



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 17 May 2023**
Judgment pronounced on: 24 July 2023

+ **ARB.A. 5/2022, I.A. 3270/2022 (Stay), I.A. 8665/2023**
M/S ARUPRI LOGISTICS PVT LTD Appellant

Through: Mr. Jayant Mehta, Sr. Adv.
with Mr. Raghav Bhatia, Ms.
Unnimaya, Ms. Surekha
Raman, Advs.

Versus

SHRI VILAS GUPTA AND ORS Respondents

Through: Mr. Jyoti Taneja, Mr. Shivam
Malhotra, Mr. Ashish Rana,
Ms. Sakshi Arora, Advs. for R-
1.
Mr. S.D. Singh, Mr. Kartikay
Bhargava and Mr. Siddharth
Singh, Advs. for R-4 to 7.
Mr. Ankit Singhal, Mr. Uday
Pratap Singh, Advs. for R-8 to
10.

+ **ARB.A. 7/2022, I.A. 8813/2022 (Stay)**
TAURUS INDIA LIMITED Appellant

Through: Mr. Anirudh Bakhru, Mr.
Shivam Goel, Mr. Sidhant
Poddar, Ms. Pragya Choudhary,
Ms. V. Laxmi, Mr. Umang
Tyagi, Advs. for appellant.



versus

VILAS GUPTA & ORS.

..... Respondents

Through: Mr. Jyoti Taneja, Mr. Shivam Malhotra, Mr. Ashish Rana, Ms. Sakshi Arora, Advs. for R-1.
Mr. S.D. Singh, Mr. Kartikay Bhargava and Mr. Siddharth Singh, Advs. for R-4 to 7.
Mr. Ankit Singhal, Mr. Uday Pratap Singh, Advs. for R-8 to 10.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

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A. PRELUDE

1. The appellants question the jurisdiction of an **Arbitral Tribunal**¹ to join and implead non-signatories to an arbitration agreement post reference of disputes by a court. The appellants would contend that an AT does not stand vested with the authority or jurisdiction to implead parties who may have neither been signatories to an arbitration agreement nor parties to proceedings before a referring court. The challenge is principally founded on the absence of a specific conferral of power as discernible from the provisions of the **Arbitration and Conciliation Act, 1996**² upon an AT. They would further urge that the “alter ego” or “group of companies” doctrines which have been occasionally invoked to join third parties can be resorted to only by courts. According to them, those precepts are not available to be independently adopted by an AT to implead additional

¹ AT

² Act



parties. The appellants would urge that the AT is bound by the order of a referring court and which must be accepted as defining the contours of its jurisdiction including the parties between whom alone proceedings may be drawn. According to the appellants, since arbitration is founded upon “party consent” it would be wholly incorrect to recognise a power inhering in the AT to join non-signatories.

2. The respondents, on the other hand, argue that the provisions of the Act must be interpreted so as to enable the AT to effectively and conclusively resolve all disputes. They would submit that the provisions of the Act when interpreted bearing in mind the scheme of the statute and its resolve to construct arbitration as an effective alternate dispute resolution mechanism would lead one to the irresistible conclusion that the AT must be recognised to have all the powers that may otherwise inhere in and be resorted to by courts in general. They thus commend that the Court should recognise the power to implead as inherently vesting in the AT.

3. While in the facts of the present appeal, the Sole Arbitrator entered the reference pursuant to an order passed by this Court on a petition under Section 11 of the Act, the Court notes that the question of the power to join is one which could arise either where a tribunal comes to be constituted with the consent of parties as also when it is formed pursuant to an order passed by a referring court. The opinion



which the Court proposes to render hereinafter would cover the twin contingencies noticed above.

B. ESSENTIAL FACTS

4. In order to set out the context in which the aforementioned issues arise, it would be apposite to notice the following material facts. The respondent nos. 8 and 9, G.R. Singhal and Pista Devi, are the family patriarchs with the various respondents arrayed herein being engaged in the family business which was conducted through the agency of three companies, namely, **Taurus India Limited**³, Taurus Polymers Pvt. Ltd. and Taurus Englobe Ltd.

5. In order to lend clarity to the position of parties as existing before the Sole Arbitrator and in the lead appeal being ARB.A. 5/2022, the Court deems it expedient to extract the following chart: -

S. No.	Group I			Group II		
	Name	Arb. A. 5/22	Sole Arbitrator	Name	Arb. A. 5/22	Sole Arbitrator
1.	G.R. Singhal	R8	R8	Vilas Gupta	R1	R1/CC1
2.	Pista Devi	R9	R9	Sunita Gupta	R2	R2/CC2
3.	Pawan Singhal	R10	R10	Akshit Gupta	R3	R3/CC3
4.	Meenu Singhal	-	R5 Deleted/ Later Referred	Kishan Gupta	Deceased	
5.	Shreya Singhal	-	R6 Deleted/ Later Referred	Manju Gupta	R4	C1
6.	Shaishav	-	R7	Karnika Gupta	R5	C2

³ Taurus India



	Singhal		Deleted/ Later Referred			
7.	-			Vipeksha Gupta	R6	C3
8.	-			Keshav Gupta	R7	C4

6. The first respondent is stated to have moved the erstwhile **Company Law Board**⁴ in March, 2007 by way of C.P. No. 31/2007 alleging mismanagement and oppression in the affairs of Taurus India. The CLB while entertaining that petition on 12 April 2007 passed an order directing parties to maintain status quo in respect of the properties of Taurus India. During the pendency of the aforesaid petition before the CLB, parties are stated to have arrived at a family settlement the terms whereof came to be reduced in writing and embodied in a **Memorandum of Family Settlement**⁵ dated 28 April 2007. The MFS principally divided the family members into two groups with Group I comprising of Mr. G.R. Singhal [respondent no.8], Ms. Pista Devi [respondent no.9], Mr. Pawan Singhal, [respondent no. 10] and Ms. Meenu Singhal, wife of respondent no.10. Group II consisted of Mr. Vilas Gupta [respondent no.1], Ms. Sunita Gupta [respondent no.2], Mr. Akshit Gupta [respondent no.3], Mr. Kishan Gupta [since deceased], Ms. Manju Gupta [respondent no.3], Ms. Kanika Gupta [respondent no.5], Mr. Vipeksha Gupta [respondent no.6] and Mr. Keshav Gupta [respondent no.7]. It becomes pertinent to note here that respondent nos. 4 to 7 are the heirs

⁴ CLB

⁵ MFS



of the late Mr. Kishan Gupta and the claimants before the Sole Arbitrator. The appellants came to be impleaded pursuant to an application in that respect being moved by respondent nos. 1 to 3 before the Sole Arbitrator.

7. In terms of the MFS that came to be drawn, the family members are stated to have agreed upon the bifurcation of the businesses and properties as per the following terms:-

“3. TERMS OF SETTLEMENT/COMPROMISE”

3.1 That ‘Group-I’ shall have complete ownership, management and control over the following businesses and properties to the complete exclusion of ‘Group-II’:-

3.1.1 Complete Business of Garden Accessories & Steel Fence post along with Land, Buildings, Plant & Machineries, other Fixed Assets and all other Assets and Liabilities including Contingent Liabilities in respect of Works - II of Taurus India Limited situated at A-331 & 332 RIICO Industrial Area Bhiwadi, District Alwar Rajasthan - 301019.

3.1.2 1/3rd (One-third) Rear portion of the Land & Building of Industrial premises situated at B-54, Mayapuri Industrial Area, Phase-1, New Delhi-110064 as indicated in the site plan (not to scale) annexed hereto, as Annexure-1 duly signed by both the constituents of both the Groups.

3.1.3 Cars namely Honda City bearing registration number DL 4CAB 8936, Innova bearing registration number DL 4CA E 1879.

3.2 That 'Group - II' shall have complete ownership, management and control over the following businesses and properties to the complete exclusion of ‘Group –I’:-

3.2.1 Complete business of Welding Accessories alongwith Land (2/3rd Front Portion as indicated in the site plan (not to scale) annexed hereto as Annexure - 1 duly signed by both



the constituents of both the Groups), Building, Plant & Machineries, Other Fixed Assets and all other Assets and Liabilities including Contingent Liabilities in respect of Works - 1 of Taurus India Limited situated at B. - 54, Mayapuri Industrial Area, Phase-I, New Delhi- 110064 alongwith the name TAURUS INDIA LIMITED.

3.2.2 TAURUS POLYMERS PRIVATE LIMITED alongwith all its business, Assets & Liabilities.

3.2.3 TAURUS ENGLOBE LIMITED alongwith all its business, Assets & Liabilities.

3.2.4 Residential House with all the three constructed floors situated at C - 108, Anand Niketan, New Delhi - 110021.

3.2.5 Residential Flat in Gold Croft Cooperative Group Housing Society Limited, Dwarka against Membership Number 362 in category 'C'.

3.2.6 Cars namely, Mercedes Benz bearing registration number DL 3FK 0054, Sonata bearing registration number DL 9CC 8571, Honda bearing registration number DL 9CC 9778, Honda bearing , registration number DL 2CP 0777.”

8. The MFS also put in place certain arrangements for the purposes of management of the three companies till the final implementation of the settlement terms by incorporating the following provisions: -

“3.3 That till the time the Family Settlement is fully and finally given effect to, the following persons shall be the only directors of all the Companies mentioned hereinabove:-

- a. Shri G.R.Singhal
- b. Shri Vilas Gupta
- c. Shri Kishan Gupta
- d. Shri Pawan Singhal

None of the person mentioned above shall be designated as Managing Director and all the directors shall be the



wholetime directors of the company. However, the constitution of the Board of Directors can be changed or altered with the unanimous consent of all the parties to this MFS it writing only.

3.4 That all the directors shall appoint any one of them as Chairman for the meetings of the Board of Directors but the Chairman so appointed shall not have any casting vote.”

9. For the purposes of effectuating the terms of the settlement, it additionally embodied the following provisions: -

“3.5 That upon signing of this MFS, the Board of each of the Company shall be reconstituted to give effect to the change as agreed upon in clause 3.3 above.

3.6 That each Group has agreed to transfer the shares standing in the name of its constituents either singly or jointly with any other constituent to the other Group or its constituents or its nominees as may be desired by the said Group in order to give effect to the change in control and management of the Companies/businesses whether through a process of demerger or otherwise.

3.7 That the constituents of each Group shall resign/retire from the Directorship of the companies and businesses firms falling into the share of the other Group upon execution of documents giving effect to the Family Settlement/Partition/Division mutually arrived at by the Parties herein.”

10. The MFS further and in terms of Clauses 3.15 and 3.16 made provisions for all disputes and differences relating to the implementation and execution of the MFS being liable to be resolved by way of arbitration. The members of the AT were also duly named and identified in those two clauses. Clauses 3.15 and 3.16 are reproduced hereinbelow: -

“3.15 That in the event of any differences between the parties on the implementation and execution of the present MFS or with



regard to any terms thereto, the parties agree to refer the said matter and issue to joint arbitration of Shri Ramanand Gupta and S. Devender Singh Kohli. In case of difference of opinion between the said two arbitrators, the matter shall be referred to Shri R.K. Gupta Son of Late Shri Munshi Ram Gupta, Resident of D - 13, Naraina Vihar, New Delhi - 110028, whose decision shall be final and binding upon the parties.

3.16 That the right to refer to arbitration any question in the event of difference or dispute amongst the parties shall be in addition to and not in derogation of the right of the parties to approach the Hon'ble Company Law Board, Principal Bench for giving effect to or execution of the terms of present MFS."

11. The MFS appears to have been placed on the record of proceedings before the CLB and taking cognizance of the same C.P. No. 31/2007 came to be disposed of in terms thereof based on a joint application which was moved by parties. The first respondent thereafter moved the CLB seeking further directions being issued including for execution of the MFS. While entertaining the said application, the CLB on 17 January 2008 passed another order of status quo. Yet another miscellaneous application is thereafter stated to have been moved in the disposed of proceedings before the CLB alleging violation of its order of 17 January 2008.

12. Taking note of the aforesaid developments, the CLB on 5 February 2008 appointed one Mr. A.R. Ramanathan as a facilitator for implementing the terms of the MFS. Upon the CLB being informed that Mr. A.R. Ramanathan had expressed his inability to continue, it proceeded to appoint Mr. K. Ramamoorthy, a retired judge as a facilitator. On 15 July 2008, Mr. Ramamoorthy is stated to have drawn an interim arrangement as a result of which the first respondent



was accorded control over Taurus Englobe Ltd. while Mr. Kishan Gupta was handed over the **industrial plot situate at B-54, Mayapuri Industrial Area**⁶.

13. While the aforesaid interim arrangement was in place, Taurus India entered into an agreement to sell dated 21 October 2010 relating to the industrial plot situate in Mayapuri with **Arupri Logistics Pvt. Ltd.**⁷, the appellant in one of these appeals, for a consideration of Rs. 6,35,00,000/-. Arupri is stated to have made significant investments in the said property including the payment of a sum of Rs.78,76,773/- for the conversion of the industrial plot into freehold. Arupri is thereafter stated to have approached the Delhi Development Authority, the lessor, for the industrial plot being conveyed in its favour. The application of Arupri came to be accepted by that authority and a conveyance deed executed in its favour on 23 May 2012. It would be pertinent to bear in mind that as per the salient provisions of the MFS, 1/3rd of the land and building comprised in the industrial plot was to be handed over to Group I which had also been accorded the right to take over the entire business of Garden Accessories and Steel Fences, while 2/3rd thereof was to be made over to Group II which was to take over the complete business of Welding Accessories. This is clearly evident from a reading of Clauses 3.1.1, 3.1.2 and 3.2 together with 3.2.1.

⁶ industrial plot

⁷ Arupri



14. Respondent nos. 1 to 3 assert that the aforesaid transfer of the industrial plot came to light in December 2012 when they inspected the records of Taurus India. The first respondent thereafter moved an application before the CLB on 17 December 2012 inter alia seeking execution of the order of 01 May 2007, cancellation of the agreement to sell dated 21 October 2010, attachment of the industrial plot and an order for winding up of Taurus India and distribution of its assets amongst the members of the company as on 01 May 2007. The first respondent is also stated to have moved an application for the impleadment of Arupri before the CLB.

15. Meanwhile, the facilitator appointed by the CLB proceeded to draw what is described to be a “final order” on 09 May 2013. The facilitator drew up the following operative directions: -

“36. Now, for the foregoing reasons the implementation of the Memorandum of family settlement is done as under:

1. It is declared that Taurus Englobe Ltd, carrying on business in Plot No.136, NEPZ NOIDA belongs to the family of Mr. Vilas Gupta.

1a) Mr. G. R. Singhal, Mr. Kishan Gupta and Mr. Pawan Singhal and the members of their families do not have any right or interest therein and they are deemed to have given up their 75% of holding in Taurus Englobe Limited which is given to them in the MFS.

1b) Mr. Vilas Gupta and his family shall be entitled to carry on business as stated above without any interference from Mr. GR. Singhal, Mr. Kishan Gupta and Mr. Pawan Singhal and their assigns and successors in interest.



1c) It is declared that Clause 3.3 in the Memorandum of family Settlement (MFS):-

“3.3 That till the time the Family Settlement is fully and finally given effect to, the following persons shall be the only directors of all the Companies mentioned hereinabove:-

- a. Shri. G.R. Singhal
- b. Shri Vilas Gupta
- c. Shri Kishan Gupta
- d. Shri Pawan Singhal

None of the person mentioned above shall be designated as Managing Director and all the directors shall be the whole time directors of the company. However, the constitution of the Board of Directors can be changed or altered with the unanimous consent of all the parties to this MFS in writing only.”

shall cease to have any legal effect and is no longer, enforceable in respect of Taurus India Limited, Taurus Englobe Limited and Taurus Polymer Pvt. Ltd.

1d) Mr. Vilas Gupta and his family are under no obligation to pay any money to Mr. G.R. Singhal, Mr. Kishan Gupta and Mr. Pawan Singhal with reference to the transactions in respect of Taurus Englobe Limited right from 2007 up to date.

2. It is declared that Taurus India Limited, Bhiwidi, belongs to Mr. G. R. Singhal, Mrs. G.R. Singhal and Mr. Pawan Singhal and his family.

2a) Mr. Vilas Gupta and the members of his family, and Mr. Kishan Gupta and the members of his family shall cease to have any right or interest therein. They are deemed to have relinquished their shareholding as provided in Memorandum of Family Settlement for resignation/retirement with effect from 09.05.2013. Mr. G. R. Singhal and Mr. Pawan Singhal shall be entitled to make necessary changes and shall inform the RoC and set the records right.

2b) Mr. G.R. Singhal and Mr. Pawan Singhal shall be at liberty to set right the records in the relevant Registers.



2c) Mr. GR. Singhal and Mr. Pawan Singhal shall be entitled to carry on business in the name of Taurus India Limited in Bhiwadi without any interference on Mr. Vilas Gupta and his family and Mr. Kishan Gupta and the members of his family.

3. In view of the fact that the liabilities of the Taurus India Limited have been discharged and taxes due have been paid, Mr. Vilas Gupta and the members of his family, Mr. Kishan Gupta and the members of his family are absolved of all liabilities. If anybody makes any claim against them the same shall be indemnified by Mr. G.R. Singhal and Mr. Pawan Singhal and if there are taxes due it shall be paid by Mr. G. R. Singhal and Mr. Pawan Singhal.

3a) It is declared that the sale effected on 21.10.2010 by Taurus India Limited in respect of the whole of the land ($2/3^{\text{rd}}$ + $1/3^{\text{rd}}$) measuring 2013.96 Sq. Mts. (2408 sq. yards) and the building is valid. The position of the fixed assets as reflected in the financial statements as prepared by Mr. G.R. Singhal and Mr. Pawan Singhal shall be final and binding on all parties.

