatory is a party to an arbitration agreement.[59]

ii. The Group of Companies doctrine is applied irrespective of the distinct juridical identities of each member of the group when they share a common economic reality by virtue of their role in the formation, performance, and termination

[58] Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?' (2011) 27(4) Arbitration International 539.
[59] Born (supra), 1531.

of the contract. The principle is based on mutual intention of all the parties to settle the dispute through arbitration.[60]

iii. The acceptance of the doctrine is highly contested across jurisdictions. The doctrine was developed in France and is applied there by emphasising mutual consent of the signatory and non-signatory companies.[61]

iv. On the other hand, countries like the United Kingdom[62] and Singapore[63] have expressly rejected the doctrine and have emphasised the fundamentality of separate legal personalities of members within the same group.

v. Some jurisdictions, such as Switzerland[64] and the USA,[65] have not accepted the Group of Companies doctrine in those terms. However, they invoke other legal principles to hold a non-signatory to be a party to the arbitration agreement (such as conduct, implied consent, contractual and agency principles).

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[60] *Dow Chemical* (supra).
[61] *Dallah Real Estate* (supra) [Paris Cour d'Appel]; *Malakoff Corporation* (supra).
[62] *Peterson Farms* (supra).
[63] *Manuchar Steel* (supra).
[64] X._____ et al v. Z._____, 4A_115/2003; A._____, v. B._____ Ltd., 4A_376/2008; X._____ v. Y._____ Engineering and Y._____ S.p.A., 4A_450/2013.
[65] *GE Energy Power Conversion* (supra); *McBro Planning & Dev. Co* (supra); *Nauru Phosphate Royalties, Inc.* (supra); *Sarhank Group* (supra).

vi. American courts also solely rely on equity considerations (non-consensual) to hold a non-signatory to be party, such as when they apply equitable estoppel and veil piercing/alter ego.[66]

ii. Indian Precedents on the Group of Companies Doctrine

34. I will now consider the application of the Group of Companies doctrine by our courts and formulate principles that arise from the precedents.

35. I am in agreement with the detailed analysis of the Indian case-law on this doctrine by the learned Chief Justice. The position of law in India can broadly be divided as it existed before and after the decision in *Chloro Controls* (supra). I have already referred to the decisions interpreting and applying Section 7(4)(b) in Part B(ii) of my opinion. The decisions cited therein recognise the possibility of a non-signatory company being a party to the arbitration. I have also referred to the reasoning in those decisions where the Court has examined the record of the agreement and constructed the existence of an arbitration agreement based on the express language, coupled with the consent of the parties.

[66] *GE Energy Power Conversion* (supra).

36. Two decisions of this Court which preceded *Chloro Controls* (supra), namely, *Sukanya Holdings*[67] and *Indowind Energy*[68] were based on a strict interpretation of Section 7 and considered that parties to an agreement are limited to its signatories.

37. There was a definitive shift in this position from the case of *Chloro Controls* v. *Severen Trent* (supra). Arising out of the conspectus of a multi-party multi-contractual dispute, a petition for reference to arbitration under Section 45 of the Act was filed in a suit, despite asymmetry in the parties to the contracts and the parties to the arbitration agreement. Interpreting the words and phrases "any person", "claiming through or under", and "shall" in Section 45 of the Court, this Court enlarged the scope of reference for the first time, to bind non-signatories.

38. It noted that if a claim is made against or by someone who is not originally a signatory to an arbitration agreement, the Group of Companies doctrine can bind the "non-signatory affiliates or sister or parent concerns" to arbitration, "if the circumstances demonstrate that the mutual intention of all the parties was to

[67] *Sukanya Holdings* v. *Jayesh H Pandya* (2003) 5 SCC 531 [2003 INSC 230].
[68] *Indowind Energy Ltd* v. *Wescare (India) Ltd* (2010) 5 SCC 306 [2010 INSC 246].

bind both the signatories and the non-signatory affiliates."[69] The Court noted in the following words:

> "*72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "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.*
>
> *73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute...*"
>
> (emphasis supplied)

39. In his opinion, the learned Chief Justice has considered the concern of Justice Surya Kant about an apparent contradiction between the above-referred paragraphs 72 and 73, and has correctly reconciled the two paragraphs. I am in agreement with the same.

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[69] *Chloro Controls* (supra), para 71.

40. In this context, it is critical to emphasize that the Court in *Chloro Controls* was interpreting Section 45, in Part II of the Act, in particular, the phrase "*claiming through or under*". The conclusion to include non-signatories to the arbitration agreement pivoted on their derivative claim to being a party to the arbitration agreement. The Group of Companies doctrine thus found recognition in the interpretation of the phrases of Section 45 of the Act. Further, for the derivative action to pass muster, "*a clear intention*" of the signatories and non-signatories had to be ascertained, through the circumstances delineated by the Court, i.e., i) direct relationship with the party to the agreement, ii) commonality of subject matter, iii) composite nature of transaction, and iv) interlinked performance of the contract.

