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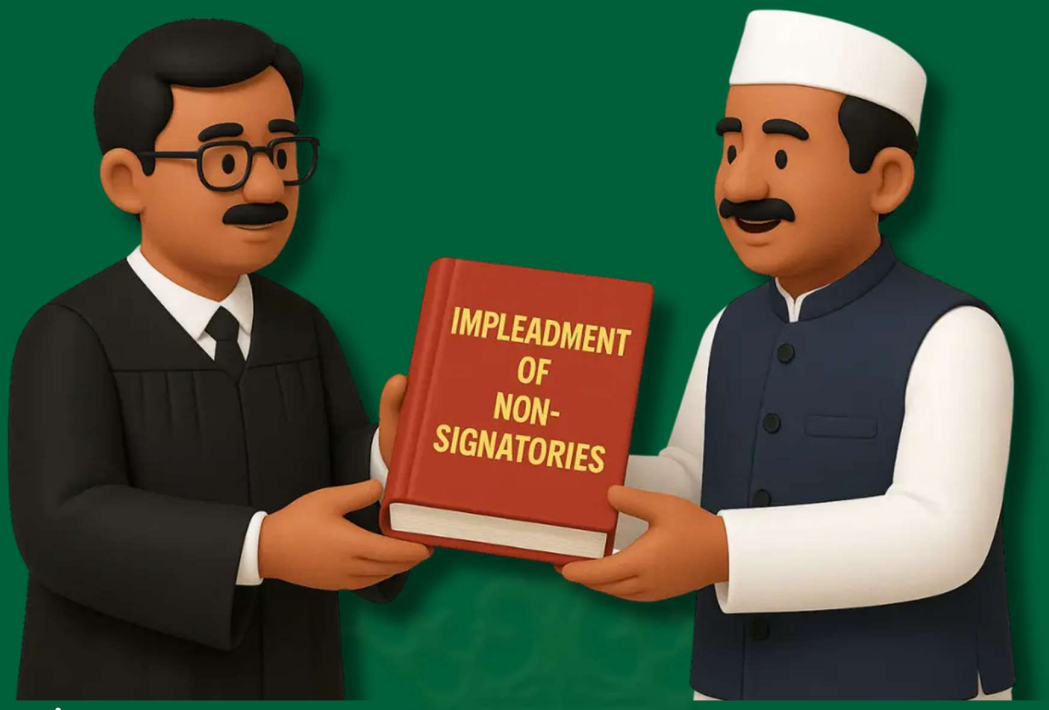
Impleading Non-Signatories in Arbitration: Supreme Court's Pro-Arbitration Shift and the Call for Legislative Reform



Introduction

Imagine a complex tapestry of modern commerce, where numerous entities, though legally distinct, are interwoven in intricate deals. When disputes arise in this web, can arbitration, a creature of contractual consent, pull in those who never formally signed the dotted line? This question, though seemingly straightforward, has vexed Indian courts for years, creating a legal landscape as nuanced as the transactions themselves.

While the Arbitration Act[1], remained conspicuously silent on the issue of joining non-signatory parties, judicial ingenuity stepped in, birthing doctrines like the "Group of Companies" to prevent crafty maneuvering through complex corporate structures. The ability to bind non-signatories became a crucial tool for effective dispute resolution, preventing parties from hiding behind veils of incorporation. Yet, this judge-made law existed in a statutory vacuum, leaving both practitioners and the judiciary in a state of perpetual interpretive flux.

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The Supreme Court of India, in a recent pronouncement in Asf Buildtech Private Limited Versus Shapoorji Pallonji And Company Private Limited[2] on May 2nd, echoed this long-standing concern with palpable urgency. Lamenting the persistent legislative gap, the Court pointed out that despite a plethora of judicial pronouncements and the much-anticipated Arbitration and Conciliation Bill, 2024, the power of arbitral tribunals to implead non-signatories remains conspicuously absent from the statute books. This judicial cry for legislative intervention underscores the pressing need to codify a power that, while often exercised, lacks explicit statutory sanction.

