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Legality of the Group of Companies Doctrine in Arbitrations Law in India

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The development of trade and commerce has significantly contributed to the growth and prosperity of the state's economy. In the process of trade and business, it is inevitable to have disputes among the people involved in the business transaction. Traditionally, such disputes are resolved through the adjudicatory process of courts. However, over time, the Indian judiciary has become overburdened with a backlog of pending cases, making litigation an unattractive option due to delays, high costs, and procedural intricacies. In this backdrop, they evolved another mechanism to resolve their commercial disputes, which is through, arbitration process.

Arbitration aims to provide a simple, less technical, and efficient alternative to traditional court litigation, while still ensuring fairness, party autonomy, and adherence to principles of justice. After the effects of liberalisation and globalisation, there is an increase in foreign investments in India, which are expecting ease of doing business, a stable business environment and a strong commitment to the rule of law. Litigation in Indian courts is indeed a time-consuming and expensive exercise, and justice usually eludes both parties to an action. The injustice is particularly egregious in commercial disputes, where cases remain pending for years. *It is in this context that one must look into 'arbitration' as a method of dispute resolution that aims to provide an effective and efficient alternative to traditional dispute resolution through the court.*

Nonetheless, despite its promise, arbitration proceedings in India have not remained entirely immune to procedural complexities and judicial intervention. Experience shows and law reports bear ample testimony that the proceedings under the arbitration laws have become highly technical, accompanied by unending prolixity at every stage, providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has, by the decisions of the Court, been clothed with 'legalese' of unforeseeable complexity.'

Arbitration is a creation of agreement or contract which has been provided statutory backing under the Arbitration Act, to user in party autonomy, quick disposal, and an efficacious alternative remedy. It has been a great boon for Indian Jurisprudence, where in number of cases have been systematically and methodically dealt with efficiently without the meandering course of litigation before courts. One of the persistent areas of practice of arbitration is both in the theoretical and practical aspects of **multi-party** and **multi-claim proceedings.** The Doctrine of Groups of companies is one such area that is utilised to bind third parties to an agreement. In theory, 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.

The Group of Doctrine is based on the understanding that in closely held corporate groups, the entities often run as a single economic unit, where formal separateness may not reflect commercial reality. If a non-signatory has actively participated in the negotiation, execution, or performance of the contract, or if there was a clear intention of the parties to bind them, courts and arbitral tribunals may extend the arbitration agreement to such entities. The absence of a rich statutory framework and incoherent judicial approaches have made the doctrine a subject of both legal innovation and intense scrutiny.

The article aims to study the outlines of the group of company doctrine, its evolution in Indian and International Arbitration Jurisprudence, and the challenges concomitant to it, especially in commercial practices. The purpose of this article is to critically evaluate the gaps that are left by judicial pronouncements and recommend a way forward that discovers a balance between commercial efficiency and legal certainty.

A. The Concept of Separate Personality of Corporations:

As it is well well-established principle of corporate law that corporations become a separate legal personality after incorporation, it becomes separate from its members. The members may be natural or legal persons. In the sense that if one company controls major shares in another company through it may be called a holding company in a legal sense; however, the subsidiary company is a separate personality for all purposes.

B. The Group of Companies Doctrine: Expanding Arbitration

The Group of Companies doctrine has been applied by tribunals and courts in arbitrations to either 'extend' the arbitration agreement or ' bind' a non-signatory affiliate of the contracting party to the arbitration clause. As it refers, where an arbitration agreement is entered 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 parties, indicate that the true intention of the parties was to bind the signatories as well as the non -signatories.

In ***Dow Chemicals France* v. *Isover Saint Gobain***.[1] the tribunal opined that the scope and application of the arbitration agreement should be determined based on the ' *common intent of the parties*' and as ascertainable from the circumstances related to the conclusion, performance, and termination of the contract. In this case, it was the subsidiary companies of Dow Chemicals that commenced the arbitration proceedings against Isover. Isover objected to the basis on which subsidiaries of Dow Chemical chose to arbitrate, without some of them having entered a valid arbitration agreement with Is over. Besides, the tribunal held that companies within the Dow Chemical group had acted as a single '**economic reality**' that the non-signatories to the distribution agreements with Saint Gobin would be bound to the arbitration agreement, regardless of whether they had performed the contract.