41. In 2015, the Law Commission of India's 246th Report acknowledged this interpretation of Section 45 to the Act. In the pursuant amendments, Section 8 in Part I of the Act was amended to mirror the language of Section 45;[70] thus, parties in domestic

[70] The amended Section 8(1) of Arbitration and Conciliation Act 1996 reads as under:

> **"8. Power to refer parties to arbitration where there is an arbitration agreement.—** (1) 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, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

arbitrations could also petition for reference to arbitration in a derivative capacity.

42. We will now examine the application of the Group of Companies doctrine in the subsequent cases. In *Duro Felguera, S.A.* v. *Gangavaram Port Ltd*,[71] the application of the doctrine as recognised in *Chloro Controls* (supra) was not applied on the facts of that case.

43. Until now, the precedents pertained to situations where the parties invoked the pre-referral jurisdiction of the courts. In *Cheran Properties Ltd* v. *Kasturi and Sons Ltd*,[72] the Court was approached at the enforcement stage.[73] The Court allowed the enforcement of an arbitral award against a subsequent purchaser of shares under Section 35 of the Act, interpreting the phrase "persons claiming under them". However, expositions pertaining to the Group of Companies doctrine were observed in the judgment,

[71] (2017) 9 SCC 729 [2017 INSC 1026].
[72] (2018) 16 SCC 413 [2018 INSC 394].
[73] The respondent sold shares of its subsidiary company to one K.C. Palanisamy, who undertook to discharge the outstanding liabilities of this company. Clause 14 of this agreement recognised the right of K.C. Palanisamy to sell or transfer his holdings in the company to any other person of his choice, provided that transferee accepts the terms of the agreement regarding the management and financial aspects of the company. This agreement also contained an arbitration clause. K.C. Palaniswamy nominated the appellant to receive 95% of the shares that were to be transferred to him. Subsequently, disputes arose and an arbitral tribunal directed him to return the share certificates and title documents. The appellant was made party to the proceedings filed by the respondents to enforce the arbitral award.

in response to certain arguments advanced before the Court. In that context, the Court made the following observations:

> "*23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.*"[74]

44. The Court did not rely on the Group of Companies doctrine. Yet, *Cheran* (supra) is an important case to demonstrate that a non-signatory company can be determined to be a party to an arbitration agreement, based on factors such as relationship of the non-signatory with the signatory parties, commonality of subject-

[74] ibid, para 23.

matter, and composite nature of transaction. It is also possible for the court to construct such an agreement where the intention of a business arrangement is apparent and the non-signatories have bound themselves by their conduct to fulfill such business arrangement.

45. The subsequent decision in *Ameet Lalchand Shah v. Rishabh Enterprises*[75] is yet another instance where this Court has allowed a non-signatory to be party to an arbitration agreement, in connected contracts, on the ground of business efficacy, noting that all agreements were executed for a single commercial project. This approach was noted in the subsequent decision of *Discovery Enterprises*,[76] where learned Chief Justice has noted:

> "*In Ameet Lalchand, the Court did not explicitly invoke the group of companies doctrine to bind a non-signatory, rather it relied on Chloro Controls to hold that a non-signatory would be bound by the arbitration clause in the mother agreement, since it is a party to an inter-connected agreement, executed to achieve a common commercial goal.*"[77]
>
> (emphasis supplied)

46. In *Reckitt* Benckiser *(India) Pvt Ltd* v. *Reynders Label Printing India Pvt Ltd*,[78] the Court inferred that since the non-signatory

[75] (2018) 15 SCC 678 [2018 INSC 450].
[76] *ONGC v. Discovery Enterprises Pvt Ltd* (2022) 8 SCC 42 [2022 INSC 483].
[77] ibid, para 28.
[78] (2019) 7 SCC 62 [2019 INSC 700].

neither signed the arbitration agreement nor had any causal connection with the negotiation or execution of the agreement, an intent to consent to the arbitration agreement could not be discerned. Hence, the non-signatory was not bound by the arbitration agreement.[79] Thus, in *Reckitt*, the Court reverted to the approach of ascertaining mutual intention of the parties for applying the doctrine, although it did not result in the non-signatory being made a party to the arbitration.

47. *MTNL v. Canara Bank*[80] is the decision which acknowledged the Group of Companies doctrine, formulated its principles, and applied them to the proceedings by recognising CANFINA, a non-signatory, to be party to the arbitration agreement. The Court held:

> "*10.5. The group of companies doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the*

[79] ibid, para 12.
[80] (2020) 12 SCC 767 [2019 INSC 881].

