REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION (CIVIL) NO. 38 OF 2020

COX AND KINGS LIMITED ...**PETITIONER**

VERSUS

SAP INDIA PRIVATE LIMITED & ANOTHER ...**RESPONDENTS**

JUDGMENT

N.V. RAMANA, CJI

1. This petition calls on us to examine the 'group of companies doctrine'. In particular, it requires us to examine whether the principles of party autonomy under arbitration law and corporate personality in company law have been adequately safeguarded in outlining the scope and applicability of the doctrine being followed at present in Indian jurisprudence.

2. The present Arbitration Petition has been preferred by the Petitioner-Applicant under Section 11(6) and Section 11(12)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter the "Arbitration Act"), for appointment of an Arbitral Tribunal in terms of the provisions of the Arbitration Act, on the ground

that there has been a failure with respect to the appointment of an Arbitral Tribunal in accordance with the agreements between the parties.

3. The facts necessary for the adjudication of the dispute are as follows: on 14.12.2010, the Applicant and Respondent No. l entered into an SAP Software End User License Agreement and SAP Enterprise Support Schedule under which the Applicant was made a licensee of certain ERP software developed and owned by the Respondents. This is an overall licensing agreement that all customers of the Respondents have to enter into compulsorily in advance in order to utilize any software of the Respondents. In 2015, while the Applicant was developing its own e-commerce platform, the Respondents approached the Applicant and recommended their Hybris Solution as it would be 90% compatible with the Applicant's software. The Respondents indicated that the remaining 10% customisation would take only 10 months, a much shorter solution than the Applicant developing the software itself.

4. The aforesaid agreement was divided into 3 separate transactions: *first,* the Software License and Support Agreement

- Software Order Form 3, dated 30.10.2015, was signed between the Applicant and Respondent No. 1 for the purchase of the SAP Hybris Software License. *Second*, an agreement dated 30.10.2015 was signed between the parties containing the terms and conditions governing the implementation of the SAP Hybris software. This agreement is called the Services General Terms and Conditions Agreement ("GTC"). *Third*, on 16.11.2015, an agreement was entered into for the customization of the software.

5. Clause 15.7 of the GTC contains the arbitration clause which we are concerned with in the present matter. The clause reads as follows:

> ***"15.7 Dispute Resolution:*** *In the event of any dispute or difference arising out of the subject matter of this Agreement,* ***the Parties shall undertake to resolve such disputes amicably****. If disputes and differences cannot be settled amicably then such disputes shall be referred to bench of three arbitrators, where each party will nominate one arbitrator and the two arbitrators shall appoint a third arbitrator. Arbitration award shall be binding on both parties.* ***The arbitration shall be held in Mumbai*** *and each party will bear the expenses of their appointed arbitrator. The expense of the third arbitrator shall be shared by the parties.*

The arbitration process will be governed by the Arbitration & Conciliation Act, 1996."

6. Till August 2016, the Applicant listed out various issues in project implementation to Respondent No. 1 and requested Respondent no. 2 to intervene. Respondent No. 2, in turn, gave certain assurances to the Applicant. As the contract could not be fulfilled even with the extended timelines and additional manpower, the contractual framework pertaining to SAP Hybris Solution was rescinded on 15.11.2016 after which the Respondents immediately withdrew their resources from the said project. Pursuant to the same, the Applicant demanded a refund of Rs. 45 crores that was paid towards the License Agreement, Annual Maintenance Charges, and implementation services. Respondent No. 2 in response to the said demand proposed a solution which was rejected by the Applicant.

7. Finally, after several correspondences and meetings, the matter could not be settled amicably. On 29.10.2017, Respondent No. 1 issued a notice invoking arbitration for the alleged wrongful termination of the contract and demanded payment of Rs. 17 crores. An Arbitral Tribunal comprising of Hon'ble Mr. Justice Madan B. Lokur (Retd.), Hon'ble Mr. Justice Dilip Bhosale

(Retd.), and Hon'ble Mr. Justice V. C. Daga (Retd.) was constituted to adjudicate the disputes between the parties.

8. Respondent No. l initiated proceedings under Clause 15.7 of the GTC entered between the parties on 30.10.2015. It may be noted here that Respondent No. 2 was not made a party in the aforesaid proceedings. During these proceedings, the Applicant herein filed an application under Section 16 of the Arbitration Act, before the Hon'ble Tribunal, contending that the four agreements entered between the parties are a part of a composite transaction and the same should be a part of a singular proceeding.

9. Meanwhile, on 22.10.2019, NCLT, admitted an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 preferred against the Applicant and appointed an Interim Resolution Professional. On 05.11.2019, the NCLT directed the parties to adjourn the arbitration proceedings *sine die* in view of the moratorium imposed upon the claims against the Applicant due to the initiation of the Corporate Insolvency Resolution Process (CIRP).

10. On 07.11.2019, the Applicant sent a fresh notice invoking Arbitration arraying Respondent No. 2 in the Arbitration Proceedings. In the said Notice, the Applicant appointed Hon'ble Dr. Justice Arijit Pasayat as its nominated arbitrator and called upon the Respondents to appoint their Arbitrator for the constitution of the Tribunal. However, there was no response from the Respondents. Hence, the Applicant has preferred this Application under Section 11 of the Arbitration Act seeking appointment of the Arbitrator in an International Commercial Arbitration.

11. Mr. Kailash Vasdev, learned Senior Advocate appearing on behalf of the Applicant made the following submissions:

i. Respondent No. 1 is a wholly owned subsidiary and proprietary concern of Respondent No. 2. Since the software is licensed by Respondent No. 2 to Respondent No. 1, the customisation would not be possible without the aid of Respondent No. 2. Therefore, all the four agreements together form a composite agreement and are a part of a single, interlinked transaction by both Respondent Nos. 1 and 2.

ii. The agreements and email correspondences clearly show that Respondent Nos. 1 and 2 and the Applicant were in *ad idem* for the implementation and the execution of the agreements. Especially, when Respondent No. 1 failed to execute the agreement, Respondent No. 2 took the responsibility to resolve the grievances of the applicant.

iii. Considering the holding in the three Judge Bench decision of ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.,*** (2013) 1 SCC 641, arbitration can be invoked even against the non-signatories, if the circumstances demonstrate that it was the mutual intention of the parties.

iv. There is no commonality of claims between the present arbitration proceedings and the earlier proceedings.

v. Considering, the limited scope under Section 11 of the Arbitration Act, the intervention of the Court should be as minimal as the Court is only required to examine the existence of the arbitration agreement.

12. Mr. Ritin Rai, learned Senior Advocate appearing on behalf of the Respondent No. 1 made the following submissions:

i. The Applicant has suppressed material facts regarding its previous attempts to resist constitution of an Arbitral Tribunal. It ought to be noted that when Respondent No. 1 had earlier invoked Clause 15.7 of the GTC, it was the Applicant who had challenged the same for being *void ab initio.* Now, the Applicant himself is invoking the same provision seeking the appointment of an Arbitrator.

ii. Immediately one day after the commencement of the CIRP and the consequent imposition of the moratorium, the Applicant has chosen to raise similar claims through a fresh notice and has obliquely arrayed Respondent No. 2 as a party to inflate its claim. It is a settled principle of law that the principle of res-judicata applies to arbitral proceedings as well.

13. Mr. Neeraj Kishan Kaul, learned Senior Advocate appearing on behalf of Respondent No. 2 made the following submissions:

i. Respondent No. 2 is neither a signatory, nor has it ever agreed (*expressly or impliedly*) to be bound by the agreements between the Applicant and the Respondent No. 1. Respondent No. 2, being a foreign entity does not have any business dealings in India and is a separate and independent legal entity from Respondent No. 1.

ii. The emails relied upon by the Applicant do not indicate any undertaking by Respondent No. 2. Especially, when the Applicant himself approached Respondent No. 2 seeking assistance much after the execution of the License Agreement and Service Agreement. Admittedly, Respondent No. 2 was not involved in the contract negotiation process.

iii. The "*Group of Companies*" doctrine is not applicable in the present case. Respondent No. 2 is not only a non-signatory but also never participated in the negotiation process during the drafting of the contract. Moreover, there is no consensus of the parties to be bound by the contract.