In ***Dallah Real Estate and Tourism Holding Company* v. *Ministry of Religious Affairs, Government of Pakistan***[2], a housing company entered into a contract with a trust established by the Ministry of Religious Affairs of Pakistan for leasing and operating of housing for Pakistani pilgrims in Mecca. . A dispute arose and unreasonably arbitration proceedings were initiated against the Pakistani government rather than the trust. Dallah sought to enforce the award in Uk under the New York convention. The UK Supreme Court held that *consent remains the cornerstone of arbitration*, and in the absence of clear evidence of Pakistan's intention to be bound by the arbitration agreement, the arbitral award could not be enforced against it. The Court reaffirmed that under English law, the Group of Companies Doctrine is not recognised unless it can be demonstrated that the non-signatory had unequivocally consented to arbitration, either through its conduct or participation in the contractual framework.

Generally, arbitration happens between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlying that agreement. But it does not occasionally happen that a claim is made against or by someone who is not originally named as a party.

Besides, the separate legal form of the parent company remains undisturbed, and the application of veil piercing or alter ego is merely for the identification of duplicitous acts by a third party, which would then lead to the application of the Group of Companies Doctrine to bind them to arbitration. It is emphasized that doctrine is an exception to the general

rule of arbitration. Where the facts of a case indicate that the parties intended 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.

For all practical purposes, the doctrine is a means of grappling with complex multi-party business transactions that necessarily involve more than two parties, even if these additional parties do not finally and formally sign the contract. To the extent, the doctrine helps to ensure that arbitration as a dispute resolution mechanism is able to adapt to this reality. It also ensures the multiplicity of proceedings is avoided.

C. Indian Jurisprudence on Non-Signatory Group Entities in Arbitration

A large portion of Indian business houses comprises family-run groups where individuals often hold roles across multiple companies. These entities function with shared resources and centralized decision-making, blurring legal boundaries. As a result, the Group of Companies Doctrine becomes particularly relevant, reflecting the commercial reality and ensuring that non-signatory affiliates cannot evade arbitration through formal technicalities 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 participations in the negotiations, conclusions or ICC ward in various cases.

In company's doctrine, 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 is not always clear in this respect. In the majority of cases, it seems that only a substantial involvement is considered sufficient to constitute consent or ratification.

The case of **ONGC Ltd. v. Discovery Enterprises (P.) Ltd.**[3], reiterated the deep-rooted existence of the doctrine in India, that the following factors may be considered to decide 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 subject matter
(*iv*) the composite nature of the transaction and
(*v*) the performance of the contract.

This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate, if the circumstances demonstrate that the mutual intention of all the parties was bind both the signatories and the non-signatory affiliates. This theory has been applied in number of arbitrations so as to a party who is not a signatory to the contract containing the arbitration agreement.[4]

The motive and intention of the parties may be inferred from the exchange of communication through letters, telegrams, telex, and other means of electronic communications. The existence of an arbitration agreement can be deduced once it is ascertained that the parties were at ad idem through a contract, conduct or correspondence.[5]

The first case in India, where in doctrine of Group companies was discussed and dealt is ***Sukanya Holdings (P.) Ltd.* v. *Jayesh H Panday*[2003] 44 SCL 146 (SC)**. Where in certain disputes had arisen between the different parties relating to the same transaction, and all parties were not signatories to the agreement, having an arbitration clause. In this particular case, disputes had arisen between multiple parties over the same transaction. Some of the parties in the dispute were not part of the arbitration agreement. The court held that, under Section 8 of the Arbitration Act, causes of action cannot be bifurcated in an arbitration, and non-parties to an arbitration agreement cannot be included in the same arbitration.

In Indowind case [6] while applying this doctrine, the court said and adopted a rigid and restrictive understanding of the Act. To hold that a third party cannot be subjected to the arbitration proceedings, the two-judge bench placed undue

emphasis on the issue of formal consent. In various jurisdictions, the formal consent for an arbitration agreement is not necessary.