4a) Mr. Vilas Gupta and the members of his family shall have no right to challenge the transaction as they are allotted Taurus Englobe Limited and portions in C-108, Anand Niketan and he and members of his family being released from all liabilities of Taurus India Limited and the $1/3^{\text{rd}}$ share had already been allotted to Mr. G.R. Singhal and Mr. Pawan Singhal in the Memorandum of Family Settlement which is not in dispute. No party can claim any Intellectual Property Rights in Taurus India Limited and Taurus Englobe Limited as both families Mr. Vilas Gupta and Mr. Kishan Gupta are carrying on welding business.

5. It is declared that Taurus Polymers Ltd, belongs to Mr. Kishan Gupta and the members of his family carrying on business in welding and polymers. The position reflected in the financial statements prepared by Mr. Kishan Gupta shall be final and binding on all the parties.



5a) Mr. G. R. Singhal, Mr. Vilas Gupta and Mr. Pawan Singhal and members of their respective families shall cease to have any right and they are deemed to have relinquished their shareholding in Taurus Polymers Pvt. Ltd. with effect from 09.05.2013

5b) Mr. Kishan Gupta and the members of his family shall be entitled to carry on his business in the name of Taurus Polymers Limited without any interference from Mr. G.R. Singhal, Mr. Vilas Gupta and Mr. Pawan Singhal and the members of their respective families.

5c) Mr. G.R. Singhal, Mr. Vilas Gupta and Mr. Pawan Singhal are under no obligation to anybody and if any claim is made by third parties. Mr. Kishan Gupta shall indemnify them in respect of transactions of Taurus Polymers Limited

5d) It is declared that Taurus India Limited is no longer holding any right in No. 54, Mayapuri Industrial Area.

6. It is declared that the house and premises No. C-108, Anand Niketan is free from any liability.

6a) The house and premises No. C-108, Anand Niketan is allotted in the following manner:-

- A. The Ground Floor and the basement stand allotted to Mr. Vilas Gupta which are already in his name.
- B. The First Floor and the Second Floor stand allotted to Mr. Kishan Gupta which are already in his name.
- C. Mr. Vilas Gupta and Mr. Kishan Gupta shall have the right to enjoy the common facilities intact and enjoyable in accordance with law.

7. All the cars in the custody of Mr. Vilas Gupta shall be retained by him with absolute rights and the cars in the custody of Mr. G.R. Singhal, Mr. Pawan Singhal shall be retained by them with absolute rights. Necessary formalities under the Motor Vehicles Act, 1988, for ownership shall accordingly be effected by the respective parties on the basis of this order and no consent from any other party is necessary.

7a) The flat at Gold Croft Cooperative Group Housing Society Limited, Dwarka acquired under Membership



No.362 in Category "C" which has been sold by Mr. Vilas Gupta is deemed to have been allotted to Mr. Vilas Gupta in consideration of the above arrangement.

8. As and from this date there is no relationship between Mr. Vilas Gupta on the one hand and Mr. G. R. Singhal, Mr. Kishan Gupta and Mr. Pawan Singhal on the other with reference to any business/shareholding except the blood relationship which cannot be subject matter of any division or deletion. The parties shall not be entitled to initiate any proceedings in any forum touching the affairs of Taurus India Limited, Bhiwadi, Taurus Englobe, NOIDA and Taurus Polymers Ltd.

9. It is declared that the Memorandum of Family Settlement dated 28.04.2007 stands fully implemented and the parties are in full quits and no party is liable to the other on any account in respect of Taurus India Limited, Bhiwadi and Taurus Englobe, NOIDA and other assets referred to above.

10. It is further made clear that Mr. G. R. Singhal shall have no claims against Mr. Vilas Gupta and Mr. Kishan Gupta,

11. Mr. Vilas Gupta shall have no claims against Mr. G. R. Singhal, Mr. Kishan Gupta and Mr. Pawan Singhal.

12. Mr. Kishan Gupta shall have no claims against Mr. G. R. Singhal, Mr. Vilas Gupta and Mr. Pawan Singhal.

13. Mr. Pawan Singhal shall have no claims against Mr. Vilas Gupta and Mr. Kishan Gupta.

The parties shall bear their respective costs.

I fervently hope that the parties will appreciate the position and be rest content with what each of them gets, assets of substantial value and allow others to carry on businesses peacefully for the benefit of generations to come holding the flag of the family high for the good of the society in general, growing the Banyan tree, sustaining and nurturing it, coming out of a small seed sown by the father Mr. G. R. Singhal.

Dated at New Delhi on this the 9th day of May 2013."



16. When the matter was called before the CLB on 23 August 2014, and upon it being apprised of the developments which had taken place in the interregnum, it disposed of all pending applications. While doing so, the CLB essentially observed that the order of 01 May 2007, had finally disposed of the pending petition and thus nothing remained for the CLB to administer, implement or oversee. It further held that the MFS or its implementation could not constitute a subject which could be validly enforced by the CLB under Section 634A of the **Companies Act, 1956**⁸.

17. The aforesaid order passed by the CLB presently forms subject matter of challenge in CO. A(SB) No. 47/2014 instituted at the instance of respondent no.1. Suffice it to note that in the said appeal which remains pending on the board of this Court, an order came to be passed on 15 October 2014 directing parties to those proceedings to maintain status quo in respect of the properties as well as the shares forming subject matter of the MFS.

18. On 03 March 2020, the respondent nos. 4, 5, 6 and 7 invoked arbitration against respondent nos. 1, 2, 3 and 10 in terms of a notice referable to Section 21 of the Act. As would be evident from the contents of that notice, allegations were primarily levelled against respondent nos. 1 to 3. On a failure of parties to agree upon the constitution of an AT, the respondent nos. 4 to 7 proceeded to file a

⁸ The 1956 Act



petition under Section 11 of the Act before this Court. The said petition came to be allowed with a Sole Arbitrator being appointed. Undisputedly, the appellants were not arrayed as parties in those proceedings.

19. Pursuant to the order of reference made by this Court, the Sole Arbitrator entered upon the reference on 12 February 2021. On 15 March 2021, the Sole Arbitrator passed interim orders of protection in the following terms: -

"I have heard learned counsel for the parties. It has been brought to my notice that interim Order passed by the learned Single Judge of the High Court on October 15, 2014 is already operating inter-se the parties. The operative portion of the Order reads as follows:

"Till the next date of hearing, the parties shall maintain status quo as of today in respect of properties and the shares covered by the Family Settlement dated 28.04.2007 and the Order dated 09.05.2013 of Justice K. Ramamoorthy (Retd)."

The parties have entered into Memorandum of Family Settlement dated 28.04.2007 which is still subsisting though it is contended by the learned counsel for Respondents 4 to 6 that some modification was allegedly made by Justice K. Ramamoorthy (Retd) vide Order dated 09.05.2003.

It may be stated that the above Order passed by the learned Single Judge of High Court amply protects the interests of the parties and is still in operation. It will be in the interest of justice that the Order shall continue as admittedly the parties have already entered into Memorandum of Family Settlement dated 28.04.2007. The parties are hereby directed to maintain status quo in respect of properties and shares as covered by Memorandum of Family Settlement dated 28.04.2007. This will, however, be without prejudice to the respective rights and contentions of the parties and liberty is granted to the Petitioners and the respondents to move



this Tribunal at an appropriate stage if it is so required in accordance with law for further directions, if any.

The present petition/application is disposed accordingly in the above terms.”

20. The respondent nos. 1 to 3 are also stated to have moved an application purporting to be under Section 16 of the Act before the Sole Arbitrator on 14 April 2021 challenging the assumption of jurisdiction in light of the pendency of CO. A(SB) No. 47/2014. That application is still pending consideration before the Sole Arbitrator.

21. On 04 May 2021, respondent nos. 1 to 3 and respondent nos. 4 to 7 entered into a separate Declaration cum Memorandum of Settlement bringing a closure to all inter se differences and disputes. On 17 July 2021, a Statement of Claim came to be filed before the Sole Arbitrator with the following prayers: -

a. “pass an Award in favour of the Claimants and Respondent no. 1 to 3 'Group-II' against the respondent no. 4 to 9 'Group I', their successor, attorneys, Lrs, agent etc. to ever on their behalf, whereby directing the Respondent no. 4 to 9 'Group-I' to execute all the relevant documents in favour of Claimants to the extent of 46.66% (front portion) and in favour of Respondent no. 1 to 3 to the extent of 20% (front portion) for complete ownership of the land and building, management and control over the complete business Welding Accessories, as indicated in the site plan (not to scale) annexed as annexure -1 to the MFS duly signed by the constituents of both the groups) of B-54, Mayapuri Industrial Area, Phase-I, New Delhi- 110064 and handover the peaceful vacant possession of the, aforesaid properties including the land, building, plants and machineries etc to the claimants and the respondent nos. 1 to 3;

b. pass an award of Rs. 5.06 crores (Five Crores and Six Lacs only) in favour of the claimants against the Respondent no. 4 to 9 and their successors, attorneys and LR. whosoever on their



behalf towards the amount as claimed under Claim no. 1. (b) and 2, with the pendant lite interest @18% per annum till its realization and payment to the Claimants by the aforesaid Respondents along with pendent lite and future mense profit @Rs. 3 lacs per months w.e.f. 21st July, 2021 till such time the respondent no. 4 to 9 stop using the name of Taurus India Limited by De-merger or by change of name from M/s. Taurus India Ltd. To any other name as per provision of Companies Act.

c. pass an award in favour of the Claimants against the Respondent nos. 4 to 9 and their successors, attorneys and LR.s. whosoever on their behalf from undertaking any business in the name of M/s. Taurus Polymers Private Limited and further they be restrained & injuncted permanently from using the name of the said company M/ s Taurus Polymers Pvt. Ltd;

d. pass an award in favour of the Claimants against the Respondent no.4 to 9 and their successors, attorneys and LR.s. whosoever on their behalf and whereby directing the Respondent no. 4 to execute registered Gift Deed in the office of competent authority in accordance with law in favour of the Claimant no. 3 Ms. Vipeksha Gupta with respect to 20% land fights of the Respondent no. 4. in relation to the House no. C-108, Anand Niketan, New Delhi and for remaining 10%land right in favour of respondent no. 1 or his nominee

e. pass an award in favour of the Claimants against the Respondent no. 4 to 9 whereby directing them to render the true and correct statement of Account with respect to the businesses run of the property and company i.e M/s. Taurus India Limited mentioned in clause no. 3.2.1 and the business of the company M/s. Taurus Polymers. Private Limited mentioned in clause no. 3.2.2 with complete disclosure and documents in support thereof for the -period w.e.f. 16.05.2018 to till date;

f. Pass an award in favour of the Claimants against the Respondent no.4 to 9 and their successors, attorneys and LR.s. whosoever on their behalf and whereby they be injuncted and restrained permanently from causing any obstruction or hindrance in peaceful use and occupation of the properties as mentioned in prayer clause no. (a), (c) and (d) and as detailed in Clause no. 3.2.1, 3.2.2 and 3.2.4 of MFS dated 28.04.2007;



22. The respondent nos. 1 to 3 filed their Statement of Defence along with counter claims which included a prayer for cancellation of the agreement to sell dated 21 October 2010. On 24 November 2021, the Sole Arbitrator directed the deletion of Mrs. Meenu Singhal, Ms. Shreya Singhal and Mr. Shaishav Singhal who had been arrayed in those proceedings as respondent nos. 5, 6 and 7. The aforesaid deletion was based upon the Sole Arbitrator taking the view that since they had neither been arrayed as parties in the Section 11 proceedings nor had they been placed upon notice under Section 21 of the Act, they could not be joined as parties to the arbitration proceedings. The Sole Arbitrator, however, granted liberty to parties to take such further steps as may be warranted in law.

23. On the same day, the first respondent moved an application before the Sole Arbitrator seeking impleadment of the present appellants. The said application came to be allowed by the Sole Arbitrator on 23 December 2021 in the following terms: -

“6. I have heard Learned Counsel for the parties and perused the documents and pleadings as placed on record. The reference made by Counsel for the Applicants to the Memorandum of Family Settlement dated 28.04.2007 as well as to the proceedings pending before the Hon'ble High Court and the Orders passed by the Company Law Board will clearly establish that M/s Taurus India Ltd. and M/s Arupuri Logistics Pvt. Ltd. will have vital interest in the matter and any Order or Award made by this Arbitral Tribunal will bear consequences accordingly. It has been clearly established by a judgment of Hon'ble Supreme Court reported in 2013(1) SCC 641 titled as *Chloro India Pvt. Ltd. vs Severn Trent Water Purification Inc. and Others*, reported as (2013) 1 SCC. 641.



Paragraph 73 at page 683 and paragraph 107 at page 695 may be referred to as follows:

“73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve and ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.”

“107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party ie. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement arid there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.”

7. In view of the settled position of law, it is clear that the parties sought to be impleaded in the present arbitral proceedings have vital interest in the matter and will be affected by the arbitral



proceedings and their non-exclusion will cause prejudice and will not serve the ends of justice. Therefore, these entities are necessary parties.

8. For the aforesaid reasons, the Companies Taurus India Ltd. and M/s Arupuri Logistics. Pvt. Ltd. are herein impleaded to represent their interest in the proceedings pending before this Tribunal. The Applicants / Respondents 1 to 3 shall serve these parties with the relevant documents for the next date. Amended memo of parties be placed on record. The application stands disposed of.”

24. It also becomes pertinent to note at this juncture that while a reply to the impleadment application which ultimately came to be allowed by the Sole Arbitrator was filed by respondent no. 10, the appellants were neither placed on notice nor invited to file any objections by the Sole Arbitrator prior to the passing of the impugned order. Aggrieved by the order of 23 December 2021, the present appeals came to be instituted before this Court and on 03 March 2022 the Court proceeded to stay further proceedings before the Sole Arbitrator.

25. Respondent no.4, thereafter, moved a petition under Section 11 which came to be numbered as ARB. P. 773/2022 seeking constitution of an AT for resolution of disputes existing between the said petitioner and Mrs. Meenu Singhal, Ms. Shreya Singhal and Mr. Shaishav Singhal, parties who had been deleted from the original proceedings by the Sole Arbitrator on 24 November 2021.



26. The Court while proceeding to allow the said petition in terms of its order of 06 March 2023 observed as follows: -

“15. I have considered the submissions made by the learned counsels for the parties. The Family Settlement defines the Fourth Part thereto as under:-

“(4) Shri Pawan Singhal Son of Shri G.R. Singhal and Smt. Meenu Singhal Wife of Shri Pawan Singhal both residing at 39 Paschimi Marg, Vasant Vihar, New Delhi - 110057 together with Minor Daughter Ms Shreya Singhal and Minor Son Master Shaishav Singhal, both represented by their father Shri Pawan Singhal (hereinafter jointly referred to as parties OF THE FOURTH PART)”.

16. It further goes on to say that Fourth Part along with First Part of the Agreement, that is, Shri G.R. Singhal and his wife, will form ‘Group-I’ of the Family Settlement.

17. In the notice dated 03.03.2020, husband/father of the respondents Shri Pawan Singhal was also named and ARB.P. 331/2020 also impleaded him as a respondent. On the said petition, this Court has appointed an Arbitrator, observing as under:-

“27. The existence of Clause 3.15 of the MFS, cannot, in my view, be gainsaid in any manner. The clause exists; ergo, it is enforceable. No valid ground, to hold that Clause 3.15 of the MFS cannot be enforced, has been raised by Mr. Jagia, arguing for Respondent Nos. 1 to 3. In fact, as already noted hereinabove, an arbitral tribunal had been constituted, in accordance with Clause 3.15 of the MFS, to arbitrate on the disputes between the parties but, owing to the resignation of one of the named arbitrators, Clause 3.15 has become incapable of enforcement in the terms set out in the said clause.

30. It is always open, therefore, to the petitioners as well as the respondents to raise all contentions, before the arbitral tribunal, regarding the existence of the arbitration agreement, the validity of the arbitration agreement as well as the existence of an arbitrable dispute between the parties. It cannot be said that the



present case is one in which these issues cannot be examined by the arbitral tribunal.

31. In view thereof, I am of the opinion that, as there exist disputes between the parties which, prima facie, are arbitrable in nature, and Clause 3.15 of the MFS constitutes a valid arbitration agreement, the present petition under Section 11(6) of the 1996 Act, is maintainable. Owing to the resignation of S. Devender Singh Kohli, it is not possible for the arbitral tribunal to be constituted in the manner contemplated by Clause 3.15. The notice from the petitioner to the respondent, to appoint an arbitrator, to arbitrate on the dispute between them, has evoked no response. The task of appointing the arbitrator, therefore, falls on this Court under Section 11(6) of the 1996 Act.”

18. The Arbitrator having already been appointed for adjudicating the disputes between the executants of the Family Settlement, including the father of the respondents, who together with the respondents formed one group in the Family Settlement, in my opinion, this Court should not venture into the plea of limitation and other issues raised by the respondents as the same may prejudice such arbitration proceedings and parties, who are not parties to the present petition. It would always be open to the respondents to raise all these grievances and objections to the arbitration proceedings before the learned Arbitrator so appointed. In my opinion, in order to ensure that there are no conflicting findings and there is a full and final adjudication of the disputes that have arisen between the parties in relation to the Family Settlement, all disputes and questions of maintainability should be settled together by forum. In observing so, I am guided by the general principles which govern the family disputes and the family settlement.”

27. Pursuant to the aforesaid order, the disputes which formed subject matter of the aforementioned Section 11 petition also came to be referred for adjudication by the Sole Arbitrator who was already seized of the disputes which had arisen between the parties. Ms.