This judicial observation arose from a case involving Shapoorji Pallonji & Co. Pvt. Ltd. (SPCPL) seeking to bring ASF Buildtech Pvt. Ltd. (ABPL), a non-signatory, into ongoing arbitral proceedings. Ultimately, the Supreme Court sided with the Delhi High Court's decision to allow the impleadment. Justice Pardiwala, in a powerful articulation, asserted a pro-arbitration stance: once an arbitral tribunal is duly constituted, it should ordinarily be the sole arbiter of jurisdictional and factual issues, including the status of non-signatories. Judicial intervention, the Court emphasized, should remain confined to the narrow grounds for challenge under Section 34 of the Arbitration Act. This ruling not only resolved the immediate dispute but also served as a forceful nudge to the legislature to finally bestow statutory recognition upon the arbitral tribunal's power to implead.

This divergence in judicial thought highlights a fundamental tension within Indian arbitration law: the delicate balance between the sacrosanct principle of consent underpinning arbitration and the practical imperative of comprehensively resolving disputes involving interconnected entities. It was against this backdrop of unsettled legal principles and the appellant's specific challenge that the Supreme Court embarked on its crucial inquiry.

The appellant, ASF Buildtech Pvt. Ltd. (ABPL), anchored its challenge on the argument that as a non-signatory, it was never formally brought into the arbitral proceedings at the referral stage under Section 11 of the Arbitration Act – the very process that birthed the tribunal. Adding weight to their contention, they highlighted the absence of any arbitration invocation notice directed at them. Their core argument was stark: once the Section 11 referral concludes and the arbitral tribunal assumes its mantle, it lacks any inherent power to unilaterally implead a non-signatory, especially based solely on assertions in the respondent's pleadings. This authority, they argued, remains exclusively vested in the referral court and must be exercised before the arbitral tribunal comes into existence.

Recognizing the profound implications of these conflicting viewpoints, the Supreme Court

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honed in on two pivotal questions:

1. Does an Arbitral Tribunal possess the inherent power to implead or join non-signatories to the Arbitration Agreement?
2. Does the Arbitral Tribunal hold the independent authority and power to implead Non-Signatories to the arbitration agreement on its own accord, without the need for prior judicial intervention?

To truly grasp the significance of the Supreme Court's eventual pronouncements, a detailed exploration of the contrasting judicial opinions that preceded becomes essential.

Before dissecting the appellant's specific arguments, the Supreme Court undertook a crucial survey of the divergent opinions held by various High Courts on this very issue. The question of whether an arbitral tribunal could bring in parties not originally signatories to the arbitration agreement had indeed created a schism within the Indian judicial landscape.

The Bombay High Court, in the case of Oil and Natural Gas Corporation Ltd. v. Jindal Drilling and Industries Ltd[3]., was among the first to directly confront this issue. ONGC sought to hold Jindal liable for the obligations of DEPL, a related but non-signatory entity, arguing for the piercing of the corporate veil. However, the Bombay High Court firmly held that the power to lift the corporate veil resided exclusively with courts, not arbitral tribunals. Consequently, as DEPL was not a party to the arbitration agreement, and the tribunal lacked the power to treat them as one with Jindal, the court upheld the arbitral award that had refused to hold Jindal liable for DEPL's actions within that specific arbitration. This raises a fundamental question: If a tribunal lacks the power to even examine the corporate structure to potentially link a non-signatory, how could it possibly possess the broader authority to formally implead them?

Subsequently, the Madras High Court, in V.G. Santhosam v. Shanthi Gnanasekaran[4], grappled with whether a tribunal could implead the legal heir of a deceased partner in an arbitration concerning the partnership. The arbitral tribunal, invoking the procedural powers under Order I Rule 10 of the Code of Civil Procedure (CPC), had allowed the impleadment. However, the Madras High Court overturned this decision, offering several compelling reasons.

Firstly, the court emphasized the absence of any express provision within the Arbitration and Conciliation Act, 1996, explicitly granting the power of impleadment to an arbitral tribunal. While Section 17 allows for interim measures, the court reasoned that impleadment, fundamentally altering the composition of the arbitration, could not be considered a mere interim measure derived from the arbitration agreement itself. This leads to the question: Is

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the power to add a party to a dispute inherently different from the power to seek temporary relief within an existing dispute?