In *Mahanagar Telephone Nigam Ltd.* v. *Canara Bank* [7], the Supreme Court observed that the group of company's 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 circumstances in which the ' group of companies' doctrine could be invoked to bind 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 transatin refers to a transaction which is interlined 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.

In ***Vingro Developers (P.) Ltd.* v. *Nitya Shree Developers (P.) Ltd.*[8],** the Delhi High Court held that the 'Group of Companies' doctrine cannot be used to bind directors of a company to arbitration when they are non-signatories and were acting purely in their capacity as agents. The Court noted that the doctrine requires a clear intention to bind non-signatories and a composite transaction involving mutual performance or interlinked agreements. Here, the directors were not parties to the Builder Buyer Agreements, nor was there evidence of any such intention.

In another judgement by the Bombay High Court in the case of ***Cardinal Energy and Infrastructure (P.) Ltd.* v. *Subramanya Construction and Development Co. Ltd.***[9], the court upheld the decision to implead non-signatories by applying the "Group of Companies doctrine" The court issued that the group doctrine can be invoked if factual and circumstantial evidence shows a close relationship and common intention to bind the non-signatory, such as performance of the contract, composite transactions, or shared economic reality.

This doctrine can be applied where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit or a single economic reality. In such a situation, signatories 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.[10]

D. Economic Realities and Legal Fictions: Revisiting Corporate Personality and Arbitration Consent

Section 45 of the Arbitration and Conciliation Act, 1996 uses the expression "any person", showcasing a glaring legislative intent to broaden the ambit of who may be referred to arbitration beyond signatories. This diversification aligns with principles such as party autonomy and the recognition of corporate entities as a part of a single economic unit. The legal fiction of corporate personality, while conserving the separate identity of each entity, has often been taken practically in arbitration jurisprudence. In the words of Lopes L.J., that company was a *mere nominis umbra.* Which means(the shadow of a name). The company is under the law a different person altogether from the subscribers to the memorandum.[11]

In **Dow Chemicals Group** operated as single economic reality and thus the non-signatories were also bound by agreement.[12] Group of Companies Doctrine is one of such area which has been utilized to bind third parties to an arbitration agreement. The efficacy and legal basis is under judicial scrutiny.

The constitutional bench answered the question posed in **Cox and Kings**[13] about the legal basis of the Doctrine by holding that it has an independent existence as a principle of law stemming from a harmonious reading of Section 2(1) h along with Section 7 of the Arbitration and Compilation Act. The court adroitly stated that "*arbitration can be possible between a signatory to an arbitration agreement and a third party. "*The onus lies on that party to show that, in fact and law, it claims through or under" the signatory party as contemplated under section 45 of the 1996 Act.[14]

Considering the holding in the three-judge bench decision of ***Chloro Controls India (P.) Ltd.*(*supra*)**, arbitration can be invoked even the non signatories if the circumstances demonstrate that it was the mutual intention of the parties.

It may be possible that the Group of Companies doctrine is not applicable in a case where one of the parties is only a non-signatory but also never participated in the negotiation process during the drafting of the contract. Besides, there is no consensus among the parties to be bound by the Contract. Ever since this doctrine was expounded in the Chloro Control case, it has been utilized in a varied manner. It is in this regard that there is a further need to examine the rationality behind the doctrinal approach taken by the Supreme Court of India.

Arbitration is a creature of contract which has been provided statutory backing under the Arbitration Act, to user the party autonomy, quick disposal, and an efficacious alternative remedy. Arbitration is a significant boon for Indian jurisprudence, as numerous cases have been effectively dealt with without the lengthy course of litigation before the courts.

The challenging area of arbitration practice in India is both theoretical and practical, and also relates to multiparty and multiclaim proceedings. In General, Arbitration involves parties who have explicitly entered into an arbitration agreement or parties with successor interests, claiming under them. In some other cases, it happens that third parties are bound by an arbitration clause by tacit consent, etc.

Group of Companies doctrine is one such area that 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.