Meenu Singhal, Mrs. Shreya Singhal and Mr. Shaishav Singhal who were originally deleted from the proceedings pursuant to the order passed by the Sole Arbitrator, are presently before the said tribunal.

28. Having set out the foundational facts leading upto the filing of these appeals, the Court now proceeds to notice and consider the submissions which were addressed on the question which stands posed.

C. APPELLANTS' SUBMISSIONS

29. Appearing for the appellants, Mr. Mehta, learned senior counsel, as well as Mr. Bakhru, learned counsel addressed the following submissions. It was contended on behalf of the appellants that the AT has neither been vested with any jurisdiction to implead a third party nor is such a power discernible from the scheme of the Act. It was their submission that the appellants being non-signatories to the MFS could not have been impleaded in the arbitration proceedings. Both Mr. Mehta and Mr. Bakhru further submitted that the appellants had also not been placed upon notice in terms as envisaged under Section 21 of the Act and therefore this was thus a case where there was no valid commencement of arbitration proceedings against the appellants. Learned counsels submitted that a reference to arbitration is founded on consent and in the absence thereof addition of parties to arbitration proceedings cannot be countenanced in law. It was the contention of the appellants that if a power to implead were



recognised to inhere in an AT, it would empower it to join parties who may have never intended to subject themselves to its authority or resolved to have disputes adjudicated upon by that AT.

30. It was then submitted that while the Law Commission of India in its Report of August 2014 had specifically recommended amendments being introduced in Section 2(1)(h) of the Act and the words “*or any other person claiming through or under such party*” after the words “*party to an arbitration agreement*” being added, the said recommendation never came to be accepted or incorporated in the Act even though amendments were introduced in the statute in 2015 as well as 2019. This according to learned counsels manifests the clear intent of the Legislature to confine the authority of an AT to extend only to those who were parties to the arbitration agreement.

31. Learned counsels argued that Section 2(1)(h) continues to define a party to mean one who is a party to an arbitration agreement and thus necessarily being confined to its signatories. The attention of the Court was also drawn to Section 7 which again defines an arbitration agreement to mean one which is executed by parties who consent to submit all or certain disputes to arbitration and those disputes being such which emanate from a defined legal relationship, contractual or otherwise. It was submitted that Section 7(2) again lays emphasis on parties to an agreement and being restricted to those who have agreed for disputes being resolved by way of arbitration.



According to learned counsels, this too is indicative of a complete absence of jurisdiction or authority inhering in an AT to join non-signatories to arbitration proceedings.

32. Insofar as the alter ego and group of companies doctrine is concerned, learned counsels submitted that those precepts have been adopted only in certain special circumstances where courts had found on facts that there was a discernible intent of parties for the arbitration agreement to extend to and bind third parties. It was also pointed out from those decisions that courts had duly cautioned against the invocation of those principles unless the facts and circumstances clearly warranted such a direction being framed. It was additionally urged that merely because courts may have chosen to adopt those precepts, the decisions rendered on those lines cannot be read as empowering AT's to invoke those principles since the exercise of such a power must be recognised as being available to be wielded by courts alone.

33. Elaborating upon these aspects, it was submitted that proceedings relating to domestic arbitration are solely governed by the provisions contained in Part I of the Act. It was submitted that in terms of the provisions enshrined in that Part, arbitration proceedings could commence either on an application filed under Section 8 or Section 11 or in a situation where parties by consent agree to the reference of all disputes to an AT. It was, however, submitted that the



Act neither in express terms nor impliedly appears to confer any power upon an AT to implead parties to proceedings. It was submitted that the aforesaid issue is no longer res integra and stands conclusively decided in favour of the appellants in terms of the judgments rendered by the Madras High Court in **V.G. Santhosam & Ors. vs. Shanthi Gnanasekaran & Ors.**⁹ and **Abhibus Services India Pvt. Limited & Ors. vs. Pallavan Transport Consultancies Services Ltd.**¹⁰

34. Taking the Court, firstly through the decision in *V.G. Santhosam*, learned counsels placed reliance upon the following passages from that decision: -

“60. Section 17 of the Arbitration and Conciliation Act, 1996, provides interim measures ordered by the Arbitral Tribunal. The impleading petition is entertained under Section 17(1)(ii)(e), which states that “such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient”. By invoking the said provision of Law, the Tribunal can pass any order regarding interim measures. There is no express provision for impleadment in the Act. In the absence of any such express provision, the Arbitrator impliedly could entertain the impleading petition only under Section 17(1)(ii)(e) of the Arbitration and Conciliation Act, 1996. However, the said provision indicates that the power is to be exercised within the ambit of the Act and cannot be extended so as to exercise an inherent power by invoking the Code of Civil Procedure. Thus, the very findings of the Arbitrator by exercising wide powers under Order I, Rule 10 of the Code of Civil Procedure, he entertained the impleading petition is absolutely untenable and beyond the scope of the arbitral proceedings as well as the Act itself. Any interim measure is to be granted within the scope of the arbitral proceedings and not beyond the dispute raised between the parties for arbitration. Therefore, the very exercise of power to implead a third person who is unconnected with the Partnership Deed is improper and in violation of the very Scheme of the Act itself.

⁹ 2020 SCC Online Mad 560

¹⁰ 2022 SCC Online Mad 796



72. The abovesaid findings of the Hon'ble Supreme Court of India, in the case of *Chloro Controls India (P) Ltd.*, cited supra, is crystal clear that, while invoking an arbitral reference in multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. Such facts and circumstances would not arise as far as the present lis on hand is concerned. The present lis relates to a domestic arbitral proceedings wherein the Partnership Deed between the appellants and the respondents 2 to 6 are definite and regarding such facts, there is no dispute between the parties, including the first respondent. Therefore, the multi-party agreement with intrinsically interlinked causes of action has not arisen as far as the facts and circumstances of the present cases are concerned. In paragraph-70 of the judgment, cited supra, the Hon'ble Supreme Court unambiguously enumerated that normally, an arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. The occasional circumstances are narrated by the Supreme Court and in those circumstances, in the case of *Chloro Controls India (P) Ltd.*, cited supra, the Supreme Court arrived a conclusion that there is no absolute obstructions to law/the arbitration agreement. Arbitration and it could be possible between a signatory to an arbitration agreement and a third party. However, the Supreme Court held that heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. In paragraph-71, the Supreme Court held that the "Group of Companies Doctrine" was mainly extended in the judgment, cited supra, wherein there is a principal agreement and other ancillary agreements which flow from and out of the same transaction and the right also consequently flows between the parties, may not be signatory in the principal agreement. However, those circumstances have not arisen as far as the present cases are concerned. Even in paragraph-72 of the case of *Chloro Controls India (P) Ltd.*, cited supra, the Supreme Court held that "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. In this case, the facts regarding the execution of the Partnership Deed by the father of the first respondent late Mr. V.G. Panneerdas is not disputed by the first respondent. The reconstitution of Partnership Deeds on various occasions for the last 37 years are also not disputed between the parties, including the first respondent. Under these circumstances, the first respondent has filed a petition before the Arbitrator after a lapse of 37 years from the constitution of the original Partnership Deed by her father late Mr. V.G. Panneerdas. Therefore, the present cases cannot be construed as exceptional. The exceptional circumstances cannot be



extended in view of the fact that the present arbitration is a domestic arbitration without reference to Section 45 of the Arbitration Act, 1996 and this apart, the Partnership Deed between the father and sons were established and the same is admitted by the first respondent and there is no right flows from those Partnership Deeds in favour of the first respondent. This being the factum, the judgment of the Supreme Court, cited supra, may not have any application with reference to the facts and the circumstances of the present cases on hand and consequently, the reliance placed by the learned Senior Counsel appearing on behalf of the first appellant deserves no merit consideration.

77. The above proposition of law laid down by the Courts would reveal that the Arbitrator cannot exercise an inherent power conferred to the Civil Courts under the Code of Civil Procedure. The Arbitrator is bound to function within the scope and ambit of the Act and resolve the disputes between the contracted parties to the Arbitration Agreement as defined under the Act. Travelling beyond the scope of the Act is impermissible and if such an exercise is made, then the same would result in exercise of excess jurisdiction and finally the Arbitrator would be functioning as a Civil Court, which is not intended under the provisions of the Arbitration and Conciliation Act, 1996. When the Arbitrator is appointed under the Statute, scope, powers and jurisdiction shall be within the provisions of the said Statute. The Arbitrator is not empowered to travel beyond the scope of such powers and in the event of such an exercise, the same would cause prejudice to either of the parties to the Arbitration Agreement and this apart, certain common civil rights cannot be decided by the Arbitrator.

78. The sole object of the Arbitration Act is to resolve the disputes as expeditiously as possible with the minimum intervention of the Court of Law. The scope of Alternative Dispute Resolution (ADR) cannot be expanded so as to usurp the inherent powers of Civil Courts. Section 16 cannot be interpreted so as to entertain an application from any person, who is a third party to the Arbitration Agreement for the purpose of arbitral adjudications and competence of the Arbitral Tribunal to Rule of its Jurisdiction would indicate that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the Arbitration Agreement and for that purpose, the Tribunal may consider the facts and the terms and conditions of the agreement. Section 16(2) states that “a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence”.

80. This Court is of the considered opinion that even such a right is traceable in favour of the first respondent, then the only possible course would be to approach the Competent Court of Law and establish her legal right, if any, available based on the documents or the evidences.



Civil rights are to be established independently before the Competent Civil Court by the parties. However, such civil rights cannot be adjudicated or enforced by the Arbitrator in the contracted arbitration proceedings under the provisions of the Act. If an Arbitrator is allowed to adjudicate the civil rights of the parties or the rights regarding inheritance of properties, then it would result in submerger of the very Arbitration Agreement.

81. The Arbitrator is a person appointed in order to resolve the dispute between the parties under certain terms and conditions in the Arbitration Agreement. The disputes between the parties are definite and existence of Arbitration Agreement is an essential one, while-so, the Arbitrator cannot invoke the powers contemplated under Order 1, Rule 10 of the Code of Civil Procedure, wherein wide powers are granted, so as to implead a person, which is otherwise unconnected with the partnership or in the Arbitration Agreement. If such a concept of power to impleadment is provided to the Arbitrator, then the scope of arbitration proceedings will be, not only widened but, the purpose and the object of the Act, would be defeated. Thus, the Arbitrator is empowered to adjudicate the disputes strictly with reference to the Arbitration Agreement and with the consent of the parties to the Arbitration Agreement. Contrary to the contractual agreement between the parties, the Arbitrator cannot exercise any powers so as to implead a third party to the Arbitration Agreement for the purpose of adjudicating the right of any such third party.

99. The spirit of the order passed by the Arbitrator with reference to the Arbitration Act is to be considered by this Court. The above findings would reveal that the Arbitrator has made an initiation to decide the legal rights of the parties, including the rights of the first respondent. The Arbitrator in express terms held that the impleadment of party, provisions contained in the Code of Civil Procedure through Order 1, Rule 10 gives a wide power to a Court and in our context, the same must apply to an Arbitral Tribunal. Such a conclusion arrived by the Arbitral Tribunal is undoubtedly an exercise of inherent power, which is impermissible in law. The power which is not contemplated under the Arbitration Act, cannot be exercised by the Arbitral Tribunal. The power being statutory in character, the inherent power is not vested. While-so, the Arbitrator cannot invoke the provisions of the Code of Civil Procedure for the purpose of impleading a third person into the arbitral proceedings and he is bound to be strict with reference to the contracted Arbitration Agreement as well as the parties to the Arbitration Agreement and the adjudication must be within the parameters of the disputes raised between the parties to the Arbitration Agreement.”



35. It was submitted that an identical question arose for consideration in *Abhibus Services* where the Madras High Court upon an elaborate examination of the statutory scheme as well as precedents rendered on the subject made the following pertinent observations:-

“127. In the face of the fundamental jurisdictional question being raised inter alia on behalf of the appellants herein, this Court has already dealt with the scope of Section 17 of the Act. The section after amendment in 2016 has become a mirror image of Section 9 of the Act. It may therefore be plausible to argue that the arbitral Tribunal is vested with all the powers and jurisdiction enjoyed by the Courts under Section 9 of the A & C Act, 1996. After the amended Act 2016, the scope of Section 17 has considerably been widened, conferring the same power as enjoined upon the Courts under section 9. But did amendment to Section 17 make any quintessence change as to the fundamental character and status of the arbitral Tribunal to the extent of conferring the power on the Tribunal to implead non-signatory/third parties in arbitration proceedings? The answer could only be in the negative.

128. As concluded earlier in the judgment, the scope and the ambit of Section 17 are to be understood within the contours of its explicit language. After the amendment, the role of the referral courts at the threshold stage has been limited to prima facie consideration and in such consideration any doubt arises then, simply relegate as the doctrine goes “when in doubt do refer”. In order to avoid flooding of applications before the Courts under section 9, amendment to section 17 became necessary in keeping with the UNCITRAL Model Law and adopting the rule of priority in favour of the Arbitration. But it does not automatically follow that arbitral Tribunal can also exercise the residual or inherent power exclusively vest in the Courts. Therefore, it is to be held that even after widening of the scope of Section 17, the Tribunal cannot said to be vested with the power of impleadment of third party/non-signatory.

130. The conferment of power on the Tribunal of ruling on its own jurisdiction, is to advance the cause of arbitration in order to avoid the same being stultified by the vested interests. In the said legal and the statutory backdrop, it is once again plausible to contend that when the Tribunal can rule on its own jurisdiction, the power



to implead non-signatory/third party may well come within the sweep of the principle competence-competence. Ruling on its own jurisdiction pre-supposes existence of the Tribunal in the first place. The Tribunal owes its existence through operation of sections 8, 9 or 11 of the A & C Act, 1996. The power to rule on its own jurisdiction is a post facto contingency or eventuality. Only as a legal consequence of the reference, the Tribunal is given a life (jurisdiction) either defective or valid to rule on it. It can preside over its own destiny only with reference to the “reference” and not rule on non-reference.

131. In cases of impleadment of non-signatory/third party by the Tribunal the original reference by the Court in terms of Sections 8, 9 or 11 gets enlarged by adding more parties who were not party/parties to the reference. If such power is to be read anywhere in the whole scheme of Act as it stands today, the very concept of ‘reference’ to arbitration loses its sanctity. As long as the Tribunal does not enjoy any status of institution both in its form and substance, the power either patent or residual enjoyed by the Courts in terms of the provisions of the Act, cannot said to be enjoined upon the Tribunal. The arbitral Tribunal in the existing framework is authorised to rule on its jurisdiction but it cannot create a jurisdiction for itself. In substance, the exercise of power of impleadment of non-signatory/third party by the Tribunal would amount to vary the terms of the reference itself. Such overreach is antithetical to the concept and transitional edifice of arbitral Tribunal as envisaged in the scheme of the Act. By no liberal stretch of legal standards, ephemeral Tribunal can be said to enjoy any residual power, which power can only stated to be the attribute of a permanent judicial institution. Being created for a specific assignment and purpose, the Tribunal cannot said to have any inherent or implied power which could be read into the scheme of A & C Act, 1996.

132. A very careful reading of the Chapter IV and Section 16, the competence to rule on its own jurisdiction stems from the reference made by the judicial authority/Court under sections 8, 9 and 11 of the Act, as the case may be. It is legally possible for the arbitrator to hold and conclude that it has no jurisdiction over the matter and refuse to arbitrate i.e., in respect of a particular reference, dispute. But as far as the dispute arising between A’ party and a third party, though with reference to the same contractual agreement, the arbitral Tribunal cannot be said to be having any legal existence at



all. As far as such a dispute is concerned, the arbitral Tribunal is still born and not acquired the jurisdiction in the first place to rule on its own jurisdiction. In the conceptional framework, the arbitral Tribunal is not even a creature of the Statute for it assume the power in the absence of specific provision in the Act, clothing it with the authority. The arbitral Tribunal is a void mechanism and non-existent, unless and until the Courts bring its existence in the eye of law on a reference and the Court can also write its obituary as well, terminating its mandate in terms of the scheme of the Act.

133. This Court is unable to fathom out any section which can even remotely said to be conferring the power of impleadment on the arbitral Tribunal. In fact as rightly contended by the learned counsel for the appellants herein, there is no residuary power vested in the arbitral Tribunal to implead the third party to the arbitration. In fact, such a power has never been contemplated in the Act at all, pre or post amendment. The Tribunal owes its creation only to the reference by the judicial authority/court under sections 8, 9 or under section 11 of the Act. Once, the arbitral Tribunal comes into existence on the terms of reference, such terms of reference cannot be expanded or elongated during the course of the arbitration. There is a subtle distinction between ruling on its own referred jurisdiction after reference and conferring expanded or non-existent jurisdiction upon itself by exercise of the assumed power of impleadment.

134. Such power cannot be construed as incidental to the powers that are enjoined upon the Tribunal in the Scheme of A & C Act, 1996, for the essential reason that the underlying concept of arbitration is 'consent'. Whether there is explicit or implicit consent in terms of 2(1) (h) and Section 7 of the Act is for the Courts to rule on a prima facie consideration first, while exercising its jurisdiction under Section 8, 9 or 11 at the referral stage. In the event of non-signatory is referred to the arbitration on such consideration, the Tribunal gets an opportunity to apply the doctrine competence-competence in terms of Section 16. Any decision of the Tribunal is subject to appeal to the Court, as per Section 37. The competence bestowed upon the Tribunal to render a decision even on the fundamental plea of validity of its jurisdiction and its exercise of jurisdiction or exercise of the scope of the authority as provided in sub sections 2 and 3 of the Section 16 must be with reference to the terms of the arbitration agreement qua parties and not outside the arbitration agreement. But on the



other hand, the consideration whether a non-signatory to the arbitration agreement could be added in the arbitral proceedings obviously falls outside the expressed terms of the agreement and the prima facie ruling is contingent as being part of such consideration at the pre-referral stage.”

