Compelling a non-signatory to an arbitration agreement to arbitrate pursuant to the alter ego doctrine

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The recent judgment of the Madras High Court in the case of *Vatsala Jagannathan v. Tristar Accommodations Ltd, 2023 SCC OnLine Mad 308* **("Vatsala Judgment"),** provides greater clarity on the limited circumstances when a non-signatory can be held to be a party to the arbitration agreement through the application of the alter ego doctrine/ group liability doctrine. In this instance, the Madras High Court refused to appoint an arbitrator in a case where a party sought to compel non signatories to the arbitration agreement to arbitration.

The *Vatsala Judgment* dealt with a case wherein the Petitioners comprising two individuals contracted with a company pursuant to which the company would construct a multistorey building on the Landed Property owned by the Petitioners. The Petitioner alleged that the Company through its then Managing Director - Mr. Naren Rajan had committed malfeasance with respect to the Petitioners Landed Property by mortgaging the same without the consent of the Petitioners. Thereafter the companies Managing Director – Mr. Naren Rajan died. The Petitioners commenced arbitration proceedings under the arbitration agreement contained in the contract between the Petitioners and the Company in which they had sought to array the legal heirs of Mr. Naren Rajan i.e., his mother, his widow, his daughter, and his sister in the arbitration proceedings by invoking the alter ego doctrine.

The Madras High Court in analysing the particular facts of the case made an observation that whilst it can perhaps be argued that the mother of the of the Companies deceased Managing Director can be treated as the alter ego of the Company so as to bind her to the arbitration agreement contained in the contract between the Company and the Petitioners, in the particular facts of the case, the Companies deceased Managing Director, widow, daughter and sister cannot be said to be the alter ego of the Company. In the particular facts of that case the Companies deceased Managing Director, widow, daughter, and sister has a relatively insignificant equity stake in the Company in comparison to that of his mother. Additionally, at all material times the Companies deceased Managing Director's mother was a director of the Company and was privy to all transactions entered into by the Company in comparison to that of his widow, daughter and sister.

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The Madras High Court had arrived the conclusion of law that *"the doctrine of alter ego is resorted to in exceptional cases to depart from the fundamental principle that only a signatory to an arbitration agreement is bound by it. It is further clear that it is a significant and exceptional departure which should not be resorted to unless there is convincing evidence that the non-signatory is the alter ego of the signatory."*

Notwithstanding this observation the Madras High Court did not appoint an arbitrator in the dispute between the Petitioner and the Companies deceased Managing Director Mother as the Court came to a finding that the Petitioners by their conduct had waived and repudiated the arbitration agreement by having instituting a substantial lawsuit on the cause of action arising under the contract containing the arbitration agreement.

Analysis

The *Vatsala Judgment* reiterates arbitration proceedings *"should, as a rule, be only between parties to the arbitration agreement and any deviation therefrom should necessarily be the exception."* Additionally, exception to this general rule on the ground of "alter ego" should be resorted to with considerable circumspection and the corporate veil should only be pierced on the date the material fraudulent event took place.

A 3 Judge Bench of the Supreme Court of India in the case of *Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc, (2013) 1 SCC 641* ***("Chloro-Controls Judgment")*** made a slight departure to intention of the parties to arbitrate by recognizing that a non-signatory can be bound by an arbitration agreement inter alia by piercing the corporate veil/ applying the alter ego doctrine. Thereafter, the Supreme Court of India in the case Purple *Medical Solutions Pvt Ltd. v. MIV Therapeutics Inc, (2015) 15 SCC 622*, appointed an arbitrator in an arbitration seated in India in a dispute between an Indian Company and a Canadian Company. Whilst the CEO of Canadian company was not a signatory to the arbitration agreement with the Indian Company, the Supreme Court of India allowed the Indian company to array the CEO of the Canadian company as a Co-Respondent in the arbitration proceedings on the basis of the Indian company's contention that the CEO of the Canadian company is an alter ego of the Canadian company and observed that the arbitral tribunal seated in India would have jurisdiction to examine the issue of whether or not the corporate veil of the Canadian company can be pierced to make the CEO of the Canadian company personally liable for the liabilities of the Canadian company.

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The Supreme Court of India in the case of *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited, (2019) 7 SCC 62,* refused to apply the alter ego doctrine and refer a non-signatory to an arbitration agreement to arbitration. In this case a contract had been entered into between two Indian companies. The Petitioner an Indian company commenced arbitration against its Indian contractual counterparty and had also sought to array a Belgian company which was part of the group of the Indian company in the arbitration proceedings. Whilst the Supreme Court of India quoted with approval the "group of companies" doctrine as laid down in the *Chloro-Controls Judgment* in the particular facts of the case, the Supreme Court of India held there was insufficient evidence on record to array the Belgian company in the arbitration proceedings.

It should be noted that recently another 3-judge bench of the Supreme Court of India in the case of *Cox and Kings Limited v. SAP India Private Limited, (2022) 8 SCC 1* ***("Cox & Kings Judgment")*** had questioned the correctness of the earlier 3 judge bench in *Chloro-Controls Judgment* and referred the issue to a larger bench. The minority concurring Judge of the *Cox & Kings Judgment* had also stressed on the examination of the issue of "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?"

The Delhi High Court in the case of *Aditya Birla Finance Limited v. Siti Networks Limited, 2023 SCC OnLine Del 1290,* was confronted with the issue of whether it should continue to apply law laid down by the Supreme Court of India in the *Chloro-Controls Judgment* has been subsequently referred to a larger bench by the Supreme Court of India in the *Cox & Kings Judgment* and came to the conclusion that until the *Chloro-Controls Judgment* is overruled by a larger bench of the Supreme Court of India, it continues to remain good law. Accordingly, the Delhi High Court proceeded to appoint an arbitrator under a Term Loan Facility Agreement between a Borrower and Financial institution wherein the Financial Institution had arrayed the Promoter Group Company and the Managing Director of the Promoter Group Company in circumstances, wherein the Promoter Group Company and the Managing Director of the Promoter Group Company were non signatories to the arbitration agreement contained in the Term Loan Facility Agreement between a Borrower and Financial institution.

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