E. Party Intention and the group doctrine in arbitration

The intention of the parties can be inferred from an exchange of letters, telex, telegram and even electronic means. The existence of an arbitration agreement can be deduced once it is ascertained that the parties were at ad idem either through a contract, conduct or correspondence.[15]

The first case, which dealt with of company's doctrine for domestic arbitrations, was **Sukanya Holdings Pvt. Ltd. (*supra*),** and later there were various schools of thought when it came to the doctrine in arbitration jurisprudence. It was in this context that the court[16] had to formulate an opinion to provide a best fit for the doctrine of Indian jurisdiction under Part II of the Arbitration Act.

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 the doctrine itself, the Court brought in the intention of the parties as to whether they were ad dem 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.

In ***Roussel U Claf* v. *G.D.Searle &Co. Ltd. and G.D. Searle & Co***.,[17] the court interpreted the term "*claiming through or under*" while staying a case against a company that was neither a party nor privy to an arbitration agreement. Here, the non-signatory was a fully owned subsidiary, and its 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 means that if the parent 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.

The ***Mayour and Commonality & Citizens of the City of London* v. *Ashok Sancheti***[18] overruled the Uclaf Case. 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 based on the rights of a signatory to an arbitration agreement. It is observed that in *Chloro Controls*, the Supreme Court found both cases to be persuasive but did not provide clear reasoning to prefer one interpretation over the other.

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 thorough or under such party*" to cure the anomaly pointed out by this court in the Chloro Control case. The relevant observations of the law commission report are given below-

> *"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."*

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 egos 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***."

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.[19] Further, it was held that non-signatories are bound by the arbitration agreement, including in cases of interrelated contracts, the group of companies doctrine, etc.[20] In ***Ameet Lalchand Shah* v. *Rishabh Enterprises***[21] the court has to deal four parties had executed four agreements for the single purpose and the contracts are interconnected and of a single commercial project, the court held and extended the arbitration to non-signatory and opined that the dispute could be resolved only be four agreements and parties there on to arbitration. The interpretation of Chloro Control was expanded in ***Cheran Properties Ltd.* v. *Kasturi & Sons Ltd.*[2018] 92 taxmann.com 384/147 SCL 352 (SC),** the court applied Section 35 of the Arbitration Act to enforce an Award against a non-signatory even though it did not participate in the proceedings. In ***Reckitt Benckiser (India) (P.) Ltd.* v. *Reynders Label Printing (India) (P.) Ltd.***,[22] the court refused to apply the group companies doctrine due to a lacky of commonality of intention of the parties.

F. Limits of the Group Doctrine and Single Economic Entity

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. Composite transaction refers to a transaction which is interlinked in nature or where the performance of the agreement may 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.

Group of Companies has invoked where in a tight group structure with strong organizational and financial links, so as to constitute a single economic unit or a single economic reality. In such scenario, non signatories and signatory have been found to one in the arbitration agreement. This will apply when funds of one company are used to financially support or restructure other members of the group.[23] That the concepts like single economic entity are economic concepts difficult to be enforced as principles of law.[24] This will be against the concept of distinct legal entities and party autonomy.

There is a clear need for having a relook at the doctrinal ingredients concerning the group of companies' doctrine, especially in the Indian context where its application has expanded starkly over time. While the doctrine serves the practical purpose of addressing complex multiparty commercial arrangements, it raises serious concerns about party autonomy, corporate separateness, and consent, core principles of arbitration.

Mr.Hoffmann prominent British jurist, suggested beguilingly that distinguishing between a parent company and its subsidiary might be technically correct in law, but economically, they function as the same entity. The distinction

between the two is , in law, fundamental and cant here be bridged. In ***Peterson Farms Inc* v. *C &M Farming Ltd.***[25]**,** the Queens Bench held that a group of companies does not form part of English Law.

In Bank of **Tokyo v. Karoon**,[26] held that it exists to create separate legal entities, and a general agency relationship would defeat this purpose. The court held there in:

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

Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group company doctrine or good faith, etc., in a multiparty arbitration raise complicated factual questions, which are left to the tribunal to handle.