14. After hearing the counsel appearing on both sides and considering the ramifications it may have by the adjudication of the subject matter, this Court must examine the ambit of the "Group of Companies" doctrine. Ever since this doctrine was expounded in the ***Chloro Control*** (*supra*) case, it has been utilised in a varied manner. It is in this context we felt that there is a further need to examine the rationality behind the doctrinal approach taken by this Court in the ***Chloro Control*** (*supra*) case.

15. Arbitration is a creature of contract which has been provided statutory backing under the Arbitration Act, to usher in party autonomy, quick disposal, and an efficacious alternative remedy. Arbitration has been a great boon for Indian jurisprudence, wherein numerous cases have been methodically dealt with in an effective manner without taking the meandering course of litigation before Courts.

16. One of the most challenging areas of Arbitration practice, both theoretical and practical, relates to multi-party and multi-claim proceedings. Usually, arbitration involves parties who have explicitly entered into an arbitration agreement, or parties with successor interests, claiming under them. In some cases, it happens that third parties are bound by an arbitration clause by tacit consent, etc.

17. Doctrine of group of companies is one such area which is utilized to bind third parties to an arbitration agreement. Theoretically, the policy consideration of efficiency is argued to allow such joinders. However, until a legal basis for the same is provided, efficiency cannot itself be the sole ground to bind a party to arbitration.

18. Section 7 of the Arbitration Act defines an arbitration agreement. Being a creature of contract, the realm of arbitration is one of consent. The bare reading of the aforesaid provision indicates that parties must reduce their intention to submit their existing or future disputes to arbitration, in writing. The statute does not mandate a particular form for an arbitration agreement. The intention of the parties can be inferred from an exchange of letters, telex, telegram, and even electronic means. The existence of the arbitration agreement can be deduced once it is ascertained that the parties were at *ad idem* either through a contract, conduct or correspondences. (See ***Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.***, (2015) 13 SCC 477). Therefore, the question of the extension of an arbitration agreement to non-signatories necessarily also involves the question of the extension of the scope and the effects of the jurisdiction of the arbitration tribunal over such companies.[1]

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1 Pietro Ferrario, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?', Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2009, Volume 26 Issue 5) pp. 647 - 673

19. This doctrine can be clearly stated to have originated in the ***Dow Chemical France, the Dow Chemical Company v. Isover Saint Gobain,*** (ICC Case No. 4131). In the case of **Dow Chemicals** (supra), it was the subsidiaries of Dow Chemicals which initiated Arbitration proceedings against Isover. In that case, Isover objected to the basis on which the subsidiaries of Dow Chemicals chose to arbitrate, without some of them having entered a valid arbitration agreement with Isover. The Tribunal, while disregarding the contention of Isover, held that Dow Chemicals Group operated as a single economic reality and thus the non-signatories were also bound by the arbitration agreement. We may note that the **Dow Chemicals** (supra) case related to a situation where a non-signatory did not resist arbitration. Rather they wished to join an arbitration already initiated by its affiliates. The effect of this position has not been evaluated in any precedents of this Court and needs to be examined.

20. The first case which dealt with group of companies doctrine for domestic arbitrations was ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya***, (2003) 5 SCC 531. In that case, disputes

had arisen between multiple parties over the same transaction. Some of the parties in the dispute were not a part of the arbitration agreement. The appellant was claiming relief against some of these parties who were not party to the agreement. The Court held, under Section 8 of the Arbitration Act, that causes of action cannot be bifurcated in an arbitration, and non-parties to an arbitration agreement cannot be included in the same arbitration.

21. The next important case which dealt with the group of companies doctrine was the ***Chloro Control*** (supra) case. The Court at the outset acknowledged that there were various school of thoughts when it came to the doctrine in arbitration jurisprudence. It was in this context that the Court had to formulate an opinion to provide a best fit for the doctrine for Indian jurisdiction under part II of the Arbitration Act. As many foreign parties were involved, the Court had to invoke Section 45 of the Arbitration Act for appointment of an arbitrator. Section 45 of the Arbitration Act stood as under:

> "**45. Power of judicial authority to refer parties to arbitration**.—Notwithstanding anything contained in Part I or in the Code of

Civil Procedure, 1908 (V 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, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

22. The Court compared Section 45 of the Arbitration Act to Article 2 of UNCITRAL Model Law and formulated the following ingredients for a Judicial Authority to examine at a referral stage:

"1. Does the arbitration agreement fall under the scope of the Convention?

2. Is the arbitration agreement evidenced in writing?

3. Does the arbitration agreement exist and is it substantively valid?

4. Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular dispute settled by arbitration?

5. Is the arbitration agreement binding on the parties to the dispute that is before the court?

6. Is this dispute arbitrable?"

23. The Court noticed distinction in the language under Section 45 and Section 8 of the Arbitration Act in the following manner:

> "**69.** We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. **In Section 45, the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party**. Once this link is established, then the court shall refer them to arbitration. The use of the word "shall" would have to be given its proper meaning and cannot be equated with the word "may", as liberally understood in its common parlance. The expression "shall" in the language of Section 45 is intended to require the court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the prerequisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.
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> **70.** Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining

(sic underlying) that agreement. **But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act.** Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (2nd Edn.) by Sir Michael J. Mustill:

"1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

(emphasis supplied)

From the above it is clear that the Court was of the firm opinion that there must be a legal relationship between the non-signatory and the party to the arbitration agreement.

24. While expounding on the legal relationship, the Court accepted the group of companies doctrine as a sufficient basis to establish this legal relationship. However, while expounding on the ingredients of doctrine itself, the Court brought in the intention of the parties as to whether they were *ad-idem* to treat a non-signatory as being a party to the arbitration agreement. This postulation conflates a contractual understanding of the group of companies doctrine, which has evolved within the framework of arbitration, without alluding to contractual principles.

25. On one hand, this Court reduced the threshold of arbitration being a consensual affair. On the other, the doctrine of group of companies is transposed on requirements under contract law to bind a party to an arbitration.

26. An attempt was made by the Court to find a basis for reading the group of companies doctrine within the language of Section 45 of the Arbitration Act in the following manner:

> **"99.** Having examined both the above stated views, we are of the considered opinion that it will be the facts of a given case that would act as precept to the jurisdictional forum as to whether any of the stated principles should be adopted or not. If in the facts of a given case, it is not possible to construe that the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party, then the case would not fall within the ambit and scope of the provisions of the section and it may not be possible for the court to permit reference to arbitration at the behest of or against such party.
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> **100.** We have already referred to the judgments of various courts that **state that arbitration could be possible between a signatory to an agreement and a third party. Of course, heavy onus lies on that party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated under Section 45 of the 1996 Act."**
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> *(emphasis supplied)*

27. It is interesting to note that this Court discusses some judgments from the United Kingdom in this regard. In ***Roussel-Uclaf v. G.D. Searle & Co. Limited and G. D. Searle & Co.,*** [1978] F.S.R 95, the Court interpreted the term 'claiming through or under' while staying a case against a company that was neither party nor privy to an arbitration agreement. Here,

the non-signatory was a fully owned subsidiary, and its parent company was a signatory to an arbitration agreement. The subsidiary had claimed that it had the right to sell patented articles which it had obtained from the parent company because the parent company had ordered the sale of the patented articles. A stay on the litigation was granted, but the Court concluded that the subsidiary was 'claiming through or under' the parent company. This meant that if the parent company was entitled under the license agreement to sell the articles, then the same right flowed to the subsidiary company as well. Although this case did not explicitly indicate the acceptance of group of companies doctrine under the English Law, the wordings can only be said to have left the door open to possibility of such inclusion.

