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Critical Analysis of the Position of Law on Joinder

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ABSTRACT

*Joinders is the process used in arbitration to add on-signatories to the arbitration agreement and arbitration proceedings. Increasing the scope of the arbitration proceedings should be done only after detailed analysis of the factual position and should be limited to cases where the third party's inclusion is absolutely necessary to deliver justice. The Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") does not lay down a procedure for adding non signatory or third parties to the arbitration. The courts first determined its legal footing in the case of Dow chemical v. Isover Saint Gobain. The reason behind allowing joinders was the group of companies doctrine and the presence of mutual intention to be included in the arbitration. Since then, the evolution of joinders has evolved due to case law and the 2015 amendment to the Arbitration Act.*

Keywords: *Alternate Dispute Resolution, Joinder, Arbitration.*

I. INTRODUCTION

Arbitration agreement is the starting point of an arbitration proceedings. It is a prerequisite for submitting the dispute to arbitration. This is laid down in section 7 *of the Arbitration and Conciliation Act which defines an arbitration agreement as* "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not." This implies that for the parties to refer their dispute to arbitration, they must be parties to the arbitration agreement. There must also be consensus between the parties. Another important aspect is privity to contract. However, there are exceptional cases where third parties can join the arbitration proceedings which are done through the help of joinder agreements.

There are cases where the inclusion of the third party will be beneficial as their inclusion would help decide the matter better. Another circumstance could be the similarity in subject matter so joinders are done to avoid parallel arbitration proceedings. Third circumstance could be the presence of a third-party claim in an arbitration proceeding. These cases are when third parties

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are added to the arbitration.

For a joinder to take place and to defend any objections to the joinder, consent needs to be shown. It can either be explicit or implicit consent. Explicit consent is when parties explicitly state that if disputes happen, they will be party to the arbitration. It is specifically opting into the joinder. Implicit consent is when there is a joinder clause and it has not been opted out by the parties. Also, if the parties agree to follow ICC rules, they are implicitly agreeing to the joinder clause.

The specific theories that allow joinder to take place are - agency, estoppel, third party beneficiary, piercing of the veil, incorporation by reference and group of companies doctrine. The common denominator in all these situations is that there is a link between the third party and the two parties in dispute in such a way that the outcome of the arbitration will impact them too.

II. CASE LAW

The first case that spoke of the group of companies doctrine is *Dow chemical v. Isover Saint Gobain*. In this case, various Dow Chemical Company subsidiaries signed contracts but the parent company was not party to the contracts. When disputes arose, along with its subsidiaries, Dow Chemical Company filed a request for arbitration. Isover objected to this on the grounds that the parent company was not party to the arbitration agreement and thus cannot join the proceedings. Court allowed the parent company to join the arbitration and said that the party getting added to the arbitration should be linked to one of the parties/dispute "*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."* Thus, the role of the third party is very important while considering joinder. The idea behind the rule of group of companies is not that you are diluting the independent economic identity concept. The idea is that there is a common denominator like a common director or high holding/control they have over the subsidiary or how involved for they in the conclusion of the contract or part of negotiation proceeding before signing of arb agreement etc that binds the companies together so they should be included in the arbitration. This shows mutual intention of sorts that if a situation like this arises, they would have to be a part of it.

To understand the evolution of Indian jurisprudence on this, we have to begin by understanding the pre amendment case of Sukanya Holdings Pvt. Ltd. V Jayesh H Pandya and Ors. It held

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that different parties cannot be bifurcated in a single arbitration if the cause of action differs. The arbitration must arise from the same arbitration agreement for joinder to take place. The court referenced to S8 and said "*If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."*

Then in 2013, the position evolved with the help of Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors. In this case, several interconnected agreements were stemming from the Shareholders Agreement. The court said that all these parties can be referred to a single arbitration and it would not clash with Sukanya because Sukanya was a S8 judgment while the present case is S45 judgement. S45 has a much wider interpretation than s8 because under s45, the parties can, at request of parties or any person claiming through or under him", refer this suit to arbitration. The court also applied 'Group of Companies' doctrine and said that when a company which belongs to a group of companies, enters into an arbitration agreement, it can *bind its non- signatory affiliates or sister or parent companies, if the circumstances show that the mutual intent of all the parties was to bind both the signatories and the non-signatory affiliates.*

III. 2015 AMENDMENT

Then in 2015, the Arbitration and Conciliation Act was amended by including to Section 8 the words 'a party to the arbitration agreement or any person claiming through or under him'. After this change, there was confusion on whether Chloro ratio could be applied to S8 domestic cases. There were some judgements that went the Sukanya way and said that even if the parties are interconnected, it is not enough for a joinder when there are multiple contracts.

To clarify matters, *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Ors.* case said that Chloro judgement extends to s8 domestic cases after the amendment to it. Court referred to the language of the Amended Section and the 246th Report of the Law Commission to give this judgement which diluted the applicability of Sukanya in S8 cases.

The next case is *MTNL v. Canara Bank and Ors*. It laid down conditions of when the doctrine of 'group of companies' can be invoked. For joinder, the conditions are *"mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group , non-signatory's engagement in the negotiation or performance or termination of the contract, non-signatory having made statements indicating its intention to be bound by the contract, non-signatory getting benefits from the contract,* direct relation where parties involved in composite

transaction where business objective is shared, the group of companies is a single economic unit. This case was followed by *GMR v. Doosan (2017)* which gave more conditions for the doctrine to be applicable. The first is the existence of co-mingled funds and Family business which cannot be separated, second is the presence of common directors and thirdly, the amount of holding the parent company has over the subsidiary.

IV. INTERNATIONAL PERSPECTIVE

The courts in Canada also recognise the legal validity of joinders. The Quebec Superior Court of Canada in *Quebec Inc. (Team Productions) vs. Bieber* held that a third party can be added to an arbitration proceedings and be bound by the law of agency in exceptional circumstances. Those exceptions are where the circumstances require their addition to the arbitration agreement based on their intentions to arbitrate.

Joinders are not as vastly recognised in the courts of United kingdom. It was held in in *Peterson Farms Inc. vs. C&M Farming Ltd* that the group of companies doctrine does not have legal footing. USA courts follow English jurisprudence as well. *Thomson-csf, S.a., vs. American Arbitration Association* held that the scope of including third parties to arbitration agreements does not include the group of companies doctrine. Singapore also follows the same line of reasoning. The case of *Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pvt. Ltd* held that the group of companies doctrine is not a valid exception for allowing joinders.

Indian and Canadian courts have an opposing view to UK, USA and Singapore's judiciary. Thus, there exists no 'one size fits all' rule when it comes to joinders and the group of companies doctrine which can be utilised universally. In spite of this, there is a need for a holistic and well-rounded doctrine on joinders which balances the essential principles which govern arbitration.

V. CONCLUSION

To conclude, joinders with respect to group of companies doctrine are exceptions to privity of contract which in this case is the arbitration agreement. However, joinders are not allowed in every circumstance and only certain conditions as the above-mentioned cases have explained. Along with the cases, the 2015 amendment has also led to the evolution of jurisprudence on joinders. The judgement of Sukanya has been diluted, S8 has been broadened by Chloro Controls and Ameet Lalchand, and MTNL has given clarity on the necessary elements of joinders.

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