36. Learned counsels then drew the attention of the Court to the decision rendered by a learned Judge of this Court in **Sudhir Gopi vs. Indira Gandhi National Open University and Anr.**¹¹ where one of the questions which arose was whether the group of companies doctrine could be resorted to by an AT to implead a party. Proceeding to answer that question in the negative, this Court in *Sudhir Gopi* observed as follows: -

“15. The jurisdiction of the arbitrator is circumscribed by the agreement between the parties and it is obvious that such limited jurisdiction cannot be used to bring within its ambit, persons that are outside the circle of consent. The arbitral tribunal, being a creature of limited jurisdiction, has no power to extend the scope of the arbitral proceedings to include persons who have not consented to arbitrate. Thus, an arbitrator would not have the power to pierce the corporate veil so as to bind other parties who have not agreed to arbitrate.

16. There may be cases where courts can compel *non* signatory (ies) to arbitrate. These may be on grounds of (a) implied consent and/or (b) disregard of corporate personality. In cases of implied consent, the consent of non-signatory (ies) to arbitrate is inferred from the conduct and intention of the parties. Thus, in cases where it is apparent that the non-signatory (ies) intended to be bound by the arbitration agreements, the courts have referred such non-signatories to arbitration.

17. The second class of cases, is where a corporate form is used to perpetuate a fraud, to circumvent a statute or for other misdeeds. In such cases, the courts have disregarded the corporate façade and held the shareholders/directors (the alter egos) accountable for the obligations of the corporate entity.

20. The courts would, undoubtedly, have the power to determine whether in a given case the corporate veil should be pierced and the persons

¹¹ 2017 SCC Online Del 8345



behind the corporate façade be held accountable for the obligations of the corporate entity. However as stated earlier, an arbitral tribunal, has no jurisdiction to lift the corporate veil; its jurisdiction is confined by the arbitration agreement - which includes the parties to arbitration - and it would not be permissible for the arbitral tribunal to expand or extend the same to other persons.

34. As stated above, arbitration is founded on consent between the parties to refer the disputes to arbitration. The fact that an individual or a few individuals hold controlling interest in a company and are in-charge of running its business does not *ipso jure* render them personally bound by all agreements entered into by the company.

35. Arbitration agreement can be extended to non-signatories in limited circumstances; first, where the Court comes to the conclusion that there is an implied consent and second, where there are reasons to disregard the corporate personality of a party, thus, making the shareholder(s) answerable for the obligations of the company. In the present case, the arbitral tribunal has proceeded to disregard the corporate personality of UEIT. The arbitral tribunal has lifted the corporate veil only for the reason that UEIT's business was being conducted by Mr. Sudhir Gopi who was also the beneficiary of its business being the absolute shareholder (barring a single share held by Mr. Fikri) of UEIT. This is clearly impermissible and militates against the law settled since the nineteenth century. Any party dealing with the limited liability company is fully aware of the limitations of corporate liability. Business are organised on the fundamental premise that a company is an independent juristic entity notwithstanding that its shareholders and directors exercise the ultimate control on the affairs of the company. In law, the corporate personality cannot be disregarded. Undisputedly, there are exceptions to this rule and the question is whether this case falls within the scope of any of the exceptions.”

37. It was submitted further that the appellants had also not been placed upon notice of the intent of the respondents to join them in the arbitral proceedings. It was in this connection submitted that Section 21 of the Act and the notice which is envisaged to be issued thereunder serves a salutary purpose as was explained by the Court in



Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd¹²

in the following words: -

“25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be ‘disqualified’ to act an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons

¹² 2017 SCC OnLine Del 7228



outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

29. of course, as noticed earlier, parties may agree to waive the requirement of such notice under Section 21. However, in the absence of such express waiver, the provision must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of commencement of arbitration proceedings for the purpose of Section 43(1) of the Act, how is such date of commencement to be fixed if the notice under Section 21 is not issued? The provision talks of the 'Respondent' receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By overlooking this important step, and straightaway filing claims before an arbitrator appointed by it, a party would be violating the requirement of Section 21, thus frustrating an important element of the parties consenting to the appointment of an arbitrator.

30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the



arbitration proceedings that are commenced would be unsustainable in law.”

38. Viewed in that light, it was the submission of learned counsels that a failure to issue a Section 21 notice must be held to be fatal to the proceedings. It was additionally urged by learned counsels that the AT committed a manifest illegality in failing to place the appellants on notice before proceeding to frame the impugned order. This according to the appellants is not only violative of the principles of natural justice, but also in evident breach of the statutory obligation placed upon the AT itself to conduct those proceedings in accordance with the basic tenets of natural justice and ensure that the procedure adopted by it is in accord with the fundamental obligations required to be adhered to by an adjudicatory institution.

39. The respondents had also raised an issue with respect to the maintainability of the present appeals. It becomes pertinent to note that while the respondents were duly represented by learned counsels when these appeals came up for consideration initially on 03 March 2022, no objection with respect to the maintainability of these appeals appears to have been raised or addressed. However, and since the aforesaid objection was voiced in terms of the written submissions which were filed during the pendency of these proceedings, the objection was countered with learned counsels relying upon the decisions in *V.G. Santhosam* and *Abhibus* as well as the decision of this Court in **Edelweiss Asset Reconstruction Company Limited vs.**



GTL Infrastructure Limited and Another¹³. While the Court has already noticed the two decisions rendered by the Madras High Court on this question, it would be relevant to extract the following passages from *Edelweiss*: -

“96. Which brings us to the issue of whether, Edelweiss as a third party can maintain an appeal under Section 37 of the 1996 Act.

97. The only judgment, which pronounces on the maintainability of an appeal, by a third party, under Section 37 of the 1996 Act, has been rendered by a learned Single Judge of the High Court of Bombay in *Prabhat Steel Traders Private Ltd. v. Excel Metal Processes Pvt. Ltd.*.

98. In the said decision, the High Court of Bombay noted that the interim measures, which could be awarded by an Arbitral Tribunal in exercise of its power under Section 17, could, very conceivably, affect third parties, who were not privy to the arbitration agreements. In conjunction therewith, it was noticed that, though the expression “party” was defined in Section 2(1)(h), Section 37 did not stipulate that an appeal, thereunder, could be filed only by a party in the agreement. The High Court of Bombay also placed reliance on the judgment of Supreme Court in *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*¹⁵, which recognises the permissibility of adding parties, who were strangers to the arbitration agreement, in arbitral proceedings, albeit in exceptional cases. The High Court observed and held, in paras 38 to 42, 47, 49, 50, 54, 59 to 61, 66 to 68, 73 and 102 of the report, thus:

“38. Section 2(1)(h) defines “party” means a party to an arbitration agreement. Sections 2(1)(h) to 36 refers the “party” for different purposes. However, section 37 does not provide that an appeal under the said provision can be filed only by the parties to the arbitration agreement. By virtue of the amendment inserted by the Act 2 of 2016 with effect from 23rd October, 2015 thereby amending section 17 of the Arbitration & Conciliation Act, 1996, powers which are available with the Court under section 9 for grant

¹³ 2020 SCC Online Del 2081



of interim measures, identical powers are now also granted to the arbitral tribunal.

39. A perusal of section 17(1)(ii) clearly indicates that though such interim measures under section 17 can be applied only by a party to the arbitral tribunal and more particularly specified in section 17(1)(ii)(a) to (e), such reliefs may in some of the cases affect even third parties.

40. The said provision clearly indicates that a party to the arbitration agreement who is permitted to apply for interim measures to the arbitral tribunal under the said provision and seek interim measures of protection in respect of any goods which are subject matter of the arbitration agreement or even to enter upon any land or building in possession of any party. Under section 17(1)(d) such party to the arbitration agreement can even apply for interim measures for appointment of a Court Receiver or for such interim measures or protection as may be appeared to the arbitral tribunal to be just and convenient. There may be a situation that a property or goods may belong to a third party who is not a party to the arbitration agreement but still a relief may be applied in respect of such goods or properties belonging to a third party and more particularly if a party to the arbitration agreement is either in possession or custody thereof claiming any right therein in any manner whatsoever.

41. In such a situation, where third party who is the owner of such goods or properties or claiming any right, title or interest in respect of such goods or properties but may not be in physical possession thereof and such goods or properties being in possession of one of the party to the arbitration agreement, such a third party is obviously going to be affected if any order is passed by the arbitral tribunal for interim measures under section 17 of the Act. There is no dispute about the proposition of law that a third party cannot appear before the arbitral tribunal and seek any interim measures under section 17 of the Arbitration & Conciliation Act, 1996 or seek any modification or variation of the interim measures if granted by the arbitral tribunal against such third party though he may be aggrieved by such interim measures granted by the arbitral tribunal.



42. The question therefore arises for consideration of this Court is whether a third party who is aggrieved by any such order of interim measures granted by the arbitral tribunal can file an appeal under section 37 of the Arbitration & Conciliation Act, 1996 after obtaining the leave of the Court or otherwise and whether can impugn such order of the arbitral tribunal in respect of any goods or properties in respect of any such right, title or interest claimed by such third party or in any other manner affected by such interim measures or not.

47. The question thus arises for consideration of this Court is that whether the remedy of an appeal under section 37 of the Arbitration & Conciliation Act, 1996 can be availed off by such a third party who is affected by an order of interim measures granted by the arbitral tribunal under section 17 of the Arbitration & Conciliation Act, 1996. Learned counsel for the respondents did not dispute the proposition that if a third party is impleaded in the proceedings under section 9 of the Arbitration & Conciliation Act, 1996 filed by a party to the arbitration agreement or the rights of any third party is affected by an order passed by a Court in an application under section 9 of the Arbitration & Conciliation Act, 1996 filed by a party to the arbitration agreement, such third party can apply for impleadment or intervention in such proceedings and to apply for modification and/or for variation of such order. If such third party does not succeed in such application for modification or variation of the order passed by a Court in favour of a party to the arbitration agreement affecting the right, title and interest of such third party, such third party can file an appeal under section 37 of the Arbitration & Conciliation Act, 1996 before the Court under section 2(1)(e) of the Act.

49. The Division bench construed Rule 803E of the Bombay High Court (Original Side) Rules and has held that section 9 is distinct from Section 17 in as much as Petition under section 17 is moved before the Arbitrator for an order against a party to the proceedings, whereas section



9 vests remedy in a party to arbitration proceedings to seek interim measure of protection against a person who need not be either party to the arbitration agreement or to the arbitration proceedings. In the said proceedings under section 9, third party was also impleaded since the grant of the proposed relief was to incidentally affect those third parties. This Court entertained an appeal under section 37 of the Arbitration Act filed by such third party who was affected by the order passed by the learned Single Judge under section 9 though dismissed the said appeal on merit.

50. In view of the fact that powers of Court under section 9 to grant interim measures and powers of the arbitral tribunal under section 17 of the Arbitration Act are identical in view of the amendment to section 17 with effect from 23rd October 2015, in my view, even a third party who is directly or indirectly affected by interim measures granted by the arbitral tribunal will have a remedy of an appeal under section 37 of the Arbitration Act. The principles of law laid down by the Division bench of this Court in the case of *Girish Mulchand Mehta and Durga Jaishankar Mehta v. Mahesh S. Mehta and Harini Cooperative Housing Society Ltd.* (supra) can be extended to this situation.

54. Though a stranger to an agreement cannot be allowed to be impleaded as party to the arbitral proceedings before the arbitral tribunal and more particularly under section 17 of the Arbitration Act nor can such third party seek impleadment to the proceedings before the arbitral tribunal, he is however not precluded from challenging the said order before the arbitral tribunal under section 17 if he so aggrieved by such order by invoking the remedy of an appeal under section 37 of the Arbitration Act.

59. In order to invoke jurisdiction of the Court under Section 45, the applicant should satisfy the prerequisites stated in Section 44 of the 1996 Act.

60. Chapter I, Part II deals with enforcement of certain foreign awards in accordance with the New York



Convention, annexed as Schedule I to the 1996 Act. As per Section 44, there has to be an arbitration agreement in writing. To such arbitration agreement the conditions stated in Schedule I would apply. In other words, it must satisfy the requirements of Article II of Schedule I. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration their disputes in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The arbitration agreement shall include an arbitration clause in a contract or an arbitration agreement signed by the parties or entered in any of the specified modes. Subject to the exceptions stated therein, the reference shall be made.

61. The language of Section 45 read with Schedule I of the 1996 Act is worded in favour of making a reference to arbitration when a party or any person claiming through or under him approaches the Court and the Court is satisfied that the agreement is valid, enforceable and operative. Because of the legislative intent, the mandate and purpose of the provisions of Section 45 being in favour of arbitration, the relevant provisions would have to be construed liberally to achieve that object. The question that immediately follows is as to what are the aspects which the Court should consider while dealing with an application for reference to arbitration under this provision.

66. Mr. Nariman, learned senior counsel appearing on behalf of the appellant, contended that in terms of Section 45 of the 1996 Act, parties to the agreement shall essentially be the parties to the suit. A stranger or a third party cannot ask for arbitration. They have to be essentially the same. Further, the parties should have a clear intention, at the time of the contract, to submit any disputes or differences as may arise, to arbitration and then alone the reference contemplated under Section 45 can be enforced.

67. To the contra, Mr. Salve, the learned senior counsel appearing for respondent No. 1, submitted that the phrase “at the request of one of the parties or any person claiming



through or under him” is capable of liberal construction primarily for the reason that under the 1996 Act, there is a greater obligation to refer the matters to arbitration. In fact, the 1996 Act is the recognition of an indefeasible Right to Arbitration. Even a party which is not a signatory to the arbitration agreement can claim through the main party. Particularly, in cases of composite transactions, the approach of the Courts should be to hold the parties to the bargain of arbitration rather than permitting them to escape the reference on such pleas.

68. At this stage itself, we would make it clear that we are primarily discussing these submissions purely on a legal basis and not with regard to the merits of the case, which we shall shortly revert to.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

102. Joinder of non signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as



being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is “no” and the same is supported by a number of reasons.”

99. I concur, respectfully, with the exposition of the law, in the passages from *Prabhat Steel Traders Private Ltd.*, extracted hereinabove.”

40. As noted hereinabove, the issue of maintainability of an appeal against an order passed by the AT impleading parties had also arisen before the Madras High Court in *V.G. Santhosam* where the learned Judge had held as follows: -

“40. Regarding the maintainability of the Civil Miscellaneous Petitions under Section 37, this Court is of the opinion that there is no express provision under the Act to entertain an impleading petition by the Arbitrator. However, the Arbitrator impliedly entertained the impleading petition under Section 17(1)(ii)(e) of the Act, which states that such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient. This apart, impleading a person in the main arbitration proceeding is an interim measure. Even an independent interpretation with reference to the impugned order passed by the Arbitrator, the first respondent is made to participate in the arbitral adjudications. Therefore, the said impugned order, now under challenge, is to be treated as an interim measure within the meaning of Section 17(1)(ii)(e) of the Act. When the impugned order is an interim measure, permitting a person to implead herself in the arbitration proceedings, then Section 37 will come into force and accordingly, the present Civil Miscellaneous Appeals are maintainable under Section 37(2)(b) of the Act.

42. No order of an Arbitrator can remain as remediless. There is no express provision in the Arbitration Act for the impleadment of the third party. Thus, any such interim application filed for impleadment by a third person is necessarily to be treated as an application under Section 17(1)(ii)(e) of the Act. Once the impleadment is allowed, then the right of appeal cannot be denied. The Arbitrator allowed a third person to a contracted Arbitration Agreement to participate in the arbitral proceedings and such an order of impleadment cannot be construed as a final order in the arbitration proceedings. Therefore, an appeal under Section 37(2)(b) of the Arbitration Act, is entertainable by this Court and



consequently, the point of maintainability raised by the first respondent is devoid of merits and stands rejected.”

D. CONTENTIONS OF RESPONDENTS

41. Mr. Singh, learned counsel appearing for the respondent nos. 4 to 7 submitted that the AT has in clear and unequivocal terms come to the conclusion that the appellants are liable to be viewed as necessary parties and was thus justified in ordering their impleadment in the proceedings in question. It was his submission that undoubtedly the industrial plot which forms the subject matter of the agreement to sell dated 21 October 2010, comprised an essential element of the MFS. Mr. Singh submitted that despite the unambiguous terms of the MFS requiring a division of the industrial plot between Group I and Group II, Mr. Pawan Singhal and other respondents in control of Taurus India surreptitiously proceeded to transfer that property in favour of Arupri. According to Mr. Singh, unless the AT is recognised to have the jurisdiction to examine the validity of the said disposition, the very edifice of the MFS would crumble and disintegrate. Mr. Singh submitted that this Court must also bear in consideration that the validity of the agreement to sell and the conveyance in favour of Arupri was a question which could not have been authoritatively ruled upon by the AT in the absence of the appellants. There was thus, according to learned counsel, a clear and compelling imperative to join the appellants in the proceedings before the AT.



42. Mr. Singh further laid stress on the fact that the AT was essentially concerned with the implementation of a family settlement. Learned counsel submitted that courts and as a necessary corollary the AT must always remain cognizant of the special equities which imbue family settlements and arrangements. It was his submission that when the aforesaid principles are borne in mind, it would be apparent that the order of the Sole Arbitrator merits no interference at all.