28. In any case, the Court of Appeal in the case of ***The Mayor and Commonalty & Citizens of the City of London v. Ashok Sancheti,*** [2008] EWCA Civ 1283 overruled the ***Uclaf Case*** (*supra*). The Court pronounced that a 'mere legal or commercial connection is insufficient'. In essence, this restricted the phrase 'claiming through or under' to only those third persons who

assert their right on the basis of the rights of a signatory to an arbitration agreement. It is noticed that this Court in ***Chloro Control*** (supra), while observing both cases as persuasive, however, does not provide reasoning to favour one interpretation over the other, in the following manner:

> **"98.** In Roussel-Uclaf v. G.D. Searle & Co. Ltd. [(1978) 1 Lloyd's Rep 225] the Court held:
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> > "The argument does not admit of much elaboration, but I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. **The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis**

that it is 'claiming through or under' the parent to do what it is in fact doing whether ultimately held to be wrongful or not."

However, the view expressed by the Court in Roussel-Uclaf case [(1978) 1 Lloyd's Rep 225] does not find approval in the decision of the Court of Appeal in City of London v. Sancheti [2008 EWCA Civ 1283 : (2009) 1 Lloyd's Rep 117 (CA)] . In para 34, it was held that the view in Roussel-Uclaf [(1978) 1 Lloyd's Rep 225] need not be followed and stay could not be obtained against a party to an arbitration agreement or a person claiming through or under such a party, as mere local or commercial connection is not sufficient. But the Court of Appeal hastened to add that, in cases such as the one of Mr Sancheti, Corporation of London was not party to the arbitration agreement, but the relevant party is the United Kingdom Government. The fact that in certain circumstances, the State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of the local authorities, does not make the local authority a party to the arbitration agreement."

29. This Court ultimately concluded that ***Sukanya Holdings*** (supra) was not applicable for interpreting Section 45 of the Arbitration Act. The ratio of the ***Sukanya Holdings*** (*supra*) was restricted to arbitrations under Part I of the Arbitration Act as such.

30. It may be noted that following the ratio in ***Chloro Control*** (supra), the 246th Law Commission Report recommended an amendment to Section 2(1)(h) and 8 of the Arbitration Act to modify the definition of 'party' under Part I of the Arbitration Act, to "a party to an arbitration agreement or any person claiming or through or under such party" to cure the anomaly pointed out by this Court in the ***Chloro Control*** (*supra*) case. The relevant observations by the 246th Law Commission Report are extracted below:

> "**61**... It would thus be incongruous and incompatible with this "consensual" and "agreement based" status of arbitration as a method of dispute resolution, to hold persons who are not "parties" to the arbitration agreement to be bound by the same.
> **62.However, a party does not necessarily mean only the "signatory" to the arbitration agreement. In appropriate contexts, a "party" means not just a signatory, but also persons "claiming through or under" such signatory – for instance, successors-of-interest of such parties, alter-ego's of such parties etc**. **This is particularly true in the case of unincorporated entities, where the issue of "personality" is usually a difficult legal question and raises a host of other issues. This principle is recognized by the New York Convention, 1985 which in article II (1) recognizes an agreement between parties**

“in respect of a defined legal relationship, whether contractual or not.”

63.The Arbitration and Conciliation Act, 1996 under section 7 borrows the definition of the “arbitration agreement” from the corresponding provision at article 7 of the UNCITRAL Model Law which in turn borrows this from article II of the New York Convention. However, the definition of the word “party” in section 2(1)(h) refers to a “party” to mean “a party to an arbitration agreement.” This cannot be read restrictively to imply a mere “signatory” to an arbitration agreement, since there are many situations and contexts where even a “non-signatory” can be said to be a “party” to an arbitration agreement. This was recognized by the Hon’ble Supreme Court in Chloro Controls v. Severn Trent Water Purification, (2013) 1 SCC 641, where the Hon’ble Supreme Court was dealing with the scope and interpretation of section 45 of the Act and, in that context, discussed the scope of the relevant doctrines on the basis of which “non-signatories” could be said to be bound by the arbitration agreement, including in cases of inter-related contracts, group of companies doctrine etc.

64. This interpretation given by the Hon’ble Supreme Court follows from the wording of section 45 of the Act which recognizes the right of a “person claiming through or under [a party]” to apply to a judicial authority to refer the parties to arbitration. The same language is also to be found in section 54 of the Act. This language is however, absent in the corresponding provision of section 8 of the Act. It is similarly absent in the other relevant provisions, where the context would demand that a party includes also a “person claiming through or under such party”. To cure this anomaly, the Commission proposes an

amendment to the definition of "party" under section 2 (h) of the Act."

(emphasis supplied)

We must here also state that the Law Commission did not examine the interpretation of 'claiming through or under'. Rather, it simply recognized that there may be a need to extend the same to arbitrations under Part I of the Arbitration Act.

31. Pursuant to the aforesaid recommendation, the legislature made the following amendment to Section 8(1) of the Arbitration Act.

SECTION 8(1) PRIOR TO ACT 3 OF 2016	**SECTION 8(1) AFTER ACT 3 OF 2016**
"**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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.	**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.

The 2015 Amendment brought in four amendments to Section 8(1). Firstly, the scope of the concept of "party" has been expanded to include persons claiming "*through or under*". Secondly, the amendment also clarified the scope of judicial interference, and that the same is to be limited only to the *prima facie* examination regarding the existence of the arbitration agreement. Thirdly, the cut-off for submitting an application under Section 8 of the Arbitration Act has been stated to be "the date of" submitting the first statement on the substance of the dispute. Fourthly, the aforesaid amendment shall apply notwithstanding prior judicial precedent. However, it may be observed that the Parliament has not carried out any amendment to Section 2(1)(h) of the Arbitration Act. The impact of the absence of such an amendment needs to be clearly examined by this Court. This has created an anomalous situation wherein potentially a party "claiming through or

under" could be referred to an arbitration, but would not have the right to seek relief under Section 9 of the Arbitration Act. This is merely an illustrative example to indicate a potentially anomalous result.

32. In the case of ***Ameet Lalchand Shah* v. *Rishabh Enterprises***, (2018) 15 SCC 678, this Court had to deal with a case wherein four parties had executed four agreements for the single purpose of commissioning a Photovoltaic Solar Plant in Uttar Pradesh. A Division Bench of this Court treated the contracts as interconnected. Although the parties were different, yet the agreements were effectuated in light of a single commercial project. Thereafter, the Court applied the amended Section 8(1) of the Arbitration Act and extended the arbitration to non-signatory and opined that the dispute could be resolved only by referring all four agreements and parties thereon to arbitration. The Court observed therein:

> "**25.** Parties to the agreements, namely, Rishabh and Juwi India: (*i*) Equipment and Material Supply Agreement; and (*ii*) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the

main agreement, namely, Equipment Lease Agreement (14-3-2012). All the four agreements are inter-connected. **This is a case where several parties are involved in a single commercial project** (Solar Plant at Dongri) **executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement** (14-3-2012).

26. Since all the three agreements of Rishabh with Juwi India and Astonfield had the purpose of commissioning the Photovoltaic Solar Plant project at Dongri, Raksa, District Jhansi, Uttar Pradesh, the High Court was not right in saying that the Sale and Purchase Agreement (5-3-2012) is the main agreement. The High Court, in our view, erred in not keeping in view the various clauses in all the three agreements which make them as an integral part of the principal agreement, namely, Equipment Lease Agreement (14-3-2012) and the impugned order of the High Court cannot be sustained."

(emphasis supplied)

33. The interpretation of ***Chloro Control*** (*supra*) was further expanded in the three Judge Bench decision of this Court in ***Cheran Properties Ltd. v. Kasturi & Sons Ltd.,*** (2018) 16 SCC 413. In that case, this Court interpreted Section 35 of the Arbitration Act to enforce an Award against a non-signatory, even though it did not participate in the proceedings.