Secondly, the Madras High Court rejected the argument that **Section 16**, dealing with the tribunal's competence to rule on its own jurisdiction (**Kompetenz-Kompetenz**), could be interpreted to permit the impleadment of third parties. The court clarified that Section 16 pertains to objections regarding the existence or validity of the arbitration agreement itself, not to adjudicating the civil rights of non-parties or expanding the scope of the arbitration to include them. This begs the question: **If the very foundation of the tribunal's authority – the arbitration agreement – binds only the signatories, how can the tribunal unilaterally extend this binding effect to others under the guise of determining its own jurisdiction?**

Thirdly, the Madras High Court underscored that an arbitrator is a **creature of statute**, with its powers and jurisdiction confined to the four corners of the Arbitration Act and the arbitration agreement. It cannot venture beyond these boundaries to usurp the inherent powers vested in national courts, such as those under **Order I Rule 10 of the CPC**. Allowing tribunals to implead parties, the court reasoned, would not only widen the scope of arbitration beyond consenting parties but would also undermine the very essence of the Act – the adjudication of disputes between parties with a defined contractual relationship. This raises a crucial point: **Is arbitration intended to be a private dispute resolution mechanism strictly confined to consenting parties, or can it evolve to encompass those closely connected but not formally signatories?**

Adding to this line of reasoning, the **Delhi High Court**, in **Arupri Logistics Pvt. Ltd. v. Vilas Gupta & Ors[5].**, further solidified the view that arbitral tribunals lack the power to implead non-signatories. The Delhi High Court also addressed the argument that **Section 19** of the Act, which allows the tribunal to determine its own procedure in accordance with the CPC, could be a source of this power. The court emphatically stated that while the tribunal can adopt CPC procedures, this does not automatically confer upon it powers explicitly granted to national courts under the CPC, such as the power of impleadment under **Order I Rule 10**, especially when such a power is absent in the Arbitration Act itself. This prompts us to consider: **Is adopting a procedure equivalent to inheriting all the powers associated with that procedure, even if those powers fundamentally alter the nature and scope of the arbitral process?**

Furthermore, the Delhi High Court reiterated that an arbitral tribunal owes its very existence to the arbitration agreement, serving as a private forum detached from the hierarchy of

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courts. Its powers are derived solely from this agreement and the provisions of the Arbitration Act. The concept of **inherent powers**, the court noted, is typically recognized for national courts whose authority flows from their duty to administer justice. Arbitral tribunals, lacking this inherent judicial authority and deriving their power from the private consent of parties, cannot claim such inherent powers. Consequently, any authority exercised by the tribunal must be explicitly or implicitly conferred by the Act. This leads to a critical inquiry: **Can a private dispute resolution forum, born out of a contract, possess powers that could fundamentally alter the contractual basis upon which it was established?**

Finally, the Delhi High Court also rejected the argument that the power to implead could be sourced from **Sections 16 or 17** of the Act. It reiterated that Section 16's Kompetenz-Kompetenz is limited to jurisdictional objections regarding the arbitration agreement's existence or validity raised by the existing parties. Similarly, Section 17, concerning interim measures, cannot encompass the power to implead, as impleadment is not an interim or interlocutory step but rather a fundamental alteration of the parties involved, binding the new party to the entire arbitral process and the final award. The court also clarified that while doctrines like "**alter ego**" or "**group of companies**" might be used to compel non-signatories to arbitration, this power has been expressly granted by the legislature only to courts under **Sections 8 and 45** of the Act, which deal with referring parties to arbitration at the judicial stage. The deliberate use of the broader phrase "**any person claiming through or under him**" in these sections, as opposed to the narrower definition of "**party**" in Section 2(1)(h), clearly indicates a legislative intent to reserve this power of extending arbitration to non-signatories to the courts.

Thus, the consistent reasoning from the Bombay, Madras, and Delhi High Courts presented a strong argument against the arbitral tribunal possessing the power to implead non-signatories, emphasizing the contractual foundation of arbitration and the limited statutory powers of the tribunal.