43. It was further urged by Mr. Singh that the non-inclusion of the appellants would not only cause grave prejudice to parties before the Sole Arbitrator but also result in a failure to effectively implement the terms of the MFS and render an effective quietus to the disputes which have arisen. It was submitted that even if it were assumed that the appellants were not necessary parties by virtue of not being a signatory to the MFS, they are clearly liable to be viewed as proper parties and thus impleaded in the proceedings. According to Mr. Singh, the absence of the appellants would result in the AT being impeded from effectively and comprehensively ruling upon the rights of parties and rendering a finality to the disputes that exist.

44. Continuing on to the question of the power to implead that must be recognised to exist in an AT, it was submitted that while the AT may not be bound by the provisions of the **Code of Civil Procedure, 1908**¹⁴, that by itself would not detract from the its right to otherwise

¹⁴ CPC



draw sustenance from the various provisions of the CPC in order to effectively resolve the disputes which arise. Reliance in this regard was placed on the following principles as enunciated in **SREI Infrastructure Finance Limited vs. Tuff Drilling Private Limited**¹⁵:-

“17. Section 19 of the Act provides for determination of rules of procedure. Sub-section (1) of Section 19 provides that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872. The words “Arbitral Tribunal shall not be bound” are the words of amplitude and not of a restriction. These words do not prohibit the Arbitral Tribunal from drawing sustenance from the fundamental principles underlying the Civil Procedure Code or the Evidence Act but the Tribunal is not bound to observe the provisions of Code with all of its rigour. As per sub-section (2) of Section 19, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings.

26. There cannot be a dispute that the power exercised by the Arbitral Tribunal is quasi-judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the Arbitral Tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution insofar as the power of procedural review is concerned. We have already noticed that Section 19 provides that the Arbitral Tribunal shall not be bound by the rules of procedure as contained in the Civil Procedure Code. Section 19 cannot be read to mean that the Arbitral Tribunal is incapacitated in drawing sustenance from any provisions of the Code of Civil Procedure. This was clearly laid down in *Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn.* [*Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn.*, (2009) 8 SCC 646 : (2009) 3 SCC (Civ) 481] . In para 98(n), the following was stated: (SCC p. 693)

¹⁵ (2018) 11 SCC 470



“(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. “Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice.” (See *ICICI LTD. v. Grapco Industries Ltd.* [*ICICI LTD. v. Grapco Industries Ltd.*, (1999) 4 SCC 710])

27. We thus are of the view that principles underlying Order 9 Rule 9 can very well be invoked by the arbitrator. There is nothing on record to indicate that parties have agreed to the contrary. The issue, which has arisen for consideration has engaged attention of different High Courts from time to time. The Patna High Court in *SenboEngg. Ltd. v. State of Bihar* [*SenboEngg. Ltd. v. State of Bihar*, 2003 SCC OnLine Pat 1189 : AIR 2004 Pat 33] , had occasion to consider the order terminating the proceedings under Section 25(a). The Patna High Court after considering the provision has held that the Arbitral Tribunal has power to review on sufficient cause being shown. In para 32, the following has been laid down: (SCC OnLine Pat)

“32. I find the submissions of Mr Chatterjee well founded. Mr Chatterjee has relied upon the provisions of the Act itself (that is to say, the internal aids to interpretation) in support of the point that on sufficient cause being shown, the Arbitral Tribunal has full authority and power to recall an order under Section 25(a) of the Act. I think that one would arrive at the same conclusion on the basis of some external aids to interpretation.””

45. Mr. Singh then submitted that in light of the jurisprudence which has evolved across jurisdictions including India with respect to the alter ego principles, it would be wholly incorrect for the appellants to urge that non-signatories cannot be joined in arbitration proceedings. It was the submission of Mr. Singh that the AT has in this regard rightly rested his conclusions on the decisions rendered by



the Supreme Court while dealing with the scope and ambit of the “group of companies” doctrine.

46. Appearing for respondent nos. 1 to 3, Ms. Taneja submitted that the issue of third parties being impleaded in arbitration proceedings stands authoritatively settled in light of the decision rendered by the Supreme Court in **Chloro Controls India Private Limited vs. Severn Trent Water Purification INC.**¹⁶ as well as the various decisions rendered post *Chloro Control* and it would thus be incorrect to proceed on the premise that a non-signatory, even though it be a mere alter ego, cannot be joined merely because it may not have been an actual signatory to the arbitration agreement.

47. Additionally learned counsel sought to sustain her submission with respect to the authority of the AT to implead parties by placing reliance upon the following passages as appearing in the decision rendered by the Bombay High Court in **Maharashtra State Electricity Board vs. Datar Switchgear Ltd**¹⁷:-

“41. In sub-section (1) of section 19, the Act has prescribed that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or by the Evidence Act, 1872. These are words of amplitude and not of restriction. These words do not prohibit the Arbitral Tribunal from drawing sustenance from the fundamental principles underlying the Civil Procedure Code or Evidence Act, but free the Tribunal from being bound, as would a Civil Court, by the requirement of observing the provisions of the Code and the law relating to evidence with all its rigour.

¹⁶ (2013) 1 SCC 641

¹⁷ 2002 SCC Online Bom 983



Sub-section (2) of section 19 preserves the consensual nature of the arbitral proceeding by laying down that subject to the provisions of Part-I, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. The freedom which is conferred upon the parties to agree on the procedure to be followed by the Arbitral Tribunal is regulated by Part-I but subject to that regulation parties are otherwise free to agree on arbitral procedure and the conduct of proceedings. In the event that parties are not agreed on the procedure to be followed in the conduct of proceedings, the Arbitral Tribunal is again, subject to Part-I, free to conduct the proceedings in a manner which it considers appropriate. Sub-section (4) of section 19 provides some indication of the contents of sub-section (3). Sub-section (4) lays down that the power of the Arbitral Tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Sub-section (4) is of course not exhaustive of the content of sub-section (3) but provides an instance of the power conferred by sub-section (3).”

48. It was then submitted that bearing in mind the fact that the transaction between the appellants related to an asset which undisputedly formed the subject matter of the MFS, they were clearly liable to be recognised as necessary and proper parties and thus the order of the Sole Arbitrator is liable to be upheld and affirmed. Learned counsel further argued that the facts clearly bear out that respondent no. 10 had transferred the industrial plot with the sole objective of frustrating the family settlement, and since the said transfer was in clear abuse of process, the issue of consent of the appellants would not arise at all.

49. Ms. Taneja further relied upon the celebrated decision of the Supreme Court in **Kale vs. Deputy Director of Consolidation**¹⁸ and

¹⁸ 1976 3 SCC 119



which had recognised the special pedestal upon which family settlements are liable to be placed. Learned counsel placed reliance upon the following principles as enunciated in that decision: -

“9. Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise *Kerr on Fraud* at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus:

“The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.”

The object of the arrangement is to protect the family from long-drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term “family” has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a *spes successionis* so that future disputes are sealed for ever and the family instead of fighting



claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In *Halsbury's Laws of England*, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

“A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term “family arrangement” is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements.”

10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

“(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;



(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made *under the document* and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.”

11. The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, which we shall discuss presently.

12. In *Lala Khunni Lal v. Kunwar Gobind Krishna Narain* [LR 38 IA 87, 102 : ILR 33 All 356 : 8 ALJ 552] the statement of law regarding the essentials of a valid settlement was fully approved of by their Lordships of the Privy Council. In this connection the High Court made the following observations which were adopted by the Privy Council:

The learned Judges say as follows:

“The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on



each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the courts to uphold and give full effect to such an arrangement.

Their Lordships have no hesitation in adopting that view.”

13. In *SahuMadho Das v. Pandit Mukand Ram* [(1955) 2 SCR 22, 42-43 : AIR 1955 SC 481] this Court appears to have amplified the doctrine of validity of the family arrangement to the farthest possible extent, where Bose, J., speaking for the Court, observed as follows:

“It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid in anticipation, future disputes which might ruin them all, and we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present.”

14. In *Ram Charan Das v. Girjanandini Devi* [(1965) 3 SCR 841, 850-851 : AIR 1966 SC 323] this Court observed as follows:

“Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word ‘family’ in the context is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute The consideration for such a settlement, if



one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. That consideration having been passed by each of the disputants the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter.”

15. In *Tek Bahadur Bhujil v. Debi Singh Bhujil* [AIR 1966 SC 292, 295 : (1966) 2 SCJ 290] it was pointed out by this Court that a family arrangement could be arrived at even orally and registration would be required only if it was reduced into writing. It was also held that a document which was no more than a memorandum of what had been agreed to did not require registration. This Court had observed thus:

“Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.”

16. Similarly in *Maturi Pullaiah v. Maturi Narasimham* [AIR 1966 SC 1836 : (1967) 1 SCJ 848] it was held that even if there was no conflict of legal claims but the settlement was a bona fide one it could be sustained by the Court. Similarly it was also held that even the disputes based upon ignorance of the parties as to their rights were sufficient to sustain the family arrangement. In this connection this Court observed as follows:

“It will be seen from the said passage that a family arrangement resolves family disputes, and that even disputes based upon ignorance of parties as to their rights may afford a sufficient ground to sustain it.

* * *

Briefly stated, though conflict of legal claims in praesenti or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and



the terms thereof are fair in the circumstances of a particular case, courts will more readily give assent to such an arrangement than to avoid it.”

17. In *Krishna Beharilal v. Gulabchand* [(1971) 1 SCC 837 : 1971 Supp SCR 27, 34] it was pointed out that the word “family” had a very wide connotation and could not be confined only to a group of persons who were recognised by law as having a right of succession or claiming to have a share. The Court then observed: [SCC p. 843, paras 7-8]

“To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in *Ram Charan Das v. Girjanandini Devi* the word “family” in the context of a family arrangement is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement — see *Ram Charan Das case* [(1965) 3 SCR 841, 850-851 : AIR 1966 SC 323] .

The courts lean strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all.”

18. In the recent decision of this Court in *S. Shanmugam Pillai v. K. Shanmugam Pillai* [(1973) 2 SCC 312] the entire case law was discussed and this Court observed as follows: [pp. 319, 321-322, paras 12, 24-25]

“If in the interest of the family properties or family peace the close relations had settled their disputes amicably, this Court will be reluctant to disturb the same. The courts generally lean in favour of family arrangements.

* * *

Now turning to the plea of family arrangement, as observed by this Court in *SahuMadho Das v. Pandit Mukand Ram* the courts lean strongly in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all. As observed in that case the family arrangement can as a matter of law be inferred from a long course of dealings between the parties.

In *MaturiPullaiah v. MaturiNarasimham* this Court held that although conflict of legal claims in praesenti or in future is generally a condition for the validity of family arrangements, it is



not necessarily so. Even bona fide disputes present or possible, which may not involve legal claims would be sufficient. Members of a joint Hindu family may to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an agreement is entered into bona fide and the terms thereto are fair in the circumstances of a particular case, the courts would more readily give assent to such an agreement than to avoid it.”

19. Thus it would appear from a review of the decisions analysed above that the courts have taken a very liberal and broad view of the validity of the family settlement and have always tried to uphold it and maintain it. The central idea in the approach made by the courts is that if by consent of parties a matter has been settled, it should not be allowed to be reopened by the parties to the agreement on frivolous or untenable grounds.

20. A Full Bench of the Allahabad High Court in *Ramgopal v. Tulshi Ram* [AIR 1928 All 641, 649 : 26 ALJ 952] has also taken the view that a family arrangement could be oral and if it is followed by a petition in court containing a reference to the arrangement and if the purpose was merely to inform the court regarding the arrangement, no registration was necessary. In this connection the Full Bench adumbrated the following propositions in answering the reference:

“We would, therefore, return the reference with a statement of the following general propositions:

With reference to the first question:

(1) A family arrangement can be made orally.

(2) If made orally, there being no document, no question of registration arises.

With reference to the second question:

(3) If though it could have been made orally, it was in fact reduced to the form of a “document”, registration (when the value is Rs 100 and upwards) is necessary.

(4) Whether the terms have been ‘reduced to the form of a document’ is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

(5) If the terms were not ‘reduced to the form of a document’, registration was not necessary (even though the value is Rs 100 or upwards); and while the writing cannot be used as a piece of evidence for what it may be worth, e.g. as corroborative of other



evidence or as an admission of the transaction or as showing or explaining conduct.

(6) If the terms were ‘reduced to the form of a document’ and, though the value was Rs 100 or upwards, it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document.”

21. Similarly in *Sitala Baksh Singh v. Jang Bahadur Singh* [AIR 1933 Oudh 347, 348-349] it was held that where a Revenue Court merely gave effect to the compromise, the order of the Revenue Court did not require registration. In this connection the following observations were made:

“In view of this statement in para 5 of the plaint it is hardly open to the plaintiffs now to urge that Ex. 1, the compromise, required registration when they themselves admit that it was embodied in an order of the Revenue Court and that it was given effect to by the Revenue Court ordering mutation in accordance with the terms of the compromise.

* * *

We hold that as the revenue court by its proceedings gave effect to this compromise, the proceedings and order of the revenue court did not require registration. Similarly in a later decision of the same court in *Kalawati v. Krishna Prasad* [ILR 19 Luck 57, 67 : AIR 1944 Oudh 49] it was observed as follows:

“Applying this meaning to the facts of the present case, it seems to us that the order of the mutation court merely stated the fact of the compromise having been arrived at between the parties and did not amount to a declaration of will. The order itself did not cause a change of legal relation to the property and therefore it did not declare any right in the property.”

22. The same view was taken in *Bakhtawar v. Sunder Lal* [AIR 1926 All 173, 175 : ILR 48 All 213 : 24 ALJ 116] where Lindsay, J., speaking for the Division Bench observed as follows:

“It is reasonable to assume that there was a bona fide dispute between the parties which was eventually composed, each party recognizing an antecedent title in the other. In this view of the circumstances I am of opinion that there was no necessity to have this petition registered. It does not in my opinion purport to create, assign, limit, extinguish or declare within the meaning of these expressions as used in Section 17(1)(b) of the Registration Act. It is merely a recital of fact by which the court is informed that the parties have come to an arrangement.”



23. Similarly the Patna High Court in *Awadh Narain Singh v. Narain Mishra* [AIR 1962 Pat 400 : 1962 BLJR 881] pointed out that a compromise petition not embodying any terms of agreement but merely conveying information to the court that family arrangement had already been arrived at between the parties did not require registration and can be looked into for ascertaining the terms of family arrangement. This is what actually seems to have happened in the present case when the mutation petition was made before the Assistant Commissioner.

24. This Court has also clearly laid down that a family arrangement being binding on the parties to the arrangement clearly operates as an estoppel so as to preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same. We shall deal with this point a little later when we consider the arguments of the respondents on the question of the estoppel. In the light of the decisions indicated above, we shall now try to apply the principles laid down by this Court and the other courts to the facts of the present case.”

50. Insofar as the principles relating to the lifting of the corporate veil and the “group of companies” principle was concerned, learned counsel in addition to the judgements of the Supreme Court in *Chloro Controls* and **Cheran Properties Limited vs. Kasturi and Sons Limited**¹⁹ also sought to draw sustenance from the following observations as rendered by the Court in **GMR Energy Limited vs. Doosan Power Systems India Private Limited & Ors**²⁰:-

“65. Issue No. 3 : Whether the Arbitral Tribunal has no jurisdiction to pierce the corporate veil?

66. Learned counsel for GMR Energy contends that the concept of piercing the corporate veil is within the domain of the courts and not of the Arbitral Tribunal as held by the Supreme Court in *Balwant Rai Saluja* (supra). It is further contended that the principle of alter ego was considered by the Single Judge of this Court in *Sudhir Gopi* (supra) wherein the Court held that an arbitrator does not have the power to pierce the corporate veil which function is essentially of the Court.

¹⁹ (2018) 16 SCC 413

²⁰ 2017 SCC Online Del 11625



67. Learned counsel for Doosan India contends that this Court in *Sudhir Gopi* (supra) failed to consider the issue of arbitrability of alter ego by the Arbitral Tribunal. Relying upon the decision in *A. Ayyasamy* (supra) wherein the Court laid down the non-arbitrability disputes, it is contended that the issue of alter ego does not fall in the category of non-arbitrable disputes hence can be determined by the Arbitral Tribunal. Reliance is also placed on the decision of the Bombay High Court in *Integrated Sales* (supra) wherein the High Court held that issues which were arbitrable can be gone into by a tribunal in a foreign seat arbitration. It is further contended that notions of international arbitration jurisprudence are different from notions of domestic arbitrability as noted in the book '*International Commercial Arbitration* (Second Edition), 2nd edition by Gary B. Born'.

68. In *Sudhir Gopi* (supra) this Court was dealing with the arbitration agreement which falls in Part-I of the Arbitration Act, and held that whether a court will compel any person to arbitrate would have to be examined in the context of the specific provisions of the applicable statute. Though it is universally accepted principle that dispute resolution by arbitration must be encouraged, however, the courts determine the question whether an individual or an entity can be compelled to arbitrate, guided by the domestic law and the judicial standards of their country. This Court further held that the courts would undoubtedly have the power to determine whether in a given case the corporate veil should be pierced or not, however, an arbitral tribunal has no jurisdiction to lift the corporate veil, its jurisdiction being confined by the arbitration agreement which included the parties to arbitration and it would not be permissible for the arbitral tribunal to expand or extend the same to other persons. Continuing the discussion, this Court also noted that an arbitration agreement can be extended to a non-signatory in limited circumstances, firstly, where the Court comes to the conclusion that there is an implied consent and secondly, where there are reasons to disregard the corporate personality of a party, thus, making the shareholders answerable for the obligations of the company. Thus, this Court recognized that though limited, corporate veil could be lifted but it was for the court to do it and not the arbitral tribunal. To come to this conclusion this Court in *Sudhir Gopi* (supra) referred to the decision in *DDA v. Skipper Construction* (supra) wherein the Court lifted the corporate veil for the reason the corporate character was



being employed for the purpose of committing illegality or for defrauding others.

