

SUPREME COURT SETS ASIDE TRIBUNAL'S ORDER WHICH FAILS TO CONSIDER GROUP OF COMPANIES DOCTRINE: (ONGC v DISCOVERY ENTERPRISES PVT LTD & ANR)^[1]

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A three-judge Bench of the Supreme Court has set aside an arbitral tribunal's §16 order on the ground that it failed to consider the applicability of the "group of companies" doctrine. This doctrine originates from an International Chamber of Commerce arbitration case, Dow Chemical v Isover-Saint-Gobain^[2] and provides for the binding of non-signatories to an arbitration agreement if there is a clear intention of the parties to bind such non-signatories. The Indian Supreme Court has applied this doctrine in many of its decisions^[3].

Facts

ONGC entered into a contract with Discovery Enterprises, a subsidiary of the Jindal Group. Disputes arose between the parties and ONGC invoked arbitration under the contract against Discovery and Jindal because, according to ONGC, Discovery and Jindal were a single economic entity and thus the corporate veil ought to be lifted to compel Jindal, a non-signatory, to arbitrate. Jindal objected and sought its deletion from the array of parties by filing an application under §16 of the Arbitration and Conciliation Act 1996 on the basis that since it was not a party to the arbitration agreement, the Tribunal lacked jurisdiction in relation to it.

During the §16 proceedings, ONGC filed an application for the discovery and inspection of documents to demonstrate that Discovery was Jindal's alter ego. The Tribunal decided to defer this application until Jindal's §16 application was decided. The Tribunal eventually decided that Jindal was not a signatory to the arbitration agreement and thus was struck off the array of parties. After unsuccessfully appealing this decision to the Bombay High Court under §37 of the Arbitration Act, ONGC appealed to the Supreme Court.

¹ Judgment dated 27 April 2022 passed by Supreme Court in Civil Appeal No. 2042 of 2022

² ICC Case No. 4131

³ Chloro Controls India Private Limited v Severn Trent Water Purifications Inc. and Others (2013)

1 SCC 641; Ameet Lal Chand Shah v Rishabh Enterprises (2018) 15 SCC 678

Decision

1. “Group of companies” doctrine upheld

The Supreme Court upheld the validity of the “*group of companies*” doctrine, and held that a non-signatory may be bound by the arbitration agreement if:

- a) There exists a group of companies; and
- b) The signatory parties have engaged in conduct or made statements indicating an intention to bind a non-signatory to the arbitration agreement.

2. Factors which determine the applicability of the “group of companies” doctrine

The Court said that the factors which must be considered to determine whether a non-signatory can be bound by an arbitration agreement are:

- a) The mutual intent of the parties;
- b) The relationship of a non-signatory to a signatory;
- c) The commonality of the subject matter;
- d) The composite nature of the transaction; and
- e) The performance of the contract.

The Supreme Court held that there was a failure on part of the Tribunal to address the applicability of the “*group of companies*” doctrine in this case. The Court also held that ONGC’s discovery application may have brought on record documents which would demonstrate the economic unity of Jindal and Discovery, and that the Tribunal erred in not deciding this application prior to determining Jindal’s jurisdictional challenge.

The Supreme Court thus set aside the Tribunal’s §16 order and remanded the matter back to the Tribunal to decide Jindal’s jurisdictional challenge afresh.

Conclusion

A coordinate bench of the Supreme Court in *Cox & Kings Ltd v Sap India Pvt Ltd & Anr* [2022 SCC OnLine SC 570] has recently doubted the correctness of the “*group of companies*” doctrine and referred the matter to a larger Bench. The outcome is awaited.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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