In the words of Professor William Park, "*for arbitrators, motions to join non signatories creates 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, but still should be part of the arbitration under the circumstances of the relevant business relationship. [27]

Also, Prof.Gary Born states that Group of Companies' doctrine is another significant, but controversial basis for binding non-signatories to an arbitration agreement is the ' group of companies. 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.[28]

The Group of companies doctrine has also been explicitly accepted sin only a limited number of jurisdictions. In part of that reason, the doctrine has given rise to substantial controversy. The fact that only a small number of jurisdictions France and India, appear to have applied the group of company's doctrine in the context of international arbitration and to the prevalent criticism of the group of company's doctrine.

Group of companies raise particularly tricky issues when they or some of their members become insolvent. The **Eurofood case**[29] *made clear.*

That the parties submitted to the arbitration by an agreement which is valid by its proper law and the award is valid and final according to the law which governs the arbitration proceedings. The validity, interpretation and effect of the agreement to arbitrate are governed by the proper law of agreement, so common law rules as to the proper law of a contract remain applicable. This means that if there is an express choice of law in respect of the arbitration agreement, the chosen law will govern. The choice of place where the arbitration is to be conducted(its seat) may be treated as an implied choice of the governing law.[30] This is so even if the contract of which the arbitration clauses form part is governed by some other law.[31]

Where there is neither an express nor an implied choice of law by the parties, regard must be had to all the circumstances in deciding with which law the agreement is most closely connected. The parties can not only choose the law that governs their agreement to arbitrate but also the law that governs the arbitration proceedings.

G. Unresolved Challenges in Applying the Group of Companies Doctrine

While the decision in ***Cox and King* (*supra*)** established Doctrine to be an intrinsic part of the legal system, it also becomes imperative to address the concomitant challenges involved, especially in the complex business arena. Ssenior Advocate Ritin Rai's submission in the aforementioned case was that "*complex multi-party contracts are outcomes of*

detailed negotiations entered into after parties have fully applied their mind. To impute intention to parties in contradiction to the express terms of the agreement would defeat the purpose of the parties…

The judgment strikes to miss the commercial reality and its accommodation. The court misunderstood that the relationship between a company and its scattered shareholders is very different in its nature from that of a parent and a subsidiary. The doctrine imposes unreasonable liability and shatters the entity for active involvement. Also, an ambiguity exists in determining implied consent. There exists no clear threshold for determining when a non-signatory's conduct amount to consent.

Courts have recommended that involvement in a company's procedure, that is, negotiation, execution or performance, may imply consent. In complex joint ventures or layered contracting chains, such conduct is often driven by operational necessity rather than *consent to arbitrate*. And the predictability is often found missing. A growing concern emerges that parties may invoke the doctrine to mire a financially solvent but otherwise unrelated group. The Supreme Court acknowledges such possibility but has not laid down any procedural safeguards, and may open the doors to forum shopping and delay tactics.

In the **Vingro developers' (*supra*)**, the High Court refused to extend the doctrine to include directors in fiduciary capacity on the ground that they were non-signatories and not parties to principal agreements. It fails to take into account how Indian family institutions work. In such businesses, often the operational and financial decisions are centralised in the hands of such an individual.

The doctrine also finds itself with friction in relation to the established principle of corporate law. One of the fundamental principles of corporate law is a single-person entity. By extending non-signatory affiliates with a corporate group, based on factors such as common intent, substantial involvement and commercial reality. Without a clear statutory framework or a judicial guideline consistent in nature, this may conflict with party autonomy and may be misused by allowing unprincipled joinder of entities to an arbitration proceeding they never agreed to join.

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3. *ONGC Ltd*. v. *Discovery Enterprises (P.) Ltd.*, [2022] 8 SCC 42
4. *Chloro Controls (India) P. Ltd.* v. *Severn Trent Water Purification Inc.* [2013] 1 SCC 641/SC/0803/2012, para 66
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6. *Indowind Energy Ltd.* v. *Wescare (I) Ltd.* [2010] 5 SCC 306
7. [2019] 110 taxmann.com 270/156 SCL 419 (SC)
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