69. The Constitution Bench comprising of seven judges of the Supreme Court in (2005) 8 SCC 618 *SBP & Co. v. Patel Engineering Ltd.* held that an order of reference to an arbitration under Section 11 of the Arbitration Act was a judicial decision and not an administrative decision. The Chief Justice could also decide the question whether the claim was a dead one or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It was further held that the Chief Justice is also required to enquire whether the conditions for exercise of his power under Section 11(6) of the Arbitration Act have been fulfilled.

70. Following the Constitution Bench decision in *SBP & Co. (supra)* Supreme Court in (2009) 1 SCC 267 *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* identified and segregated three categories for consideration in an application under Section 11 of the Arbitration Act, Category (1) being where the Chief Justice/his designate has to/must decide the issue; Category (2) where the Chief Justice/his designate may choose to decide the issues or leave them to the decision of the Arbitral Tribunal and Category (3) where the Chief Justice/his designate should leave the issues exclusively to the Arbitral Tribunal. Issues falling in the three categories were noted as under:—

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.



(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

71. In *National Insurance Co. Ltd.* (supra) Supreme Court also drew a distinction between a reference to arbitration under Section 11 of the Arbitration Act and a dispute referred to the Arbitral Tribunal without the intervention of the Court and noted the questions which could be decided by the Arbitral Tribunal as under:—

21. It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction : (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void, and if so, whether the invalidity extends to the arbitration clause also. It follows, therefore, that if the respondent before the Arbitral Tribunal contends that the contract has been discharged by reason of the claimant accepting payment made by the respondent in full and final settlement, and if the claimant counters it by



contending that the discharge voucher was extracted from him by practising fraud, undue influence, or coercion, the Arbitral Tribunal will have to decide whether the discharge of contract was vitiated by any circumstance which rendered the discharge voidable at the instance of the claimant. If the Arbitral Tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the Arbitral Tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits.”

72. In *A. Ayyasamy* (supra) Supreme Court laid down that though the Arbitration Act does not specify but the courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The Court laid the categories of non-arbitrable disputes being : (i) patent, trademarks and copyright; (ii) antitrust/competition laws; (iii) insolvency/winding up; (iv) bribery/corruption; (v) fraud; and (vi) criminal matters.

73. Following the decision in *SBP & Co.* (supra) and *National Insurance Co. Ltd.* (supra) Supreme Court in *Chloro Controls* (supra) held as under:—

“129. We are not oblivious of the principle “kompetenzkompetenz”. It requires the Arbitral Tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The kompetenzkompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration



agreement. (Refer Fouchard Gaillard Goldman on International Commercial Arbitration.)

130. This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II Chapter I is suggestive of the requirement for the court to determine the ingredients of Section 45, at the threshold itself. It is expected of the court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the court in accordance with law would certainly attain finality and would not be open to question by the Arbitral Tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and reagitating of same issues over and over again. The underlining (sic underlying) principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in SBP & Co. takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorization referred to by this Court in National Insurance Co. Ltd. is founded on the decision by the larger Bench of the Court in SBP & Co., we see no reason to express any different view. The categorization falling under para 22.1 of National Insurance co. case would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the Arbitral Tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the Arbitral Tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the



decision of the Court is unreviewable by the Arbitral Tribunal.

131. Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well:

131.1 To illustratively demonstrate it, we may give an example. Where Party A is seeking reference to arbitration and Party B raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the Arbitral Tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the Arbitral Tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage hold that the agreement between the parties was null and void inoperative and incapable of being performed. The court may also hold that the Arbitral Tribunal had no jurisdiction to entertain and decide the issues between the parties.

131.2 The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality.

131.3 Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in Anderson Wright Ltd. took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the court to decide first of all



whether there is a binding agreement for arbitration between the parties to the suit or not.

131.4 Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration.”

74. Singapore High Court in the decision reported as 2006 SGHC 78 *Aloe Vera of America, Inc. v. Asianic Food(s) Pte. Ltd.* held:

72. In my opinion, the above submissions are misplaced. It is clear from the wording of the section itself that the determination of whether a matter is arbitrable or not is governed by Singapore law. The law of Arizona is irrelevant. As far as Singapore law is concerned, as para 20.149 of Halsbury's points out, no specific subjects have been identified by statute as being or as not being arbitrable. Instead, Halsbury's states:

It is generally accepted that issues, which may have public interest elements, may not be arbitrable, for example citizenship or legitimacy of marriage, grants of statutory licences, validity of registration of trade marks or patents, copyrights, winding-up of companies ...

Whether a person is the alter ego of a company is an issue which does not have a public interest element. It normally arises in a commercial transaction in which one party is trying to make an individual responsible for the obligations of a corporation. In my judgment, such an issue can in an appropriate case be decided by arbitration. In this case, the Arbitrator had first found an agreement between Mr. Chiew to arbitrate as he found the latter to be “properly a party to this arbitration as a party under the broad definition found in paragraph 13.7 of the Agreement”. It was only after hearing evidence at the final hearing that the Arbitrator found that Mr. Chiew was the alter ego of Asianic based on Arizona law. As the Arbitrator had clearly found Mr. Chiew to be a party to the arbitration agreement with AVA, he was entitled to go on and decide in the course of the arbitration



whether or not Mr. Chiew was the alter ego of Asianic. This issue was within the scope of the submission to arbitration and was clearly arbitrable.

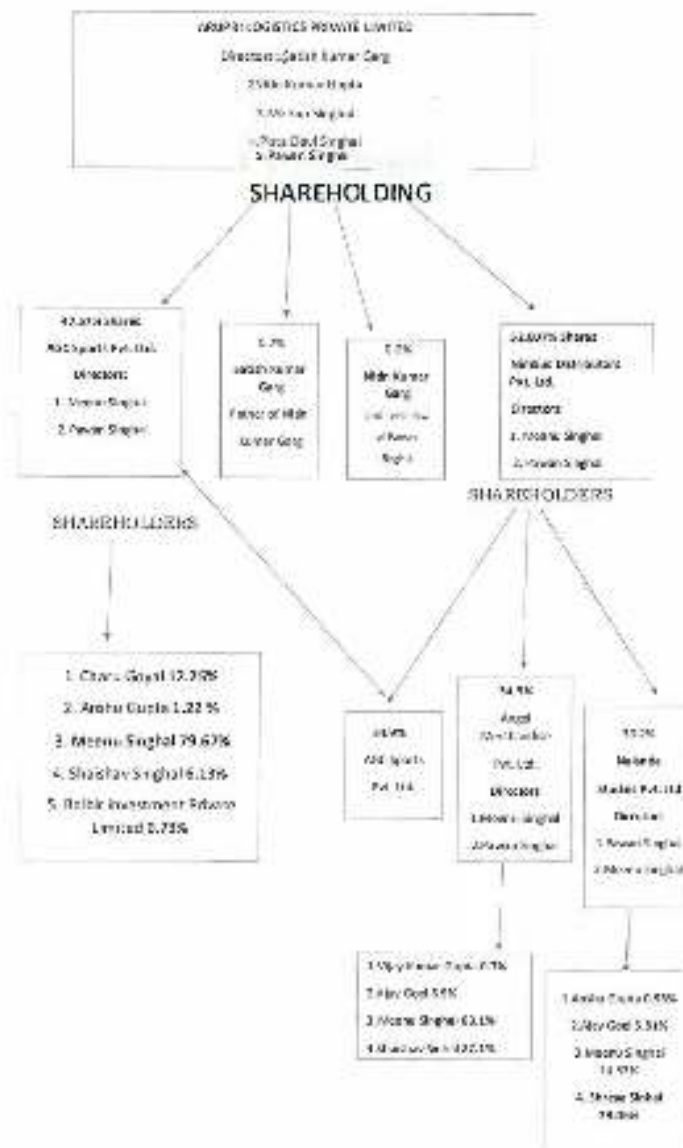
75. In *Chloro Controls* (supra) the Supreme Court also drew distinction between the question of formal validity of the arbitration agreement and nature of parties to the agreement and held:

*106. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its *ratione personae* scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.*

76. In *Chloro Controls* (supra) Supreme Court reiterated the decision in *National Insurance Co. Ltd.* (supra) wherein a distinction was carved out between a court referred arbitration and an arbitration without the intervention of the Court. In *Chloro Controls* (supra) Supreme Court was dealing with an application under Section 45 of the Arbitration Act seeking reference to arbitration. In the present case the arbitration was initiated without the intervention of the Court and only after initiation of the arbitration, GMR Energy filed the present suit invoking the jurisdiction of this Court seeking an injunction against arbitration to proceed against it on the basis of issue of alter ego. The issue of alter ego not falling within the categories of non-arbitrable disputes as specified in *A. Ayyasamy* (supra) and the nature of parties to the agreement being distinct from the formal validity of the arbitration agreement and a question of merit as held in *Chloro Control* (supra) would thus fall in the category (2) laid down by *National Insurance Co. Ltd.* (supra) even if considering that Doosan India has filed an application under Section 45 before this Court which is without prejudice to its right. Thus, the issue of alter ego based on the facts as noted in the present case and not on fraud can be decided by the Court as well as the Arbitral Tribunal.”



51. It was further urged by Ms. Taneja that Arupri, on admitted facts, is liable to be viewed as a mere alter ego of respondent no. 10 and his wife, Mrs. Meenu Singhal, as would be evident from the shareholding pattern as captured and encapsulated in the following chart:-





52. Respondent nos. 8 to 10 have supported the challenge mounted by the appellants and had addressed submissions on lines similar to those advanced by Mr. Mehta and Mr. Bakhru.

E. MAINTAINABILITY OF THE APPEALS

53. The first issue which may be conveniently disposed of relates to the maintainability of the instant appeals. As was noticed in the preceding parts of this decision, the aforesaid objection was raised for the first time through the written submissions which were filed. Notwithstanding the same, the Court even otherwise and on due consideration of the objection so raised is of the considered opinion that the appeals would be maintainable for reasons which are recorded hereinafter.

54. Undisputedly, the Sole Arbitrator has invoked jurisdiction and impleaded the appellants herein. The source of that jurisdiction would necessarily have to be found within the four corners of the statute itself. Although the Act does not incorporate any specific provision empowering the AT to join parties, it nonetheless appears to have proceeded on the assumption that such a power must be recognised to exist. In *V.G. Santhosam*, the source of a power to implead was traced back to and construed to impliedly exist in and flow from Section 17. It was on the aforesaid basis that the aforementioned decision had proceeded to hold the appeal to be maintainable. Since the AT has chosen to implead, this Court would have to necessarily presume that



it did recognize such an authority being available to be exercised by it either in Sections 17 or 19 of the Act. This the Court is constrained to observe since the AT does not specifically allude to any provision of the Act with the aid of which the appellants came to be joined in the proceedings.

55. However, once the AT has assumed authority to join the appellants in purported exercise of the powers conferred upon it under the Act, the provisions of Section 37 would clearly come into play. Surely, it would not be open for the respondent to urge that even though the Act does not explicitly speak of a power to implead, the power must be recognised to inhere in the AT and yet urge that the appeals would not be maintainable. It may also be noted that even if the Court were to ultimately come to the conclusion that neither Section 17 nor Section 19 can be recognised as embodying the source of a power to implead, the same would not detract from the maintainability of the appeals. This since the AT itself has assumed authority to join parties by invoking the provisions of the Act. More importantly, it would not be open for the respondents to assert that the appeals would not be maintainable once having invited the AT itself to invoke Section 17 and join non-signatories to the proceedings. The Court additionally notes that it was the contention of Mr. Singh that the measure framed by the Sole Arbitrator must be understood to be in furtherance of its right to draw sustenance from the provisions of the CPC. According to learned counsel, even in the absence of a specific



conferral power, the Sole Arbitrator could have impleaded the appellants on a conjoint reading of the aforementioned provisions.

56. The fact that the AT presumably proceeded principally in light of Section 17 appears to be evident when one bears in mind Section 19 which is essentially confined to the determination of rules of procedure. It becomes pertinent to observe that Section 19 of the Act enables the AT to conduct proceedings in such manner that it may consider appropriate, unless parties otherwise agree upon a particular procedure being followed. However, what this Court finds and deems necessary to emphasize is that Section 19 cannot possibly be read or construed as a source of power. It remains, as is fortified from a reading of its heading, confined to the procedure that may be adopted by the AT.

57. This Court further finds itself unable to read Section 19 as either constituting a source of power of the AT or being liable to be read as clothing an AT with powers akin to those which otherwise inhere in or are recognised to exist in courts in general. It is pertinent to note that Section 19 merely stipulates that an AT shall not be bound by the CPC or the **Indian Evidence Act, 1872**²¹. It must be noted that merely because an AT is not held to be bound by the aforementioned two statutes, the same does not elevate its status or authority over and above that of courts in general. Section 19(1) is an embodiment of the

²¹ the Evidence Act



legislative intent to free AT's from the procedural fetters and rules of evidence that may otherwise regulate the conduct of an ordinary trial before courts. This is exactly what the Supreme Court intended to convey in *SREI Infrastructure* when it observed that the phrase “*shall not be bound*” as appearing in Section 19(1) are words of amplitude and not of restriction. In *SREI Infrastructure*, it was further observed that while an AT may not be bound by the rules of procedure as contained in the CPC, the same cannot be read to mean that it would be barred from drawing sustenance or guidance from its provisions.

58. As this Court reads Section 19(1), it finds that all that the said provision purports to achieve is to unfetter an AT from the rigors of procedure as embodied in the two statutes noticed above. While it may still be open for the AT to seek guidance and regulate its procedure bearing in mind the underlying principles flowing through the provisions of the CPC or the Evidence Act, that would not be liable to be read as either conferring additional powers upon an AT or arming it with the plethora of powers that may be otherwise specifically conferred upon courts in terms of those statutes.

59. The power to implead stands conferred upon a court specifically in terms of Order I Rule 10 of the CPC. The aforesaid power is introduced in the CPC to enable the court to either strike out the name of parties or join parties whose presence in its opinion is necessary in order to enable it to effectively adjudicate upon and settle all questions



involved. What needs to be remembered is that the power to implead stands vested in a court under the CPC by virtue of an express conferral of power in terms of Order I Rule 10(2). The power to implead and join has not been understood to exist in Section 151 of the CPC and which deals with inherent powers.

60. The position which emerges from the aforesaid discussion is that the power to implead is one which stands specifically conferred by virtue of a provision duly incorporated in the CPC. The power stands placed in the hands of a court in order to enable it to effectively resolve disputes and arrive at a just settlement of questions that stand raised before it. However, and contrary to the above, the Act fails to incorporate a power to implead insofar as the AT is concerned. The power to conduct proceedings in a manner considered appropriate and which is recognised by Section 19(3) also cannot possibly be stretched to be read as a source of the authority of an AT to join parties.

61. It is relevant to note that the discretion conferred on an AT to formulate the procedure to be followed in proceedings which it proposes to initiate cannot be extended to contemplate joinder of persons who are not signatories to an arbitration agreement. This more so since the joinder of parties which may otherwise not be signatories to an arbitration agreement raises substantive issues. The impleadment of a party in arbitral proceedings results in that individual or entity becoming bound by an award, interim or final, that may be rendered



by the AT even though it may have never consented to seek resolution of questions by that tribunal. The impleadment of a party unilaterally by the AT thus results in a non-signatory being subjected to the authority of that tribunal and accepting its right to adjudicate upon disputes even though it may have never consented to subject itself to the authority of the said AT. This would clearly militate against the principle of “party consent” which forms the very foundation of arbitration.

62. That leaves the Court to presume that the AT proceeded in passing the impugned order perceiving such a power to exist in Section 17. As noted hereinabove, since the impugned order fails to allude to any provision, the Court is constrained to proceed on that assumption. If the impugned order thus be understood to have been passed by the AT by virtue of the powers conferred by Section 17, the appeals would clearly be maintainable. The objection as raised in this regard shall consequently stand negated.

F. AUTHORITY OF A TRIBUNAL AND INHERENT POWERS OF COURTS

63. That then takes the Court to the principal question which stands posited and relates to the power of the AT to implead parties other than those who may be signatories to the arbitration agreement. It must, at the outset, be noted that an AT owes its genesis to parties resolving to confer authority on a person or an institution to render an



award and adjudicate upon disputes that may arise. While the courts may intervene by virtue of the provisions of Section 11 of the Act, they do so only in cases where parties are unable to agree upon the constitution of an AT. However, even where the courts do constitute an AT by virtue of Section 11, the person or institution so designated remains a private forum which springs into existence principally in light of the agreement of parties and their resolve to have their disputes decided by that tribunal.

64. An AT constituted either upon consensus of parties or consequent to intervention by courts remains a forum outside the ordinary hierarchy of legal institutions on which the justice dispensation system of our nation rests. It owes its genesis to the agreement between the parties and upon its constitution comes to be governed by the provisions of the Act. It is thus not an adjudicatory institution which can claim to be vested with inherent powers.

65. Inherent powers are those which have been recognised to inhere in courts forming part of the formal hierarchy of legal institutions and which may be compendiously referred to as national courts. AT's thus constitute forums outside the circuit of national courts and remain to be institutions which owe their existence principally to the agreement between parties. **Redfern and Hunter on International Arbitration, Sixth Edition** while dealing with the subject of source of the power to arbitrate contains the following elucidating passages: -



“b) Sources of arbitrators’ powers

(i) Powers conferred by the parties

5.08 The parties may confer powers upon the arbitral tribunal directly or indirectly, but only within the limits of the applicable law. Any excess of power (that is, any power granted over and above that allowed by the applicable law) is invalid, even if it is contained in international or institutional rules of arbitration.

