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Role of Third-Party Arbitration: Balancing Objectivity and Fairness in Dispute Resolution

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ABSTRACT

Third-party arbitrations are on the rise with third parties being called upon in an arbitration dispute in order to provide justice to the aggrieved party. However, the Indian laws say little when the question of the rights and liabilities of a third-party arises. This blog ponders over different statutory rights as well as the liabilities of third parties in arbitration. It also focuses on different views taken by the constitutional courts and what doctrine is being used for bringing a third-party into an arbitration, with or without their consent, by interpreting various sections of the Arbitration & Conciliation Act, 1996. In the end, the author comments upon the existing jurisprudence for third-party arbitration and calls upon the legislature to recognise different rights and liabilities through various amendments.

I. INTRODUCTION

Arbitration, as we know of it, is a form of dispute resolution between two parties to a contract. One or more persons (but not an even number) can be appointed as arbitrators, who can pass an award in favour of one of the parties, which shall be binding and be complied with (unless appealed in commercial courts). The historical objective of arbitration by lawmakers and private entities is to dispose of civil cases, which require minimum judicial interference, provide speedy justice, and reduce the burden on our fatigued courts from ever-growing commercial disputes.

However, with the rise of multi-party contracts and the dependency on third parties for the enforcement of contracts between two signatory parties' arbitration tribunals, it is very essential for arbitral tribunals and the courts to not turn a blind eye to the involvement of third parties in a dispute, as without making them liable, justice may not be served to the aggrieved party. Therefore, the rights and liabilities of third parties in an arbitration are one of the most important legal issues that have been very little discussed.

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II. SECTION 8 AND 45 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Prior to the 2015 Amendment Act, the role of a third-party in an arbitration was ambiguous and uncertain. After the 2015 Amendment, some clarity has been provided in Sections 8 and 45, but the loopholes still exist, which the judiciary is struggling to close.

Section 8 gives the courts the power to refer the parties to arbitration if an action is brought by any one of the parties to an arbitration agreement or "any person" claiming through them. Section 45 talks about a similar provision applicable in Part II of the Act. From the bare language, it is clear that the legislature recognises the inclusion of third parties, who can by themselves ask the court to refer the matter to arbitration, but only with the approval of one of the parties.

The Supreme Court in, *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641* went further on this interpretation that if a third-party can bring an action against the parties by referring the dispute for arbitration, an opposite of that is also very much true i.e., a signatory to the arbitration agreement may also claim "against or by someone who is not originally named as a party" to the arbitration agreement "through or under" a signatory to the arbitration agreement.

Based on the readings of Section 8 and 45, the scope of third-party arbitration is somewhat rigid, which still leaves many questions unanswered such as whether a third-party can be involved in an arbitration proceeding without its consent or whether a third-party can enter into an arbitration proceeding without the consent of either of the parties. In order to solve these questions, the judiciary has applied various doctrines in order to unfold these issues.

III. GROUP OF COMPANIES DOCTRINE

It has been very well explained in *Chloro Chemicals*, whereby the court observed that "*this doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates*".

Therefore, third parties can be subject to arbitration provided the relationship between signatory and non-signatory comes within the scope of the group of companies' doctrine and there was an intention to bind both parties for the enforcement of the contract.

So, using the group of companies' doctrine non-signatories can be pulled into an arbitration agreement without their consent, but only in exceptional cases. The court will have to delve

into the nitty-gritty of the contract and find a composite nature where performance of the mother agreement may not be feasible without the aid and execution of ancillary agreements.

Therefore, *Chloro Chemicals* gave us two essentials for binding non-signatories without their consent: firstly, all ancillary agreements are relatable to the mother agreement, and secondly, the performance of one is so intrinsically linked with the other agreements that they are incapable of being beneficially performed without the performance of the others or severed from the rest.