34. This court in the case, ***Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd.***, (2019) 7 SCC 62**,** wherein the two-Judge Bench of this Court refused to apply the "group of companies" doctrine as the applicant failed to prove the commonality of intention of the Respondents to be bound by the arbitration agreement:

> **"4.** Keeping in mind the exposition in *Chloro Controls*... **In other words, whether the indisputable circumstances go to show that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties, namely, Respondent 1 and Respondent 2, respectively, qua the existence of an arbitration agreement between the applicant and the said respondents.**
> ...
> ...
>
> **12.**Thus, **Respondent 2 was neither the signatory to the arbitration agreement nor did have any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever.** If the main plank of the applicant, that Mr Frederik Reynders was acting for and on behalf of Respondent 2 and had the authority of Respondent 2, collapses, then it must necessarily follow that Respondent 2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof,

> even if Respondent 2 happens to be a constituent of the group of companies of which Respondent 1 is also a constituent, that will be of no avail. **For, the burden is on the applicant to establish that Respondent 2 had an intention to consent to the arbitration agreement and be party thereto, maybe for the limited purpose of enforcing the indemnity Clause 9 in the agreement, which refers to Respondent 1 and the supplier group against any claim of loss, damages and expenses, howsoever incurred or suffered by the applicant and arising out of or in connection with matters specified therein.** That burden has not been discharged by the applicant at all. On this finding, it must necessarily follow that Respondent 2 cannot be subjected to the proposed arbitration proceedings. Considering the averments in the application under consideration, it is not necessary for us to enquire into the fact as to which other constituent of the group of companies, of which the respondents form a part, had participated in the negotiation process."
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> **(*emphasis supplied*)**

35. In the Division Bench decision of this Court in ***Mahanagar Telephone Nigam Ltd. v. Canara Bank,*** (2020) 12 SCC 767, it was observed that the group of companies doctrine can be utilized to bind a third party to an arbitration, if a tight corporate group structure constituting a single economic reality existed. The Court held as under:

> "**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.
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> **10.7. <u>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</u>**. [ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.]"
>
> (*emphasis* supplied)

We may notice that these cases have been decided by this Court, without referring to the ambit of the phrase 'claiming through or under' as occurring under Section 8 of the Arbitration Act.

36. The *ratio* of the ***Chloro Control*** (*supra*) case alludes to the subjective intention of parties to be bound by arbitration agreement when the parties have clearly not been signatory to the agreement. Reconciling the two is difficult and requires exposition by this Court.

37. It may be noted that the doctrine, as expounded, requires the joining of non-signatories as 'parties in their own right'. This joinder is not premised on non-signatories 'claiming through or under'. Such a joinder has the effect of obliterating the commercial reality, and the benefits of keeping subsidiary companies distinct. Concepts like single economic entity are economic concepts difficult to be enforced as principles of law.

38. The areas which were left open by this Court in ***Chloro Control*** (*supra*) case has created certain broad-based understanding of this doctrine which may not be suitable and would clearly go against distinct legal identities of companies and party autonomy itself. The aforesaid exposition in the above case clearly indicates an understanding of the doctrine which cannot be sustainable in a jurisdiction which respects party autonomy. There is a clear need for having a re-look at

the doctrinal ingredients concerning the group of companies doctrine.

39. Internationally, the group of companies doctrine has been accepted in varying degrees. Swiss Courts usually do not recognize such a doctrine under their Switzerland *de lege lata*.[2] One English Court has observed as under:

> "Mr. Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. **But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged."**[3]
>
> *(emphasis supplied)*

40. Similarly, in the case of ***Peterson Farms Inc. v. C & M Farming Ltd.***,[4] an arbitral award was challenged wherein the claimant received damages on its behalf as well as on behalf of its group entities before the Queen's Bench Division (Commercial Court). The Court partly set aside the award and stated that the group of companies doctrine does not form a part of English law. It further stated that a corporate structure

2 Award in Geneva Chamber of Commerce Case of 24 March 2000, 21 ASA Bull. 781 (2003).
3 Bank of Tokyo v. Karoon, [1987] AC 45
4 [2004] EWHC 121 (Comm)

exists to create separate legal entities, and a general agency relationship would defeat this purpose. The Court held therein:

> "**65**. In commercial terms the creation of a corporate structure is by definition designed to create separate legal entities for entirely legitimate purposes which would often if not usually be defeated by any general agency relationship between them…"

41. The High Court of Australia, in the case of ***Tanning Research Laboratories Inc v. O'Brien, (1990) 169 CLR 332*** interpreted the phrase "*claiming through and under*" in the following manner:

> "…A person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, **the prepositions 'through' and '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 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…**"
>
> ***(emphasis supplied)***

In the aforesaid case, a company and its creditor had entered a contract having an arbitration clause. Subsequently, litigation ensued, and a question arose as to whether the liquidator of the company could rely on the arbitration clause. The Court held that a liquidator may be a person who can claim through or under the company because the grounds of defence and the causes of action he depends on are vested in the company or are exercisable by the company. This meant that an essential element of a cause of action or defence must be, or have been, vested or exercisable by the original party before the person claiming through or under the said party can rely on the same.

42. Viewed from a different angle, this Court in the case of ***Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1** noted that ambit of judicial interference under Section 8 and Section 11 of the Arbitration Act is similar. The relevant observations of this Court in the aforesaid case in relation to the power under Section 8 and Section 11 is as follows:

> **239.** Moreover, the amendment to Section 8 now rectifies the shortcomings pointed out in *Chloro Controls case* [*Chloro Controls (India) (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689]

with respect to domestic arbitration. **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.**

240. Courts, while analysing a case under Section 8, may choose to identify the issues which require adjudication pertaining to the validity of the arbitration agreement. If the court cannot rule on the invalidity of the arbitration agreement on a prima facie basis, then the court should stop any further analysis and simply refer all the issues to arbitration to be settled.

...

242. We are cognizant of the fact that the statutory language of Sections 8 and 11 are different, however materially they do not vary and both sections provide for limited judicial interference at reference stage, as enunciated above.

...

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

...

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to

appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding."

(emphasis supplied)

43. In the aforesaid case of ***Vidya Drolia*** *(supra)***,** this Court primarily delineated the threshold standard of reference to arbitration. The aforesaid case predominantly laid down that when an application is made under Section 11 of the Arbitration Act, considering the scope of judicial intervention, the Courts are only required to look into the *prima existence* of an arbitration agreement.

44. The aforesaid case pre-dominantly dealt with the scope of judicial interference at the referral stage. However, this Court did not have an occasion to explore the jurisprudential basis of group of companies doctrine and required ingredients to refer a "non-signatory" to arbitration. Especially, the scope of judicial reference at the stage of Sections 8 and 11 of the Arbitration Act, needs to be relooked considering the ambit of unamended Section 2(1)(h) of the Arbitration Act.

45. An arbitration agreement may be binding on parties, whether signatories or non-signatories, provided there is sufficient legal basis to bind them. Most legal bases for binding non-signatories to an arbitration agreement are of contractual origin, like agency, etc. Jurisprudence has shown that arbitration being a creature of contract, does not sit very well in binding non-signatories. Expounding on the same, Professor William Park, in one of his key works, captures the dilemma while attaching a non-signatory to the arbitral process[5] as under:

> "For arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons. Pushed to the limit of their logic, each goal points in an opposite direction. Resolving the tension usually implicates the two doctrines discussed below: implied consent and disregard of corporate personality…
>
> **The term "non-signatory" remains useful for what might be called "less-than-obvious" parties to an arbitration clause: individuals and entities that never put pen to paper,**

5 William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, *in* Multiple Parties in International Arbitration (Oxford University Press) (2009).