5.09 A 'direct' conferment of powers takes place when the parties agree expressly upon the powers that they wish the arbitrators to exercise, possibly by setting them out in the terms of appointment or a submission agreement. Such powers are likely to include the powers to order production of documents, to appoint experts, to hold hearings, to require the presence of witnesses, to receive evidence, and to inspect the subject matter of the dispute. The ways in which these powers may be expressly conferred upon the arbitral tribunal in submission agreements have been described in more detail elsewhere in this volume.

5.10 An 'indirect' conferment of powers takes place when the parties have agreed that the arbitration is to be conducted according to pre-established rules of arbitration that set out the powers of the tribunal. In the case of the International Chamber of Commerce (ICC), some of these powers are conferred on the ICC's International Court of Arbitration itself. For example, the place of arbitration is determined by the ICC Court, unless it has been chosen by agreement of the parties.

(ii) Powers conferred by operation of law

5.11 The powers conferred upon an arbitral tribunal by the parties, whether directly or indirectly, fall short of the powers that may be exercised by a national court. Such courts derive their authority from the state, which grants to them formidable coercive powers to ensure obedience to their orders. An arbitral tribunal does not usually possess such powers. The parties cannot confer upon a private tribunal the coercive powers over property and persons that are conferred by the state on a national court. In recognition of this fact, many systems of law supplement the powers of arbitral tribunals by:

- giving powers directly to arbitral tribunals;



- authorising national courts to exercise powers on behalf of arbitral tribunals or the parties themselves; or a combination of these two methods.”

66. As has been aptly observed by the learned authors, the AT does not possess powers which are recognised to otherwise exist in courts. This since while the latter derive their authority from the State, AT's are creatures of a contract. An AT remains an institution which comes to be constituted merely on the basis of a private agreement between parties. It must also be remembered that the inherent power recognised to exist in courts flows from their right to act *ex debito justitiae*. The power to do so has always been recognised to exist in national courts with Section 151 of the CPC merely recognizing and reaffirming that power inhering in courts. This aspect was lucidly explained by a Full Bench of the Allahabad High Court in **Raj Narain Saxena Vs. Bhim Sen**²²:-

“4. Moreover, there is Sec. 151 in the Code preserving the inherent power of the court “to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.” This expressly authorises a court to make such orders as it considers necessary for the ends of justice or prevention of abuse of the process of the court. A court can make any order even though not provided in the Code, the only condition being that it is necessary for the ends of justice or prevention of abuse of the process of the court. The provisions of the Code are generally meant to serve the ends of justice but in their very nature they cannot reach all possible circumstances that can exist and there are bound to be no provisions dealing with some of the circumstances. Also some of the provisions may result in abuse of

²² AIR 1966 All 84



the process of the court. Consequently every court has the inherent power, recognised by Sec. 151, to make any orders that it considers necessary for the ends of justice or preventing abuse of the process of the court. The Code cannot and does not even purport to, be exhaustive and hence the residuary power has been conferred upon the court through recognition of its inherent power. With this residuary power the Code is now exhaustive; for circumstances which are likely to exist frequently or can be contemplated there are express provisions; for others there is the inherent power of the court. The existence of the inherent power pre-supposes that any order that is not prohibited is within the competence of the court. Any order not prohibited by the Code can be made by a court; if it is expressly provided for it is made by virtue of that authority and if it is not expressly provided for it is made because of its being necessary for the ends of justice or prevention of abuse of the process of the court. I respectfully adopt the statement of Mahmood, J. in *Narsingh Das v. Mangal Dubey* [I.L.R. 5 Alld. 163.] that “Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law” subject to only this condition that the procedure that is not provided for expressly by the Code must be justified on the ground of the ends of justice or of prevention of abuse of the process of the court. In *Gupteshwar Missir v. Chaturanand Missir* [A.I.R. 1950 Patna 309.] Sinha, J., with whom Rai, J. concurred, said at page 310 that “it is true the Code is not exhaustive, but certainly it is exhaustive in matters specifically provided for.” What is not exhaustive is the Code minus Sec. 151; since Sec. 151 contains the residuary power it necessarily follows that the power conferred by the remaining provisions is not exhaustive. It is also not correct to say that the Code is exhaustive in matters specifically provided for because even in respect of such matters the court is left free to make a different order if it is necessary for the ends of justice or prevention of abuse of the process of the court. Consequently, rule 5, cannot be said to be exhaustive of the circumstances in which an



application for permission can be rejected; it can be rejected in other circumstances to secure the ends of justice or prevent abuse of the process of the court and rejecting an application on the ground that the court has no jurisdiction over it is rejecting it for the ends of justice and preventing abuse of the process of the court. If the court has no jurisdiction it would be abuse of its process if it is made to proceed on it. The only just order that can be passed on such an application is that of rejection. It is unusual for a legislature, when vesting a certain power in a particular authority, to enact an express provision that an authority other than it must reject an application for its exercise (on the ground of want of jurisdiction); obviously this is because the authority to which an application is made has inherent jurisdiction to refuse to exercise a power not vested in it. I respectfully agree with what was said in *Nanda Kishore Singh v. Ram Golam Sahu* [I.L.R. 40 Cal. 955 at p. 960.] . In *Shamu Patter v. Abdul Kadir Ravuthan* [L.R. 39 Indian Appeals 218 at page 223.] it was pointed out by his Lordship Amer Ali that “every court trying civil cases has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties” even in the absence of any provision in the Code.”

67. What the Court seeks to highlight is the superior powers which are recognised to exist in national courts as opposed to ATs’ generally. Statutes while according recognition to the inherent powers recognised to exist in national courts accept such a supervening power inhering in those courts and which enables them to pass such orders as would subserve the ends of justice. AT’s on the other hand derive the power to adjudicate based on an express conferral of authority by parties to an agreement. Even where parties confer a power on the AT to arbitrate, that conferral must be within the contours of the applicable law. This would take us back to the provisions specifically



engrafted in the Act. The Court thus comes to the definite conclusion that an AT cannot be recognised to have an inherent power to implead or join a non-signatory.

68. We also find ourselves unable to recognize the power to implead as flowing from Sections 16 or 17 of the Act. Section 16 as is manifest from its plain language empowers the AT to rule on its own jurisdiction. It is in essence an adoption of the *kompetenz-kompetenz* principle as recognized to inhere in AT's. The power to rule on jurisdiction or on objections with respect to the existence or validity of the arbitration agreement cannot possibly be recognized as a source of power to implead parties. It is essentially concerned with the right of the AT to rule on any jurisdictional objection that may be raised by parties before it. The authority to render a decision on a jurisdictional question or challenge that may be raised cannot be stretched to infer a power to join parties to the arbitration proceedings.

G. POWER TO IMPLEAD - WHETHER A CONCOMITANT OF SECTION 17 OF A&C ACT 1996?

69. Insofar as Section 17 is concerned, none of the interim measures of protections which are spelt out in clauses (a) to (e) of Section 17(1)(ii) deal with or confer authority upon the AT to join non-signatories. At least none of those clauses explicitly speak of a power to implead. The power to frame an interim measure which may be considered to be "*just and convenient*" and which is spoken of in



clause (e) also cannot be justifiably extended as embodying a power to implead. This since Section 17 fundamentally deals with “*interim measures*”. The impleadment or the joinder of a party to arbitral proceedings cannot be construed to be an order which may be termed as either interim or interlocutory. This since the moment a party is joined in the proceedings, it becomes bound by the award which may be ultimately rendered by the AT.

70. This Court also finds itself unable to recognize a power to implead being liable to be read in Section 17 merely because post its amendment by Act 3 of 2016 the AT now stands empowered to grant interim measures at par with the power which stands vested in courts in terms of Section 9 of the Act. The clear intent underlying the amendment to Section 17 is to enable AT’s to frame interim measures from a position of equivalence with courts. The amendment to Section 17 appears to have been motivated solely by the felt need to save courts from being deluged with applications for interim relief. However, one must not lose sight of the fact that both Section 17 as well as Section 9 continue to deal with interim measures. The power to join a party and thus subject it to the ultimate decision and award that may be rendered by the AT cannot be conceived to be a component of the power to frame interim orders under Section 17. The Court in this respect concurs with the view expressed by the Madras High Court and reflected in Paras 127–134 of *Abhibus* as well



as the legal position as enunciated and explained in Paras 81 and 99 of *V.G. Santhosam*.

H. A “PARTY” UNDER THE A&C ACT 1996

71. The agreement to arbitrate is founded upon the consent of parties. This is clear from the plain language of Section 2(1)(h) of the Act. It becomes relevant to note at this juncture that the Law Commission of India in Report No. 246 had in fact recommended an expansive amendment to the word “*party*” as would be evident from the following extracts of its report: -

“DEFINITION OF “PARTY”

61. Arbitration is a consensual form of dispute resolution, with the Arbitral Tribunal deriving powers and authority on the basis of the “contract” or the “agreement” between the parties. This agreement has far reaching consequences — it takes away the right of the party to the arbitration agreement to avail its remedies in a court of law for resolution of the disputes covered by the terms of the arbitration agreement; and makes the consequent award binding, with a limited right of recourse in terms of S. 34 of the Act. 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.

62. 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-ego's 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 recognised by the New York Convention, 1985 which in Art. II (1) recognises an



agreement between parties “in respect of a *defined legal relationship*, whether contractual or not.”

63. The Arbitration and Conciliation Act, 1996 under s. 7 borrows the definition of the “arbitration agreement” from the corresponding provision at art. 7 of the UNCITRAL Model law which in turn borrows this from art. II of the New York Convention. However, the definition of the word “party” in S. 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. This was recognised by the Hon'ble Supreme Court in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.* [(2013) 1 SCC 641], where the Hon'ble Supreme Court was dealing with the scope and interpretation of s. 45 of the Act and, in that context, discussed the scope of the relevant doctrines on the basis of which “non-signatories” could be said to be bound by the arbitration agreement, including in cases of inter-related contracts, group of companies doctrine, etc.

64. This interpretation given by the Hon'ble Supreme Court follows from the wording of s. 45 of the Act which recognises the right of a “person claiming through or under [a party]” to apply to a judicial authority to refer the parties to arbitration. The same language is also to be found in s. 54 of the Act. This language is however, absent in the corresponding provision of s. 8 of the Act. It is similarly absent in the other relevant provisions, where the context would demand that a party includes also a “person claiming through or under such party”. To cure this anomaly, the Commission proposes an amendment to the definition of “party” under s. 2(h) of the Act.”

72. Although that Report was submitted in August 2014 and various amendments have been introduced in the Act thereafter, Section 2(1)(h) has remained unchanged. The meaning to be ascribed to the word “*party*” as appearing in the Act at different places has come to be expanded only in Section 8 which in terms of the



Arbitration and Conciliation (Amendment) Act, 2015²³ incorporates the phrase “*a party to the arbitration agreement or any person claiming through or under him*”. The only other provision in which the word “*parties*” was further extended is Section 45 which too incorporates the phrase “*or any person claiming through or under him*”. However, and significantly, both Sections 8 and 45 deal with powers conferred on a “judicial authority” as opposed to an AT. Insofar as the AT is concerned therefore, it would be the provisions of Section 2(1)(h) alone which would apply.

I. THIRD PARTIES TO ARBITRATION AGREEMENTS - AN INTERNATIONAL PERSPECTIVE

73. The subject matter of third parties to arbitration agreement has been extensively discussed in **Redfern and Hunter on International Arbitration**. The celebrated authors observe that while party consent remains a pre-requisite for arbitration, the joinder of third parties in such proceedings has been the subject matter of considerable debate. It is observed that the joining of third parties in arbitration proceedings owes its origin to the “alter ego” and “group of companies” principles. The learned authors have observed that the joinder of non-signatories has been sought to be justified either on the contract and agency principles or where on facts courts have found that the precepts of “alter ego” or “group of companies” stands

²³ Act 3 of 2016



attracted. The Court deems it apposite to extract the following passages from the aforementioned work: -

“b) Third parties to the arbitration agreement

2.42 Party consent is a prerequisite for international arbitration. Such consent is embodied in an agreement to arbitrate, which, as discussed earlier, will generally be concluded 'in writing' and signed by the parties. The requirement of a signed agreement in writing, however, does not altogether exclude the possibility that an arbitration agreement concluded in proper form between two or more parties might also bind other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the 'group of companies' doctrine, pursuant to which the benefits and duties arising from an arbitration agreement may, in certain circumstances, be extended to other members of the same group of companies; and secondly, by operation of general rules of private law—principally those governing assignment, agency, and succession. Thus, by way of example: the affiliate of a signatory to an arbitration clause find itself a co-respondent in arbitration proceedings; an assignee of an insurance contract may be able to commence arbitration against the insurer of the original insured party; a principal may find itself bound by an arbitration agreement signed by its agent; or a merged entity may continue to prosecute arbitral proceedings commenced by one of its original constituent entities.

2.44 Although an objection of principle may readily be made—namely, that corporate personality is created precisely in order to contain liability within a particular corporate entity—in practice much will depend on the construction of the arbitration agreement in question, as well as the circumstances surrounding the entry into, and performance of, the underlying contract.

2.45 The *Dow Chemical* case has been invoked as the leading authority on the 'group of companies' doctrine. In that case, a claim was successfully brought before an ICC tribunal not only by the companies that had signed the relevant agreements, but also by their parent company, a US corporation, and a French subsidiary in the same group. However, a subsequent ICC tribunal ruled that 'there is no general rule in French international arbitration law that



would provide that non-signatory parties members of the same group of companies would be bound by an arbitration clause'. The Swiss and English courts have also refused to accept that a third party may be bound by an arbitration agreement merely because it has a legal or commercial connection to one of the parties.

2.46 Some now argue that the *Dow Chemical* award and the judgment of the Paris Cour d'Appel confirming the award have been misinterpreted, and do not in fact lend support to an independent 'group of companies' doctrine. They note that, on a close reading of the decision, the tribunal's analysis was based on the parties' common intention, and its decision may be explained by reference to the traditional requirement for consent in international arbitration.

2.47 In fact, the tribunal found that:

[T]he arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, *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. ”

74. Proceeding further to deal with the issue of joinder and intervention, **Redfern and Hunter** have explained the legal position as under: -

“(c) Joinder and intervention

2.59 Unlike litigation in state courts, in which third parties can often be joined to proceedings, the jurisdiction of an arbitral tribunal to allow for the joinder or intervention of third parties to an arbitration is limited. The tribunal's jurisdiction derives from the will of the parties to the arbitration agreement and therefore joinder or intervention is generally only possible with the consent of all parties concerned. As between the original parties to the arbitration agreement, such consent may be either express, implied, or by reference to a particular set of arbitration rules agreed to by the parties that provide for joinder.



2.60 Following recent revisions to many of the main institutional rules, most now contain a specific provision for joinder of third parties to an arbitration. For example, Article 7(1) of the ICC Rules provides that:

A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the 'Request for Joinder') to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party.... No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.”

75. It is pertinent to note that the **UNCITRAL Arbitration Rules, 2021**²⁴ in Article 17 specifically empower an AT to allow one or more third persons to be joined in the arbitration. However, the said power is hedged with the joinder being made dependent upon the request of any party and additionally the said third person being a party to the arbitration agreement. Article 17 of the UNCITRAL Rules is extracted hereinbelow: -

“Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid

²⁴ UNCITRAL Rules



unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration."

76. Provision for impleadment of third parties is also found in some of the provisions incorporated in legislations framed by nations as well as institutional rules. For instance, the **Swiss Rules of**



International Arbitration, 2021²⁵ in Article 6 deals with the issue of joinder and intervention as under: -

“CROSS-CLAIM, JOINDER, INTERVENTION

Article 6

1. A party asserting a claim against another party other than a claim in the Notice of Arbitration or a counterclaim in the Answer to the Notice of Arbitration (cross-claim), or a party asserting a claim against an additional party (joinder), or an additional party asserting a claim against an existing party (intervention), shall do so by submitting a notice of claim. Article 3 shall apply mutatis mutandis.

2. Prior to the constitution of the arbitral tribunal, such notice of claim shall be submitted to the Secretariat. The Secretariat shall notify it together with any exhibits to the addressee of the claim, all other parties and any confirmed arbitrator. Any objection to the application of these Rules to the claim or any other jurisdictional objection, including that claims made under more than one Arbitration Agreement may not be determined together, shall be raised by the addressee of the claim or any other party within 15 days from the date of receipt of the notice of claim. Article 5 shall apply mutatis mutandis.

3. After the constitution of the arbitral tribunal, any crossclaim, request for joinder or request for intervention shall be decided by the arbitral tribunal, after consulting with all parties, taking into account all relevant circumstances.

4. Where a third person requests or is requested by a party to participate in the arbitration proceedings in a capacity other than an additional party, the arbitral tribunal, after consulting with all parties and the third person, shall decide on whether to permit such participation and on its modalities, taking into account all relevant circumstances.”

77. However, and as is evident from a reading of the said provision, it also places the AT under the obligation of placing the party

²⁵ Swiss Rules



proposed to be joined on notice. Article 6(3) further stipulates that any request for joinder or intervention if received after the constitution of the AT would be decided only after due consultation with all parties and taking into account relevant circumstances. The Swiss Rules thus represent a statutory scheme which specifically deals with the subject of joinder and impleadment of additional parties.