> *contract, the non-signatory will also be bound and benefitted by the relevant contracts.*
>
> *10.6. The circumstances in which the "group of companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.*
>
> *10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group.*"

48. Finally, in *ONGC v. Discovery Enterprises Pvt Ltd*,[81] while the decision on whether the non-signatory was a party was remitted to the arbitral tribunal, the Court undertook a comprehensive review of the academic literature and judicial pronouncements on the issue. The court compendiously concluded the following:

> "*40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement*

[81] *Discovery Enterprises* (supra).

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.

41. Consent and party autonomy are undergirded in Section 7 of the 1996 Act. However, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego..."

49. What emerges from the aforementioned precedents is that:

i. The Group of Companies doctrine was adopted and applied in Indian arbitration jurisprudence in *Chloro Controls* (supra), where the Court read the doctrine into the phrase "*claiming through or under*" in Section 45. It held that a non-signatory affiliate or sister or parent company can be a party to an arbitration agreement if there is mutual intention of the signatories and non-signatories to this effect. In order to determine mutual intention, the Court laid down factors such as direct relationship, direct commonality of subject-matter,

and a composite transaction where the performance of multiple agreements is inextricably connected.[82]

ii. Pursuant to the 2015 Amendment of Section 8, the Court made a composite reference of signatories and non-signatories to arbitration by emphasising that all agreements were executed for a single commercial project,[83] but without explicitly referring to the Group of Companies doctrine.[84]

iii. Subsequently, this Court relied on mutual intention as the test for the doctrine. However, it deviated from *Chloro* (supra) by prescribing the non-signatory's causal connection with the negotiation and execution of the contract as factors to determine its mutual intent to arbitrate.[85]

iv. In *MTNL* (supra), the Court summarised the test under the doctrine as being based on the common intention of the parties to bind both signatory and non-signatory members of the group of companies. Such common intention can be inferred from the non-signatory's involvement in negotiation and performance of the contract (similar to *Reckitt Benckiser* (supra)), or from its statements that indicate its intention to

[82] *Chloro Controls* (supra), paras 72 and 73. This was later followed in *Cheran Properties* (supra), para 23.
[83] *Rishabh Enterprises* (supra), para 25.
[84] *Discovery Enterprises* (supra), para 28.
[85] *Reckitt Benckiser* (supra), para 12.

be a party.[86] Simultaneously, the Court also referred to the test in *Chloro Controls* (supra) for determining mutual intention.[87] Lastly, the Court held the doctrine to be applicable when there is a tight group structure or single economic reality, without any reference to the intention of the parties.[88] However, the Court ultimately relied on implied or tacit consent by the non-signatory, evidenced by its conduct, to hold that it is a party.[89]

v. In *Discovery* (supra), the Court comprehensively reviewed the above cases and ironed out the various tests formulated in them. It held that (a) mutual intent of the parties, (b) relationship of the non-signatory to the signatory, (c) commonality of subject-matter, (d) composite nature of transaction, and (e) performance of the contract, are the factors to determine whether the non-signatory is a party.[90] These factors emphasise mutual intention and draw from the tests laid down in *Chloro Controls* and *Reckitt Benckiser* but do not include the test of single economic reality as a determinative factor, as held in *MTNL* (supra).

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[86] *MTNL* (supra), para 10.5.
[87] ibid, para 10.6.
[88] ibid, para 10.7.
[89] ibid, para 10.16.
[90] *Discovery Enterprises* (supra), para 40.

50. At this juncture, it is necessary to clarify and answer a common question referred for our consideration, i.e., whether the Group of Companies doctrine is anchored in Sections 8 and 45 of the Act. The expression "*claiming through or under*" employed in Sections 8 and 45 is concerned with instances of succession and derivative rights. Learned Chief Justice has dealt with this aspect in great detail in Part F (i) and (ii) of his opinion and held that the doctrine cannot be anchored in Sections 8 and 45 and to this extent, *Chloro Controls* (supra) is wrongly decided. I am in complete agreement with his reasons and findings.