IV. APPOINTMENT OF ARBITRATOR ON BEHALF OF THIRD-PARTY

After the landmark judgement in *Chloro Chemicals*, the rights and liabilities of third parties in an arbitration have been highlighted in the Indian context in various different aspects. In one of its orders in *Purple Medical Solutions Private Limited vs. MIV Therapeutics Inc. & Anr.*, the Supreme Court applied the principles in *Chloro Chemicals* and appointed an arbitrator on behalf of signatories as well as non-signatories to an arbitration, holding that the facts of the case would justify the appointment of an arbitrator on behalf of both the signatory and non-signatory and refer the matter to arbitration by lifting the corporate veil in order to determine the role of the non-signatory in the transactions.

V. INTERIM RELIEF UNDER SECTION 9 AGAINST THIRD-PARTY

The Supreme Court has not commented on whether interim measures can be brought against third parties under Section 9 of the Act. High Courts, however, have conflicting opinions on whether the courts can take action against third parties under Section 9.

The Bombay High Court has a strict view regarding the use of Section 9 by the courts against third parties. In *Hemant D. Shah & Ors. vs. Chittaranjan D. Shah & Ors.* and *GL Asia Mauritius II Cayman Limited vs. Pinfold Overseas Limited*, the High Court rebuked the idea of granting interim orders against the third parties under Section 9.

On the other hand, the Delhi High Court, in *Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Limited*, had held that there is no hard and fast rule that can be laid down as to the issuance of interim orders qua third parties, and the same depends on the facts of each case. The Court analysed its previous cases where it held that section 9 of the Act is applicable only between the parties to the arbitration agreement but also highlighted cases where it recognised the existence of the power of the court to issue interim orders with respect to third parties under section 9 of the Act.

The Court settled this dispute by finally laying down that "*the court may issue interim orders*

against the third parties to arbitration only in exceptional circumstances, which are such that denial thereof might frustrate the petitioner's rights in arbitration; defeat the very object of arbitration between the parties thereto; render the arbitration proceedings infructuous; lead to gross injustice; and/or leave the petitioner remediless, depending on the facts of each case."

VI. POWER OF ARBITRAL TRIBUNAL TO USE THE GROUP OF COMPANIES DOCTRINE

The Supreme Court, using the *Cholo Chemicals*, has held that courts have the power to lift the corporate veil but is silent on the powers of an arbitral tribunal to use the same power. The high courts are in conflict regarding this issue and have given different interpretations of the power to lift the corporate veil.

The Bombay High Court in *Oil and Natural Gas Corporation Ltd. v. Jindal Drilling and Industries Limited* was strongly against the notion of an arbitral tribunal having the power to lift the corporate veil, and the same was also followed by the Delhi High Court in *Sudhir Gopi v. Indira Gandhi National Open University and Others*. However, the Delhi High Court in *GMR Energy Limited v. Doosan Power Systems India Private Limited and Others* cited *Chloro Chemicals*, wherein it was held that the question of the formal validity of the arbitration agreement did not include determining the parties that would be subject to the arbitration. Thus, it was observed that once the validity of the arbitration agreement was determined, it was a different step to establish which parties were bound by the arbitration agreement. It also held that the group of companies doctrine did not have any public interest element, and therefore both the courts and an arbitral tribunal could lift the corporate veil.

In *IMC Limited v. Board of Trustees of Deendayal Port Trust, the Gujarat High Court* blatantly called out the Bombay High Court for its findings and held that there is nothing in the law that prevents an arbitral tribunal from lifting the corporate veil on the basis of a group of companies. It held that every arbitration can adjudicate upon a dispute having powers similar to any civil or commercial court.

VII. CONCLUSION

As we progress further towards an ADR regime, multi-party contracts and third-party enforcement deals are slowly becoming the new norm, and sooner or later, the international commercial arbitration laws will need rigorous amendments to provide the rights and liabilities of third parties in an arbitration dispute. Although there needs to be a lot of clarification by the Supreme Court with regards to the rights and liabilities of third-party arbitrations in India, it is safe to say that the Indian jurisprudence status quo is much clearer as compared to international commercial arbitration.