However, the legal landscape was not monolithic. The Supreme Court also took note of several High Court decisions that adopted a contrasting view, holding that the arbitral tribunal does possess the power to implead a non-signatory to the arbitration agreement.

In the case of **IVRCL Ltd. v. Gujarat State Petroleum Corporation Ltd.**, the Gujarat High Court, through Justice Akhil Kureshi, observed that it is well-established that non-signatories can be subjected to arbitration. Relying on the Supreme Court's decision in Chloro Controls, the High Court noted that courts have recognized exceptions like alter-ego, apparent authority, agency, or group of companies, which are based on the 'implied consent' of the

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non-signatory. The High Court concluded that while non-signatories can be brought into arbitration under these principles, it is for the arbitral tribunal, not the courts, to determine if a specific case warrants joining a third party based on the facts.

Collectively, these judgments reflected a judicial understanding that ar[6]bitral tribunals are equipped to handle situations where non-signatories are necessarily involved in resolving disputes. This approach acknowledged the complexities of modern commercial transactions, where multiple parties may be intertwined in a contractual web, even if not all are signatories to the central arbitration agreement. This begs the question: **In the face of such divergent opinions, how did the Supreme Court navigate this legal thicket?**

The Supreme Court then delved into the evolution of the law on the referral or joinder of non-signatories to arbitration proceedings and the contrasting aversion to granting this power to arbitral tribunals.

The Court discussed the landmark decision of **Chloro Controls India Private Limited v. Severn Trent Water Purification Inc[7].** and the subsequent **Arbitration and Conciliation (Amendment) Act, 2015**. The Court noted that Chloro Controls significantly expanded the scope for including non-signatories in arbitration, recognizing that in complex transactions, parties beyond the signatories could be bound by the arbitration agreement. This was particularly relevant in cases involving group companies, where the actions and intentions of related entities could demonstrate an implied agreement to arbitrate. The **2015 Amendment** further aimed to streamline the arbitration process and reduce judicial intervention, aligning with a pro-arbitration stance that facilitated the inclusion of non-signatories when justified by the circumstances. This prompts the question: **Did the 2015 Amendment implicitly endorse the inclusion of non-signatories within the arbitral process, even if it didn't explicitly grant the tribunal the power to implead?**

The Court then discussed the decision of **Cox and Kings Ltd. (I) v. SAP India Private Limited**[8] and the judicial rectification of the first misconception arising from Chloro Controls. The Court highlighted that Cox and Kings (I) played a crucial role in clarifying the ambiguities left by Chloro Controls. While Chloro Controls Broadened the ambit for including non-signatories, Cox and Kings (I) provided a clearer framework, affirming that the touchstone for binding a non-signatory to arbitration was the "**intention of the parties**." This intention, the Court emphasized, could be inferred from the surrounding circumstances, the nature of the transactions, and the conduct of the non-signatory, rather than solely relying on the express terms of the arbitration agreement. This raises a critical point: **How does one**

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objectively ascertain the "intention" of a non-signatory to be bound by an agreement they didn't explicitly sign?

The Court further discussed the decision of **Krish Spinning Mills and Another v. Rajesh Kumar Jain**[9] and the judicial rectification of the second misconception emanating from **SBP & Co. v. Patel Engineering Ltd**[10]**.** The Court explained how Krish Spinning addressed and rectified a misconception that originated from SBP & Co. SBP & Co. had led to interpretations requiring extensive judicial scrutiny of the merits at the referral stage, particularly in determining whether non-signatories could be bound. Krish Spinning clarified that referral courts should limit themselves to a prima facie review of the arbitration agreement, leaving the substantive determination of the rights and obligations of non-signatories to the arbitral tribunal. This streamlined the referral process and reduced judicial intervention, reinforcing the tribunal's authority to decide on matters of jurisdiction and the scope of the arbitration agreement. This leads to the question: **By limiting judicial intervention at the referral stage, did the Supreme Court implicitly empower the arbitral tribunal to address the complexities of non-signatory involvement?**