> **but still should be part of the arbitration under the circumstances of the relevant business relationship**. The label does little harm if invoked merely for ease of expression, to designate someone whose right or obligation to arbitrate may be real but not self-evident...
>
> **Most significantly, the fact that a "non-signatory" might be bound to arbitrate does not dispense with the need for an arbitration agreement. Rather, it means only that the agreement takes its binding force through some circumstance other than the formality of signature**."
>
> ***(emphasis supplied)***

46. It is evident from the discussion above that the group of companies doctrine must be applied with caution and mere fact that a non-signatory is a member of a group of affiliated companies will not be sufficient to claim extension of the arbitration agreement to the non-signatory. In this context Gary Born[6] notes as under:

> **"GROUP OF COMPANIES" DOCTRINE**
>
> Another significant, but controversial, basis for binding non-signatories to an arbitration agreement is the "group of companies" doctrine. Under this principle, non-signatories of a contract may be deemed parties to the associates arbitration clause based on factors which are often roughly comparable to those relevant to an alter ego analysis. In particular, where a company is a part of a corporate group, is subject to the control of (or controls) a corporation affiliate that has executed a

6 Gary B.Born's, *International Commercial Arbitration, 3rd Edition, Volume I, Page 1558 - 1559*

> contract and is involved in the negotiation or performance of that contract, then that company may in some circumstances invoke or be subject to an arbitration clause contained in that contract, notwithstanding the fact that it has not executed the contract itself.
>
> Unlike other bases for binding a non-signatory to an arbitration agreement (such as agency, alter ego, estoppel, third party beneficiary, or assignment), the group of companies doctrine was developed specifically in the arbitration context and is not typically invoked outside that context. At least thus far, the group of companies doctrine has also been explicitly accepted sin only a limited number of jurisdictions (in particular, as discussed below, France). In part for that reason, the doctrine has given rise to substantial controversy.

Gary B Born also refers (in footnotes 222 and 223) to the fact that only a small number of jurisdictions France and India, appear to have applied the group of companies doctrine in the context of International Arbitration and to the prevalent criticism of the group of companies doctrine.

47. In view of the aforesaid discussion, we feel it appropriate to refer the aspect of interpretation of 'claiming through or under' as occurring in amended Section 8 of the Arbitration Act qua the doctrine of group of companies to a larger Bench to provide clarity on this aspect. The law laid down in ***Chloro Control***

(supra) and the cases following it, appear to have been based, more on economics and convenience rather than law. This may not be a correct approach. The Bench doubts the correctness of the law laid down in ***Chloro Control*** *(supra)* and cases following it.

48. On a different note, we are cognizant that reference to a larger Bench should not be made in a casual and cavalier manner. However, we see that the questions raised herein are fundamental to the arbitration practice in India and have large scale repercussions.

49. It is in this context that we deem it appropriate to refer the matter to a larger Bench as the threshold laid down by ***Shah Faesal v. Union of India,*** (2020) 4 SCC 1 stands adequately satisfied.

50. In view of the aforesaid discussion, we deem it appropriate to refer this matter to a larger Bench to expound on the intricacies of the Group of Companies doctrine and answer the following questions:

a. Whether phrase 'claiming through or under' in Sections 8 and 11 could be interpreted to include 'Group of Companies' doctrine?

b. Whether the 'Group of companies' doctrine as expounded by ***Chloro Control Case*** *(supra)* and subsequent judgments are valid in law?

.....CJI.
(N. V. RAMANA)

.....J.
(A.S. BOPANNA)

NEW DELHI;
MAY 06, 2022.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 38 of 2020

Cox and Kings Ltd. ..... Appellant

VERSUS

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

JUDGEMENT

Surya Kant, J:

1. I have had the advantage of going through a scholarly and self-speaking order prepared by Hon'ble the Chief Justice, doubting the correctness of a three judge bench judgment of this Court in ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.& Anr***[1] and formulating the questions of law to be determined by a larger bench. While at the outset, I concur that the contours of the Group of Companies Doctrine need to be settled by a larger bench, my thoughts are oriented in favour of the Doctrine as an integral part of Indian arbitral jurisprudence for the reasons assigned below.

2. The question which has fallen for consideration in this case is whether the parent company of Respondent No. 1, namely Respondent

[1] 2013 1 SCC 641.

No. 2, should be joined to this arbitration petition regardless of the fact that the Petitioner had entered into an SAT-Software End User License Agreement and SAP-Enterprise Support Schedule with only the subsidiary. Petitioner sought greenfield solutions for its E-Commerce problems, for which Respondent No. 1 provided its Hybris solution system. Overtime, disputes arose between the parties. During this phase, the Petitioner had requested Respondent No. 2 to mediate between the parties. However, the disputes could not be resolved. Consequently, the Petitioner initiated arbitration proceedings and has sought to bind Respondent No. 2 to the proceedings even though the said Respondent is not a signatory to the arbitration agreement.

3. On the issue of whether Respondent No. 2 may be roped into the arbitration pending between the Petitioner and Respondent No. 1, Hon'ble the Chief Justice has noted that the basis under Indian law for joining non-signatories to arbitral proceedings has been the Group of Companies Doctrine. While discussing the holdings in ***Chloro Controls*** and ***Cheran Properties Ltd. v. Kasturi and Sons Ltd. & Ors***[2], Hon'ble the Chief Justice felt it necessary to revisit certain aspects of these decisions and determine whether the manner in which they have invoked the Group of Companies Doctrine within Indian jurisprudence is consistent and sound.

[2] 2018 16 SCC 413.

4. Hon'ble the Chief Justice has very eruditely analysed the sustainability of the Group of Companies Doctrine and *inter alia* pointed out that-

i) The application of the Group of Companies Doctrine in ***Chloro Controls*** relies upon the intent of the parties to include a non-signatory to the arbitral proceedings. However, the Court in that decision failed to adhere to contractual principles on the basis of which such intent is interpreted;

ii) Joinder of non-signatories based on the notion of "single economic unit" ignores commercial reality and the importance of treating different parties within the same group of companies as separate legal entities;

iii) Following ***Chloro Controls*** there has been an expansion of the Group of Companies Doctrine. A broad interpretation of the Doctrine is at odds with the principle of party autonomy;

iv) The line of judgments by this Court, beginning with ***Chloro Controls***, seem to be premised more on convenience and economic efficiency in resolution of disputes rather than a consistent and clear legal doctrine which respects party autonomy and intent;

v) The phrase "**claiming through or under**" as provided in Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter, "the Act"), as amended via the Arbitration Amendment Act, 2016, may not be a legitimate basis for reading the Group of Companies Doctrine into Indian law.

A. <u>Origin of the Group of Companies Doctrine</u>

5. The Group of Companies Doctrine has generally been invoked by courts and tribunals in arbitrations to either 'extend' the arbitration agreement or 'bind' a non-signatory affiliate of the contracting party to the arbitration clause. As the name suggests, where an arbitration agreement is entered into by one of the companies in a group, the other members of the group may be bound by the arbitration agreement if the facts and circumstances, including the conduct of the parties, indicate that the true intention of parties was to bind the signatories as well as the non-signatories.

6. The Group of Companies Doctrine was first espoused explicitly by an arbitral tribunal in the case of ***Dow Chemicals v. Isover Saint Gobain***[3]. The International Chamber of Commerce (hereinafter "ICC") Tribunal opined that the scope and effect of the arbitration agreement should be determined on the basis of the ***"common intent of the parties***" as ascertainable from the circumstances related to 'conclusion, performance, and termination, of the contract'. The Tribunal therein determined that the Dow Chemical Group had not attached any significance to which of them performed the distribution agreements with Saint Gobain and the common intent of all the parties was that they would be playing a role in performance of the contract. The Tribunal further held that the companies within the Dow Chemical group had acted as a single 'economic reality' or unit and

[3] Rev Arb 137 1984; 110 JDI 899 (1983).

that the non-signatories to the distribution agreements with Saint Gobain would be bound to the arbitration agreement, regardless of whether they had performed the contract.