D. <u>Group of Companies Doctrine in the Context of Section 7</u>

51. In this reference, we are tasked to determine whether the Group of Companies doctrine is in accord with the statutory regime of the Arbitration and Conciliation Act, 1996, defining an arbitration agreement and parties thereto. The adaptation of the doctrine has been doubted, and that is the reason for this reference. While dealing with the international perspective on the doctrine in Part C(i) of my opinion, it was noticed that the doctrine could not attain any conceptual singularity, and it remains contested. Perhaps, this is for two reasons: *first*, the expression 'single economic reality' employed in *Dow* (supra) is not in line with

the concept of separate legal personality of a company, and *second*, the doctrine is applied for determining the intention of the parties, which is completely fact-based. For these reasons, the doctrine has remained dynamic, if not uncertain, and is subject to many qualifications and exceptions. At the same time, there are certain advantages to adopting the doctrine, considering modern business practices. I am of the opinion that it is necessary to entrench the doctrine within the statutory regime of the Act, to enable a court or arbitral tribunal to apply it as a principle to decipher the intention of the parties. I find it necessary to subsume the doctrine of Group of Companies within the judicial process under Section 7(4)(b), where a court or arbitral tribunal is called upon to determine the existence of an arbitration agreement and parties to it.

52. A conjoint reading of Section 9 of the Code of Civil Procedure and Section 28 of the Indian Contract Act informs us that the jurisdiction of an arbitral tribunal to settle disputes between the parties, to the exclusion of ordinary civil courts, must arise out of a *contract to arbitrate* between them. An arbitration agreement, being a contract, must necessarily be in writing, as against an oral agreement, but need not be signed by the parties. The written arbitration agreement can be in the form of a document signed by

the parties, or be evidenced in the record of agreement. Section 7(4)(b) prescribes the written material from which a non-signatory's consent and intention can be deciphered by a court or arbitral tribunal.

53. The existence of an arbitration agreement with a non-signatory is a matter of interpretation and construction. The express words employed by the parties enable the court to ascertain the intention of the parties and their agreement to resolve disputes through arbitration. For ascertaining the true meaning of the express words, the court or tribunal may look into the surrounding circumstances such as nature and object of the contract and the conduct of the parties during the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper adjudication and determination. The Group of Companies doctrine is one such principle. It may be adopted by courts or arbitral tribunals while interpreting the record of agreement to determine whether the non-signatory company is a party to it.

54. Although the application of the Group of Companies doctrine in India has until now been independent of Section 7, its

juxtaposition with Section 7(4)(b) case-law shows that the inquiry under both is premised on determining the mutual intention of parties to submit to arbitration. The mutual intention of the parties is discernible from their conduct in the performance of the contract and this inquiry is common to Section 7(4)(b) jurisprudence and the Group of Companies doctrine. Even the precedents on the doctrine, national and international, look to additional factors beyond the non-signatory being in the same group of companies, such as commonality of subject-matter, composite nature of transaction, and interdependence of the performance of the contracts to determine mutual intent.

55. Since the fundamental issue before the court or tribunal under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within Section 7(4)(b). Consequently, the record of agreement that evidences conduct of the non-signatory in the formation, performance, and termination of the contract and surrounding circumstances such as its direct relationship with the signatory parties, commonality of subject-matter, and composite nature of transaction, must be comprehensively used to ascertain the existence of the arbitration agreement with the non-signatory. In this inquiry, the fact of a non-

signatory being a part of the same group of companies will strengthen its conclusion. In this light, there is no difficulty in applying the Group of Companies doctrine as it would be statutorily anchored in Section 7 of the Act.

E. Conclusion

56. In view of the above, while concurring with the judgment of the learned Chief Justice, my conclusions are as follows:

I. An agreement to refer disputes to arbitration must be in a written form, as against an oral agreement, but need not be signed by the parties. Under Section 7(4)(b), a court or arbitral tribunal will determine whether a non-signatory is a party to an arbitration agreement by interpreting the express language employed by the parties in the *record of agreement*, coupled with surrounding circumstances of the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper adjudication and determination. The Group of Companies doctrine is one such principle.

II. The Group of Companies doctrine[91] is also premised on ascertaining the intention of the non-signatory to be party to an arbitration agreement. The doctrine requires the intention to be gathered from additional factors such as direct relationship with the signatory parties, commonality of subject-matter, composite nature of the transaction, and performance of the contract.

III. Since the purpose of inquiry by a court or arbitral tribunal under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within Section 7(4)(b) to enable a court or arbitral tribunal to determine the true intention and consent of the non-signatory parties to refer the matter to arbitration. The doctrine is subsumed within the statutory regime of Section 7(4)(b) for the purpose of certainty and systematic development of law.

IV. The expression "claiming through or under" in Sections 8 and 45 is intended to provide a derivative right; and it does not enable a non-signatory to become a party to the arbitration agreement. The decision in *Chloro Controls* (supra) tracing the Group of Companies doctrine through

[91] As delineated in para 40 of *Discovery Enterprises* (supra).

the phrase “claiming through or under” in Sections 8 and 45 is erroneous. The expression ‘party’ in Section 2(1)(h) and Section 7 is distinct from “persons claiming through or under them”. This answers the remaining questions referred to the Constitution Bench.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

December 06, 2023
New Delhi