The Court then elaborated on how **Cox and Kings (I)** contemplated the determination of the mutual intention of non-signatories to arbitration agreements. The Court emphasized that this decision provides a framework for ascertaining the mutual intention of all parties involved, including non-signatories, in relation to arbitration agreements. This determination is pivotal in deciding whether a non-signatory can be bound. The decision underscores that this intention can be gleaned not only from the explicit terms but also from the conduct of the parties and the surrounding circumstances. It allows tribunals and courts to examine the non-signatory's involvement in the negotiation, performance, or termination of the contract to infer their implicit consent to be part of the arbitration process. This prompts the query: **What specific types of conduct or involvement can serve as reliable indicators of a non-signatory's intention to be bound by an arbitration agreement?**

The Court further dissected the nature and extent of the test laid down in Cox and Kings (I) for determining which non-signatories are bound by arbitration agreements. The Court outlined that this test involves a fact-intensive inquiry that transcends the literal terms of the contract. It necessitates an examination of the non-signatory's role in the related transactions, their relationship with the signatory parties, and the overall commercial context to ascertain whether they can be considered parties to the arbitration agreement. The application of this test ensures that the determination is based on a comprehensive analysis of the factual matrix, rather than a narrow focus on contractual formalities. This raises the

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practical question: **How can arbitral tribunals effectively conduct such a fact-intensive inquiry to determine the implied consent of non-signatories?**

The Court then clarified the distinction between determining the "**existence**" of an arbitration agreement and ascertaining the "**intention**" of parties, including non-signatories, from the "**express words**" of such an agreement. It emphasized that while the existence of an arbitration agreement is a fundamental prerequisite, the question of who is bound by it – especially concerning non-signatories – involves a deeper inquiry into the parties' intentions, extending beyond the explicit language of the agreement to encompass their conduct and communications.

Finally, the Court discussed the implications of **Cox and Kings Ltd. (II) v. SAP India Private Limited** and **Ajay Madhusudan Kalelkar v. Nandini Enterprises**[11] on the scope of **Section 11** of the Act, 1996, for the joinder of non-signatories to arbitration proceedings. These decisions, the Court noted, indicate a trend towards granting more authority to arbitral tribunals in determining the scope of parties to an arbitration agreement. They suggest that while Section 11 primarily deals with the appointment of arbitrators, the tribunals themselves have the mandate to decide on the inclusion of non-signatories, ensuring that all parties with a genuine interest in the dispute are part of the arbitration process. This leads to the ultimate question: **Did these decisions pave the way for the Supreme Court's eventual affirmation of the arbitral tribunal's power to rule on the impleadment of non-signatories?**

Turning to the specifics of the case at hand, the High Court, in its impugned judgment, had found that ABPL, BCSPL, and AISPL operated under the same management, and the substitution in the contract was merely for convenience. It also noted that all correspondence pertained to the contract with ASF and the ASF Group of Companies, with no differentiation made.

Conclusion:

The Supreme Court's affirmation of the Delhi High Court's decision, while not explicitly granting tribunals the statutory power to implead, strongly signals a judicial inclination towards empowering arbitral tribunals to determine the scope of parties, including non-signatories intricately involved in the underlying transactions. This pro-arbitration stance emphasizes efficiency and reduces judicial intervention post-constitution of the tribunal. However, the continued absence of a clear statutory provision leaves a shadow of uncertainty. A crucial question that might arise in the future is: **Given this judicial endorsement, what specific procedural safeguards must arbitral tribunals adopt to ensure**

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fairness and due process when impleading non-signatories without explicit statutory guidelines, particularly concerning notice requirements and the non-signatory's right to challenge jurisdiction before the tribunal itself?The legislature's response to the Supreme Court's urging will be critical in solidifying the legal framework and providing much-needed clarity on this complex yet increasingly vital aspect of Indian arbitration law, ultimately impacting the efficacy and global competitiveness of India as an arbitration hub.

Citations

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3. Oil and Natural Gas Corporation Ltd. v. Jindal Drilling and Industries Ltd.(2022) 8 SCC 42
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6. IVRCL Ltd. v. Gujarat State Petroleum Corporation Ltd.2015 GUJHC 31651 DB
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