7. The Tribunal in ***Dow Chemicals*** laid down the elements required to attract the Group of Companies Doctrines, which read as follows:

> *"...irrespective of the distinct juridical identity of each of its members,* ***a group of companies constitutes one and the same economic reality of which the Arbitral tribunal should take account when it rules on its own jurisdiction...***"
>
> *xxx*
>
> *Considering that the tribunal shall, accordingly, determine the scope and effects of the arbitration clauses in question, and thereby reach its decision regarding jurisdiction, 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 performance and later the termination of the contracts in which they appear.....*
>
> *xxx*
>
> ***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.***"
>
> (Emphasis Supplied)

B. Group of Companies Doctrine in Foreign Jurisdictions

8. It is important to recount the evolution of the Group of Companies Doctrine in France and other jurisdictions in order to understand some visible anomalies that have emerged in the Indian context.

9. The practice by Courts and tribunals in terms of usage of the Group of Companies Doctrine has gravitated toward being a fact intensive exercise. In this context, what has emerged even in France where the Doctrine originated is that the existence of a group of companies is not the sole sufficient condition for the joinder of a non-signatory to arbitration proceedings. The Tribunal in ***ICC Case Nos. 7604 & 7610***[4] had summed up the steps in the application of the doctrine and held:

> ***"...Although the existence of a group is the first condition for joining a third party to the arbitration proceedings, it is also necessary to determine the parties' actual intention at the time of the facts or, at the very least the intention of the non-signatory third party."***

10. The Final Award in ***ICC Case No. 10758***[5] elaborated as follows,

> ***"The extension of an arbitration agreement to a non-signatory is not a mere question of corporate structure or control, but rather one of the non-signatory's participation in the negotiations, conclusion or***

[4] ICC award in Cases No. 7604 and 7610 of 1995, 125 J Droit Int'l 1027 (1998) and 4 ICC Awards 510.
[5] ICC award in Case No. 10758 of 2000, 6 ICC Ct Bull 87 (No. 2, 2005), 5 ICC Awards 537, JDI 2001, 1171.

performance of the contract, or its conduct towards the other party that the Arbitral Tribunal can infer."

11. Bernard Hanotiau, arguably France's leading scholar on international arbitration, while referring to French jurisprudence since ***Dow Chemicals***, has opined that,

> ***"The existence of a group of companies gives a special dimension to the issue of conduct or consent. As several authors have pointed out, when there is a group of companies, one may presume that the parent company binds its subsidiaries; but on the other hand, only the companies that have been substantially involved in the negotiation and performance of the agreement containing the arbitration clause will be considered parties to the latter.*** *The case law is not always entirely clear in this respect. In most cases, it seems that only a substantial involvement is considered sufficient to constitute consent or ratification. Some cases, however, suggest that a party's conduct should not necessarily be regarded as an expression of a party's implied consent; rather a party's substantial involvement in the negotiation and performance of the contract and the knowledge of the existence of the arbitration clause have a standing of their own, as a substitute for consent"*[6]
>
> (Emphasis Supplied)

[6] Bernard Hanotiau, 'Who Are the Parties to the Contract(s) or to the Arbitration Clause(s) Contained Therein? The Theories Applied by Courts and Arbitral Tribunals' in Bernard Hanotiau (eds), *Complex Arbitrations: Multi-party, Multicontract, Multi-issue – A comparative Study* (Kluwer Law International 2020).

12. Thus, the relevance of the Group of Companies Doctrine in its jurisdiction of origin is that of being a special lens through which the parties' intentions are interpreted. The existence of a close group structure would be only one of the considerations when determining the implied consent of a third party to arbitrate.

13. Subsequent French court decisions have taken a similar stance. In ***Lakovoglou Prodomos and Co. v. SAS Amplitude***[7], the Cour de Cassation reiterated the requirement of involvement of the third party in the performance of the main agreement in order it to be bound by the arbitration agreement contained therein. Simply the existence of a closely knit group of companies would be insufficient. In ***Societe Alcatel Business Systems v. Societe Akmor Technology***[8] as well, the Cour de Cassation noted that arbitral proceedings may bind non-signatories involved in the substantive dispute itself.

14. In yet another ICC Award[9], the Tribunal held,"*...**There 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***."

15. The reception to the Group of Companies Doctrine in other jurisdictions has been mixed. The Swiss Federal Tribunal rejected the Group of Companies Doctrine[10] but has accepted that a third party

[7] Cour de Cas, 1st Civ Ch, 27 Mar 2007, no 04-20842, JCP E 2007, 2018.
[8] Cour de Cas, 1st Civ Ch, 7 Nov. 2012, No. 11-25.891, JCP 2012, I, 1354 No 5.
[9] ICC Case No 11405, Interim award of 29 Nov 2001, Unpublished (Sole Arbitrator, Paris).
[10] Judgment of 29 January 1996, 14 ASA Bull 496 (Swiss Fed Trib) (1996); Jean Francois Poudret, 'The

may 'implicitly' consent to be bound to arbitration in certain circumstances. In general, the involvement of the non-signatory in the performance of the contract will be interpreted as intent to be bound to the arbitration agreement.[11] However, this requires an active involvement which shows clear and unambiguous intent, thus setting a high threshold for a third party to be joined.[12]

16. The Swiss sentiment *vis-à-vis* the Group of Companies Doctrine is mirrored by British jurisprudence where there has been an unequivocal rejection of the Doctrine.[13] Further, the expression "claiming under or through" in Sec. 82(2) of the English Arbitration Act, 1996, which is similar to Sec. 8 of the amended Indian Act, 1996, has been interpreted to refer to instances that are unrelated to the Group of Companies Doctrine. British Courts have deemed it to mean *inter alia* assignees[14], subrogated insurer[15], novatees[16], and successors[17].

17. American Courts usually do not refer to the Group of Companies Doctrine and rely primarily on aspects of American Contract Law and Agency Law.[18] Company law principles such as alter ego and piercing the veil are additionally invoked by American Courts though the

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Extension of the Arbitration Clause: French and Swiss Approaches' 122 JDI (Clunet) 893 (1995).

[11] Judgment of 19 August 2008, DFT 4A_128/2008 (Swiss Fed Trib) (2008).

[12] Gabrielle Kaufmann-Kohler & A Rigozzi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015).

[13] *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121.

[14] *Through Transport Mutual Insurance Association (Euasia) Ltd v New India Assurance Co. Ltd* [2005] EWHC 455 Moore-Bick J.

[15] *Starlight Shipping Co. and Anor v Tai Ping Insurance Co Ltd, Hubei Branch and Anor*, [2007] EWHC 1893.

[16] *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd (The Smaro)* [1998] EWHC 1206.

[17] Hanotiau (n 6).

[18] Gary Born, 'Parties to International Arbitration Agreements, International Commercial Arbitration' in Gary Born (eds) *International Commercial Arbitration* (Kluwer Law International 2021).

threshold for their application remains relatively high.[19] American Courts have sometimes reached conclusions through reasoning that resembles the Group of Companies Doctrine but which are actually based on the principle of equitable estoppel.[20]

18. The common theme among all these jurisdictions is that each of them has negotiated a compromise with the formalistic requirement of explicit assent through a signed contract. In other words, these jurisdictions have moved away from this need for explicit consent in each and every instance and have instead attempted to identify constructive consent via examination of the actions of the parties when the circumstances of the case require it. In some instances, these jurisdictions have even applied standards that are not based upon consent at all such as equitable estoppel and piercing the veil.

C. Evolution of the Group of Companies Doctrine in India

19. Indian arbitral jurisprudence with respect to binding a non-signatory to an arbitration agreement has seen considerable transformation. In ***Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr***[21] certain disputes had arisen between multiple parties relating to the same transaction, however, not all parties were signatories to the agreement containing the arbitration clause. The Court therein, relying upon the unamended Section 8 of the Act, held that it would

[19] Hicks v. Bank of Am, NA, 218 F App'x 739, 746 (2007); Bridas SAPIC v. Turkmenistan, 447 F 3d 411, 416-20 (2006).
[20] Astra Oil Co v Rover Navigation, Ltd, 344 F 3d 276, 277 (2003); Choctaw Generation LP v. Am Home Assur Co, 271 F 3d 403, 406-07 (2001).
[21] 2003 5 SCC 531.

not be possible to refer the non-signatories to arbitration. Thereafter, in ***Indowind Energy Ltd. v. Wescare (I) Ltd.& Anr***[22] this Court interfered with an order of the Madras High Court which had allowed the application under Section 11 of the Act and joined Indowind to proceedings even though Indowind was not a signatory to the agreement. This Court, while allowing the appeal, held:

> "***18.*** *The very fact that the parties carefully avoided making Indowind a party and the fact that the Director of Subuthi though a Director of Indowind, was careful not to sign the agreement as on behalf of Indowind, shows that the parties did not intend that Indowind should be a party to the agreement. Therefore the mere fact that Subuthi described Indowind as its nominee or as a company promoted by it or that the agreement was purportedly entered by Subuthi on behalf of Indowind, will not make Indowind a party in the absence of a ratification, approval, adoption or confirmation of the agreement dated 24-2-2006 by Indowind.*"

20. With utmost respect, it appears that the Court in ***Indowind*** adopted a rigid and restrictive understanding of the Act. In order to hold that a third party cannot be subjected to the arbitration proceedings, the two judge bench placed an undue emphasis on the issue of formal consent. However, as noticed earlier, several jurisdictions have recognized that formal consent to an arbitration agreement is not a *sine qua non* to adduce the intention of a third party to be bound to an arbitration agreement. In fact, certain

[22] 2010 5 SCC 306.

principles by which Courts across jurisdictions join non-signatories to arbitration do not depend upon intent of the parties at all.

21. The principle laid down in ***Indowind*** was then followed in ***S.N. Prasad v. Monnet Finance & Ors***[23] as well. Eventually, this position of law regarding the joinder of non-signatories was radically transformed after the decision of this Court in ***Chloro Controls***, whereby, the Group of Companies Doctrine was introduced into Indian jurisprudence. In that case, there was a Shareholders Agreement between an Indian party and a foreign entity. The Shareholders Agreement was the principal or the 'parent' agreement with English law governing the transaction and the seat of arbitration as London. Beyond the Shareholders Agreement, there were various other inter-linked agreements but not all these agreements had the same parties. These other agreements, however, were part of a 'composite transaction' and all arose out of the mother agreement. The question before the Court was whether all these parties could be referred to a single and composite arbitral tribunal. Noting earlier precedents, this Court stated that while ***Sukanya Holdings*** was decided under the ambit of Section 8 of the Act, this case fell within the purview of Section 45 of the Act which had a much wider scope. Relying upon the expression "***person claiming through or under***" in Section 45, this Court ruled that it had the power to refer parties in a multi-party

[23] 2011 1 SCC 320.

agreement to Arbitration while invoking the Group of Companies Doctrine. It was further elucidated:

> "***69. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the court shall refer them to arbitration. The use of the word "shall" would have to be given its proper meaning and cannot be equated with the word "may", as liberally understood in its common parlance. The expression "shall" in the language of Section 45 is intended to require the court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the prerequisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations***.
>
> xxx
>
> ***72....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 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 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)

22. To give legislative effect to the decision in ***Chloro Controls***, the Law Commission in its 246th Report made the following recommendation:

"64. This interpretation given by the Hon'ble Supreme Court follows from the wording of section 45 of the Act which recognizes the right of a "person claiming through or under [a party]" to apply to a judicial authority to refer the parties to arbitration. The same language is also to be found in section 54 of the Act. This language

is however, absent in the corresponding provision of section 8 of the Act. It is similarly absent in the other relevant provisions, where the context would demand that a party includes also a "person claiming through or under such party". To cure this anomaly, the Commission proposes an amendment to the definition of "party" under section 2 (h) of the Act."[24]

23. The Legislature in its wisdom did not amend the definition of Section 2(1)(h) of the Act but Section 8 of the Act was amended through Act 3 of 2016, which now reads as follows:

"(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."

(Emphasis Supplied)

24. Following the post amendment provision(s), the Group of Companies Doctrine in the Indian Context was further expanded by a three judge bench of this Court in ***Cheran Properties Ltd.*** This Court invoked the Group of Companies Doctrine and laid down that even though Cheran was not a party to the arbitration agreement and had not appeared before the Tribunal, the arbitral award could be enforced against it as Cheran was a 'party claiming under' one of the signatories to the agreement. Speaking on the importance of this doctrine in modern commercial transactions, the Court held that, "***The***

[24] Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996 ¶ 64.

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."

25. In ***Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd & Anr***[25], while acknowledging the Group of Companies Doctrine, this Court refused to allow the joinder of a non-signatory as it could not be proved that the non-signatory company had negotiated the contract on behalf of the signatory.

26. A two judge bench of this Court in ***Mahanagar Telephone Nigam Limited v. Canara Bank & Ors***[26], was concerned with the joinder of CANFINA, which was a non-signatory to the agreement but a wholly owned subsidiary of Canara Bank. Upon considering the nature of transaction involved and the conduct of the parties, the Court held that this was a case of "***tacit or implied consent***" and accordingly it was necessary to join CANFINA to the arbitral proceedings. The Court stated the principles governing the group of companies doctrine to be as follows:

> "*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*

[25] 2019 7 SCC 62.
[26] 2020 12 SC 767.

agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group. [ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.]"

27. A three judge bench of this Court (in which I was a member), has in a very recent decision dated 27.04.2022 in ***Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd. & Anr***[27], reiterated the deep rooted existence of the Doctrine in the Indian context. The Court held that the following factors may be considered when deciding whether a non-signatory company within a group of companies would be bound by the arbitration agreement:

> ***"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."***
>
> (Emphasis Supplied)

D. <u>Current State of the Group of Companies Doctrine</u>

28. At the outset, it must be candidly acknowledged that certain inconsistencies do exist in terms of the judgments of this Court regarding the underlying basis for the Group of Companies Doctrine. For instance, in ***Chloro Controls***, the Court seemed to adopt

[27] Civil Appeal No 2042 of 2022.

contradictory positions in terms of when a third party may be bound to the arbitration agreement. On the one hand, the Court emphasized on the intention of the parties to include the non-signatory party, but on other, it went on to add that non-signatories may be added to the arbitration proceedings without their consent in "***exceptional cases***". Thus, it seems that while the ***Chloro Controls*** places a premium on the intent of parties, it also advocates taking an equity based approach to discard intent completely if so required in the interest of justice.

29. In ***Mahanagar Telephone Nigam Ltd.*** the Court had applied the Group of Companies Doctrine where a tight structure with deep financial and organization links existed between a signatory and non-signatory to the extent where they constituted a "single economic unit". Such an approach has the tendency to overlook the principle of separate legal entity and seems to dispense almost entirely with the intent and/or consent of parties.

30. It is also worth noting that in ***Cheran Properties***, this Court enforced an award against a party that had not even participated in the arbitral proceedings, by relying on the phrase "***persons claiming under them***" in Section 35 of the Act. This presents the highest expansion of the Group of Companies Doctrine, whereby, a party is bound to the final award itself on the basis of the doctrine without having a chance to present its case or defend itself in the arbitral proceedings. This Court in ***Reckitt Benckiser*** fixed a higher threshold

of evidence for the Group of Companies Doctrine to apply as compared to earlier judgments. Finally, in ***ONGC***, the Court has upheld the necessity for a deeper probe to determine whether the Doctrine is attracted in the facts and circumstances of a given case. This leads to questions regarding which standard of proof must be fulfilled to apply the Doctrine.

31. An overall analysis of the above cited judgments reveals an unwitting, but nonetheless discordant note with implicit contradictions. However, in my humble view, the appropriate response to such uncertainty would be an authoritative determination of the contours of the Doctrine rather than a wholesale uprooting of it from Indian arbitration law altogether.

32. It is important to note that the Doctrine has now travelled a reasonable distance in Indian law. While the opinion of Hon'ble the Chief Justice correctly notes that the term "parties" under Section 2(1)(h) has not been amended despite the changes introduced in Section 8 of the Act, it appears to me that one of the objectives in introducing the amended Section 8 was to accord tacit recognition and acceptance of the Group of Companies Doctrine in India.

33. It may also be noted that the question as to which entities are parties to the arbitration agreement is usually left to judicial discretion, especially when there is a limited statutory guidance.[28] Thus, the perception regarding the questionable sourcing of the Group

[28] Born (n 18).

of Companies Doctrine from the wording of Section 8 of the Act, does not imply that it is barred from Indian arbitration law. Undoubtedly, the Courts have the judicial discretion to invoke and apply the Doctrine in Indian arbitral jurisprudence.

34. The earlier analysis on the interpretation of the Group of Companies doctrine fortifies that when formulated in its most modern sense, it does not affect the separate legal entity principle in company law. Gary Born[29] notes that the Doctrine,

> *"...**is ordinarily a means of identifying the parties' intentions, which does not disturb or affect the legal personality of the entities in question.** Rather, as usually formulated, the group of companies doctrine is akin to principles of agency or implied consent, whereby **the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories.**" Commentators have observed the **same distinctions between the group of companies doctrine and veil-piercing principles."***
>
> (Emphasis Supplied)

35. It therefore appears that the current interpretation of the Doctrine 'does not disturb or affect' the separate corporate form of different entities within a group of companies. Neither does the act of piercing the corporate veil necessarily cause the separate legal entity of the third party to collapse. In this context, corporate law doctrines such as piercing the veil and alter ego are a means by which to identify

[29] Born (n 18).

fraudulent activity by a non-signatory which would then provide the legal justification for application of the Group of Companies Doctrine to bind that non-signatory to the arbitration. This is a departure from the "single economic reality" approach which views the entire group of companies as a singular entity and overrides the separate legal personalities of the different members of the group.

36. Thus, in this approach, the separate legal form of the parent company remains undisturbed and the application of veil piercing or alter ego is merely for identification of duplicitous acts by a third party which would then lead to application of the Group of Companies Doctrine to bind them to arbitration. The function of this is to identify parties which have no actual intent to be part of the arbitration and deliberately use the corporate form as a shield to avoid being subjected to the arbitration proceedings. For such scenarios, a formal intent-based approach to Group of Companies Doctrine may be insufficient to address the dispute.

37. From the analysis above, it appears that joining a third party to arbitration based on the convergence of a group of companies as a "single economic unit" is no longer the norm under the Group of Companies Doctrine. Instead, the standard is premised primarily on implied consent drawn from the acts and conduct of an entity within the group of companies. Where a closely knit group exists, the interpretation of a third party's intent to be bound to the arbitration would be construed from facts and circumstances specific to that

group and the manner in which it functions. This maintains the separate legal personality of the non-signatory and joins it to the arbitration proceedings on the basis of its implied acceptance to be bound.

38. It must be emphasized that the Doctrine is an exception to the general rule of arbitration. However, where the facts of a case indicate that the intention of the parties was to bind the non-signatory, the Courts, after exercising due care and caution, will be justified in invoking the Doctrine to do substantial and complete justice. After the 2016 amendment to the Act, this Court has continued to acknowledge and apply the Doctrine in exceptional cases. When all of these factors are viewed in consonance, it emerges that the Doctrine has found firm footing in Indian jurisprudence.

39. This is not without reason. On a practical front, the Doctrine is a means of grappling with complex multi-party business transactions which necessarily involve more than two parties, even if these additional parties do not finally and formally sign the contract. To that extent, the Doctrine helps to ensure that arbitration as a dispute resolution mechanism is able to adapt to this reality. Failure to do so would make arbitration an ineffective dispute resolution forum as parties which are important for the complete and proper resolution of the dispute will be left out of the adjudication.

40. The Doctrine also ensures that multiplicity of proceedings are avoided. A party may be involved in the negotiation and even

performance of an agreement but still be able to circumvent the arbitral process on the ground that it did not sign the contract. Such a party would then have to be proceeded against in court.

41. There are additional benefits of having the Group of Companies Doctrine in Indian jurisprudence. These arise from the peculiar circumstances and manner in which Indian business entities transact with each other and establish commercial relations. A large chunk of Indian business houses are composed of family run entities or groups. The individuals running these entities often occupy multiple roles in different companies within the group. Thus, the commonality in terms of key managerial personnel and the preponderance of family members occupying these positions moulds the way these companies conduct business. Entering into commercial transactions involves informal understandings based on familiarity with persons who run the overall group of companies even if not the specific entity with which a contract is formally executed.

42. In this scenario it becomes even more relevant to have a doctrine such as the Group of Companies in Indian arbitration law. A third party outside the group of companies may transact with a subsidiary due to its faith in the bona fides and commercial know-how of the parent. The third party in question relies upon the stature or presence of the larger parent company, either due to its reputation or personal familiarity with its promoters, directors or executives.

43. The Doctrine itself may also provide greater stimulus for business with new entities that are starting out. Due to the aforementioned peculiarities in Indian business relations, newer companies have significant difficulty in gaining traction. One of the means by which such companies can then gain a foothold is by being part of a large (often family held) group of companies. These new entities are then able to feed off the goodwill or relations that the larger group has with the rest of the business world. Given that the connection to the larger group is intrinsic to the way in which business is conducted, arbitration law must acknowledge and address this reality.

44. In fact, Tribunals have already recognized the reliance that is often placed by a company upon the conduct of the non-signatory parent company when entering into an agreement with its subsidiary. The Tribunal in ***PetroAlliance Services Company Ltd. v. Yukos Oil***[30] under the aegis of the Arbitration Institute of the Stockholm Chamber of Commerce is a prime example of international arbitration grappling with this issue.

45. Therein, the tribunal noted that Yukos Oil, via its actions, had created an expectation in the mind of PetroAlliance that it was willing and ready to back up/step into the shoes of its subsidiary YNG with which PetroAlliance had entered into a contract. While there were several factors that contributed to the decision of the tribunal to bind

[30] SCC Case No 108/1997, 2000.

Yukos to the arbitral proceedings, the most relevant takeaway for our purposes is the manner in which the tribunal enunciated the "***theory of trust***" that exists under Swedish contract law.

46. The important consideration under this theory, similar to company law principles such as alter ego, is not the actual intent of the party as the non-signatory may be acting duplicitously to represent itself as the driver of the contract while avoiding any liabilities arising from it by not signing the contract. Hence, what the theory examines is what intent the non-signatory has conveyed to a reasonable party in the same position as the contracting entity. The decisive factor is the extent to which the contracting party has placed "trust" in the other party, reasonably, and on the basis of the non-signatory's actions.

47. To clarify, the wholesale adoption of the Swedish theory of trust into Indian law is not being advocated. Rather, the notion of how we may apply the Group of Companies Doctrine in situations where non-signatory parties are acting in a fraudulent or deceitful manner can be addressed by examining the impression that was conveyed to the contracting parties by the third party. This is in addition to the already well-established principles of piercing the veil and alter ego. This may also address the legitimate critique of ***Chloro Controls*** and ***Cheran Properties***, that despite placing an emphasis on legal standards of intent, the Court eventually resorted to principles of

equity and commercial/economic expediency to apply the Group of Companies Doctrine in those cases.

E. <u>Conclusion</u>

48. In view of the above discussion, respectfully, I am of the opinion that the questions that are sought to be referred to a larger bench deserve further elaboration. With all the humility at my command, the following substantial questions of law also arise for authoritative determination by a larger bench in addition and in conjunction with those formulated by Hon'ble the Chief Justice:

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?

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?

..... J.
(SURYA KANT)

NEW DELHI
DATED :06.05.2022