78. The **ICC Arbitration Rules 2021**²⁶ and more particularly Article 7 thereof again regulates the joinder of additional parties. For the purposes of appreciating the scheme underlying the subject of joinder of parties, the Court deems it apposite to extract Articles 6 and 7 hereunder: -

“Article 6: Effect of the Arbitration Agreement

1. Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.
2. By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.
3. If any party against which a claim has been made does not submit an Answer, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the

²⁶ ICC Rules



Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

4. In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:

(i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7,-(1), with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist; and

(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

5. In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.

6. Where the parties are notified of the Court's decision pursuant to Article 6(4) that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not, and in respect of which of them, there is a binding arbitration agreement.

7. Where the Court has decided pursuant to Article 6(4) that the arbitration cannot proceed in respect of any of the claims, such decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.



8. If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

9. Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be nonexistent or null and void.

MULTIPLE PARTIES, MULTIPLE CONTRACTS AND CONSOLIDATION

Article 7: Joinder of Additional Parties

1. A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)– 6(7) and 9. Unless all parties, including the additional party, otherwise agree, or as provided for in Article 7(5), no additional party may be joined after the confirmation or appointment of any arbitrator. The Secretariat may fix a time limit for the submission of a Request for Joinder.

2. The Request for Joinder shall contain the following information:

- a) the case reference of the existing arbitration;
- b) the name in full, description, address and other contact details of each of the parties, including the additional party; and
- c) the information specified in Article 4(3), subparagraphs c), d), e) and f).

The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.

3. The provisions of Articles 4(4) and 4(5) shall apply, *mutatis mutandis*, to the Request for Joinder.



4. The additional party shall submit an Answer in accordance, *mutatis mutandis*, with the provisions of Articles 5(1)–5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.

5. Any Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable. In deciding on such a Request for Joinder, the arbitral tribunal shall take into account all relevant circumstances, which may include whether the arbitral tribunal has *prima facie* jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure. Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party.”

79. Similar provisions appear in the **Hong Kong International Arbitration Centre²⁷ Administered Arbitration Rules, 2018²⁸**.

Article 27 of those Rules is reproduced hereinbelow: -

“Article 27 – Joinder of Additional Parties

27.1 The arbitral tribunal or, where the arbitral tribunal is not yet constituted, HKIAC shall have the power to allow an additional party to be joined to the arbitration provided that:

(a) *prima facie*, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, including any arbitration under Article 28 or 29; or

(b) all parties, including the additional party, expressly agree.

27.2 Any decision pursuant to Article 27.1 is without prejudice to the arbitral tribunal's power to decide any question as to its jurisdiction arising from such decision.

²⁷ HKIAC

²⁸ HKIAC Rules



27.3 Any Request for Joinder shall be raised no later than in the Statement of Defence, except in exceptional circumstances.

27.4 Before the arbitral tribunal is constituted, a party wishing to join an additional party to the arbitration shall communicate a Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators.

27.5 After the arbitral tribunal is constituted, a party wishing to join an additional party to the arbitration shall communicate a Request for Joinder to the arbitral tribunal, HKIAC and all other parties.

27.6 The Request for Joinder shall include the following:

- (a) the case reference of the existing arbitration;
- (b) the names and addresses, facsimile numbers and/or email addresses, if known, of each of the parties, including the additional party, their representatives and any arbitrators who have been confirmed or appointed in the arbitration;
- (c) a request that the additional party be joined to the arbitration;
- (d) a copy of the contract(s) or other legal instrument(s) out of or in relation to which the request arises, or reference thereto;
- (e) a statement of the facts supporting the request;
- (f) the points at issue;
- (g) the legal arguments supporting the request;
- (h) any relief or remedy sought;
- (i) the existence of any funding agreement and the identity of any third party funder pursuant to Article 44; and
- (j) confirmation that copies of the Request for Joinder and any supporting materials included with it have been or are being communicated simultaneously to all other parties and any confirmed or appointed arbitrators, by one or more means of service to be identified in such confirmation.

27.7 Within 15 days of receiving the Request for Joinder, the additional party shall communicate an Answer to the Request for Joinder to HKIAC, all other parties and any confirmed or



appointed arbitrators. The Answer to the Request for Joinder shall include the following:

- (a) the name, address, facsimile number and/or email address of the additional party and its representatives (if different from the description contained in the Request for Joinder);
- (b) any plea that the arbitral tribunal has been improperly constituted and/or lacks jurisdiction over the additional party;
- (c) the additional party's comments on the particulars set forth in the Request for Joinder pursuant to Article 27.6(a) to (g);
- (d) the additional party's answer to any relief or remedy sought in the Request for Joinder, pursuant to Article 27.6(h);
- (e) details of any claims by the additional party against any other party to the arbitration;
- (f) the existence of any funding agreement entered into by the additional party and the identity of any third party funder pursuant to Article 44; and
- (g) confirmation that copies of the Answer to the Request for Joinder and any supporting materials included with it have been or are being communicated simultaneously to all other parties and any confirmed or appointed arbitrators, by one or more means of service to be identified in such confirmation.

27.8 HKIAC or the arbitral tribunal may vary any of the requirements in Article 27.6 and 27.7 as it deems appropriate.

27.9 An additional party wishing to be joined to the arbitration shall communicate a Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. The provisions of Article 27.6 shall apply to such Request for Joinder.

27.10 Within 15 days of receiving a Request for Joinder, the parties shall communicate their comments on the Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. Such comments may include (without limitation):

- (a) any plea that the arbitral tribunal lacks jurisdiction over the additional party;



(b) comments on the particulars set forth in the Request for Joinder, pursuant to Article 27.6(a) to (g);

(c) answer to any relief or remedy sought in the Request for Joinder pursuant to Article 27.6(h);

(d) details of any claims against the additional party; and

(e) confirmation that copies of the comments have been or are being communicated simultaneously to all other parties and any confirmed or appointed arbitrators, by one or more means of service to be identified in such confirmation.

27.11 Where an additional party is joined to the arbitration, the arbitration against that additional party shall be deemed to commence on the date on which HKIAC or the arbitral tribunal once constituted, received the Request for Joinder.

27.12 Where an additional party is joined to the arbitration, all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator.

27.13 Where an additional party is joined to the arbitration before the arbitral tribunal is constituted, HKIAC may revoke any confirmation or appointment of an arbitrator, and shall appoint the arbitral tribunal with or without regard to any party's designation.

27.14 The revocation of the confirmation or appointment of an arbitrator pursuant to Article 27.13 is without prejudice to:

(a) the validity of any act done or order made by that arbitrator before his or her confirmation or appointment was revoked;

(b) his or her entitlement to be paid his or her fees and expenses subject to Schedule 2 or 3 as applicable; and

(c) the date when any claim or defence was raised for the purpose of applying any limitation bar or any similar rule or provision.

27.15 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) after a Request for Joinder has been submitted."

The power of joinder as incorporated in the HKIAC Rules is founded upon a prima facie conclusion being reached by the AT or the



HKIAC that the additional party is bound by the arbitration agreement or where all parties including the additional party expressly agree.

80. Similar special provisions for joinder of parties stand incorporated in the **Rules framed by the London Court of International Arbitration**²⁹, and Article 22 thereof is reproduced below: -

“Article 22 Additional Powers

22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraph (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

....

(x) to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration; and”

81. The **Singapore International Arbitration Centre Rules**³⁰ also confer authority to join parties as would be evident from Rule 7 of those Rules and which reads as under: -

“7. Joinder of Additional Parties

7.1 Prior to the constitution of the Tribunal, a party or non-party to the arbitration may file an application with the Registrar for one or more additional parties to be joined in an arbitration pending under

²⁹ LCIA Rules

³⁰ SIAC Rules



these Rules as a Claimant or a Respondent, provided that any of the following criteria is satisfied:

- a. the additional party to be joined is *prima facie* bound by the arbitration agreement; or
- b. all parties, including the additional party to be joined, have consented to the joinder of the additional party.

7.2 An application for joinder under Rule 7.1 shall include:

- a. the case reference number of the pending arbitration;
- b. the names, addresses, telephone numbers, facsimile numbers and electronic mail addresses, if known, of all parties, including the additional party to be joined, and their representatives, if any, and any arbitrators who have been nominated or appointed in the pending arbitration;
- c. whether the additional party is to be joined as a Claimant or a Respondent;
- d. the information specified in Rule 3.1(c) and Rule 3.1(d);
- e. if the application is being made under Rule 7.1(b), identification of the relevant agreement and, where possible, a copy of such agreement; and
- f. a brief statement of the facts and legal basis supporting the application.

The application for joinder is deemed to be complete when all the requirements of this Rule 7.2 are fulfilled or when the Registrar determines that there has been substantial compliance with such requirements. SIAC shall notify all parties, including the additional party to be joined, when the application for joinder is complete.

7.3 The party or non-party applying for joinder under Rule 7.1 shall, at the same time as it files an application for joinder with the Registrar, send a copy of the application to all parties, including the additional party to be joined, and shall notify the Registrar that it has done so, specifying the mode of service employed and the date of service.

7.4 The Court shall, after considering the views of all parties, including the additional party to be joined, and having regard to the circumstances of the case, decide whether to grant, in whole or in



part, any application for joinder under Rule 7.1. The Court's decision to grant an application for joinder under this Rule 7.4 is without prejudice to the Tribunal's power to subsequently decide any question as to its jurisdiction arising from such decision. The Court's decision to reject an application for joinder under this Rule 7.4, in whole or in part, is without prejudice to any party's or non-party's right to apply to the Tribunal for joinder pursuant to Rule 7.8.

7.5 Where an application for joinder is granted under Rule 7.4, the date of receipt of the complete application for joinder shall be deemed to be the date of commencement of the arbitration in respect of the additional party.

7.6 Where an application for joinder is granted under Rule 7.4, the Court may revoke the appointment of any arbitrators appointed prior to the decision on joinder. Unless otherwise agreed by all parties, including the additional party joined, Rule 9 to Rule 12 shall apply as appropriate, and the respective timelines thereunder shall run from the date of receipt of the Court's decision under Rule 7.4.

7.7 The Court's decision to revoke the appointment of any arbitrator under Rule 7.6 is without prejudice to the validity of any act done or order or Award made by the arbitrator before his appointment was revoked.

7.8 After the constitution of the Tribunal, a party or non-party to the arbitration may apply to the Tribunal for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or a Respondent, provided that any of the following criteria is satisfied:

- a. the additional party to be joined is *prima facie* bound by the arbitration agreement; or
- b. all parties, including the additional party to be joined, have consented to the joinder of the additional party.

Where appropriate, an application to the Tribunal under this Rule 7.8 may be filed with the Registrar.

7.9 Subject to any specific directions of the Tribunal, the provisions of Rule 7.2 shall apply, *mutatis mutandis*, to an application for joinder under Rule 7.8.



7.10 The Tribunal shall, after giving all parties, including the additional party to be joined, the opportunity to be heard, and having regard to the circumstances of the case, decide whether to grant, in whole or in part, any application for joinder under Rule 7.8. The Tribunal's decision to grant an application for joinder under this Rule 7.10 is without prejudice to its power to subsequently decide any question as to its jurisdiction arising from such decision.

7.11 Where an application for joinder is granted under Rule 7.10, the date of receipt by the Tribunal or the Registrar, as the case may be, of the complete application for joinder shall be deemed to be the date of commencement of the arbitration in respect of the additional party.

7.12 Where an application for joinder is granted under Rule 7.4 or Rule 7.10, any party who has not nominated an arbitrator or otherwise participated in the constitution of the Tribunal shall be deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the Tribunal, without prejudice to the right of such party to challenge an arbitrator pursuant to Rule 14.

7.13 Where an application for joinder is granted under Rule 7.4 or Rule 7.10, the requisite filing fee under these Rules shall be payable for any additional claims or counterclaims."

82. The rules referred to and noticed hereinabove clearly evidence that the power to implead or to permit an intervention by a third party is either governed by a special provision made in that respect or where the additional party or parties to the proceedings in general agree upon joinder.

83. While on the issue of joinder of party to proceedings, it would also be profitable to notice the advice rendered by the Privy Council in **Bay Hotel & Resort Ltd and Another vs. Cavalier Construction**



Co Ltd and Another³¹. While dealing with the subject of joinder of parties, the Privy Council held: -

“[44] For the common-law position as to joinder in England and the Turks and Caicos Islands, it is useful to reproduce some paragraphs in the 1996 report of the Department Advisory Committee (the 'DAC') previously mentioned. Headed 'Clause 35: Consolidation of Proceedings and Concurrent Hearings', they read:

'177. This clause makes clear that the parties may agree to consolidate their arbitration with other arbitral proceedings or to hold concurrent hearings.

'178. During the consultation exercises, the DAC received submissions calling for a provision that would empower either a tribunal or the court (or indeed both) to order consolidation or concurrent hearings. These were considered extremely carefully by the committee.

'179. The problem arises in cases where a number of parties are involved. For example, in a construction project a main contractor may make a number of sub-contracts each of which contains an arbitration clause. A dispute arises in which a claim is made against one sub-contractor who seeks to blame another. In court, of course, there is power to order consolidation or concurrent hearings, as well as procedures for allowing additional parties to be joined. In arbitrations, however, this power does not exist. The reason it does not exist is that this form of dispute resolution depends on the agreement of the contracting parties that their disputes will be arbitrated by a private tribunal, not litigated in the public courts. It follows that unless the parties otherwise agree, only their own disputes arising out of their own agreement can be referred to that agreed tribunal.

'180. In our view it would amount to a negation of the principle of party autonomy to give the tribunal or the court power to order consolidation or concurrent hearings. Indeed it would to our minds go far towards frustrating the agreement of the parties to have their own tribunal for their own disputes. Further difficulties could well arise, such as the

³¹ [2001] UKPC 34



disclosure of documents from one arbitration to another. Accordingly we would be opposed to giving the tribunal or the court this power. However, if the parties agree to invest the tribunal with such a power, then we would have no objection.

'181. Having said this, the DAC appreciates the common sense behind the suggestion. We are persuaded, however, that the problem is best solved by obtaining the agreement of the parties. Thus those who are in charge of drafting standard forms of contract, or who offer terms for arbitration services which the parties can incorporate into their agreements (especially those institutions and associations which are concerned with situations in which there are likely to be numerous contracts and sub-contracts) could include suitable clauses permitting the tribunal to consolidate or order concurrent hearings in appropriate cases. For example, the London Maritime Arbitrators Association Rules have within them a provision along these lines. In order to encourage this, we have made clear in this clause that with the agreement of the parties there is nothing wrong with adopting such procedures.'

[45] With regard to US law, a collection of decisions, almost all of Federal courts, were cited in argument for the respondents, viz *Thomson-CSF SA v American Arbitration Association*, 64 Fed 3rd 773 (1995), *Federated Department Stores Inc v JVB Industries Inc*, 894 F 2nd 862 (1990), *Fried, Krupp GmbH v Solidarity Carriers Inc*, 674 F Supp 1022 (1987), *Stamey v Easter*, WL 869577 (2000), *MS Dealer Service Corporation v Franklin*, 177 F 3rd 942 (1999), *Morris v Chesapeake & OSS Co*, 125 F 62 (1903), *Carte Blanche (Singapore) Pre Ltd v Diners Club International Inc*, 2 F 3rd 24 (1993), and *Moses H Cone Memorial Hospital v Mercury Construction Corporation*, 460 US 1 (1983). Their lordships have read these cases. Some of them show a readiness in arbitration matters to pierce the corporate veil or apply the concept of a third-party beneficiary, but there appears to be no clear instance of a party who has not consented and is not estopped being held bound to arbitrate with a claimant who is not a party to the arbitration agreement. The US authorities are of limited assistance on this issue of jurisdiction. Indeed counsel for the respondents, who argued (without objection) for restoration of the decision of Ground CJ upholding the award to both Cavalier Bahamas and



Cavalier TCI, based the argument ultimately on art 4.9.5 of the general conditions of contract.

[46] Such a rule of an arbitral institution may of course, by incorporation, amount to express or implied consent to extension of the arbitrators' jurisdiction by their own order. The basic criterion remains consent. This principle was seen at work in the House of Lords' case, *Lafarge Redland Aggregates Ltd v Shephard Hill Civil Engineering Ltd* [2000] 1 WLR 1621. It was a case of separate contracts, each with its own arbitration clause, between employer and main contractor and main contractor and sub-contractor. An institutional rule, applying when disputes arising under more than one contract were concerned with the same subject matter and were to be dealt with by the same arbitrator, empowered the arbitrator to order that they be heard together. The contractor sought to compel the sub-contractor to accept and wait for a composite hearing. But the sub-contractor's consent to that procedure, contained in the sub-contract, was held to be conditional on the contractor's taking the necessary steps within a reasonable time. It was also accepted that the employer could not be compelled to take part in a joint hearing; the employer was not a party to the sub-contract and had not otherwise consented.

[47] The question is whether art 4.9.5 constituted consent by the Bay to the vesting in the arbitrators of power to join Cavalier TCI. As has been seen, the courts in the Turks and Caicos Islands, for differing reasons, thought that it did. They saw it as an empowering clause, which is the argument of Mr Reese QC. The Board is unable to agree. The clause has to be read as a whole. Throughout it is concerned, as its introductory heading indicates, with *limitation* on consolidation or joinder. It is not a source of jurisdiction, but a restriction of jurisdiction. It pre-supposes relevant agreements to arbitrate, which will be the source of any jurisdiction that does exist, and it imposes conditions on the exercise of any powers of joinder that may otherwise flow from such agreements. The various references to consent and agreement are consistent with this theme. There is a prohibition against including parties other than the owner, contractor, other contractors and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. Their lordships cannot extract from this prohibition the positive conferment of jurisdiction to add a



claimant who is not a party to the arbitration agreement and to whose joinder a party to that agreement objects.”

84. As was noticed hereinbefore while arbitration principally remains the subject matter of consent and choice of parties, courts in India as well as internationally have recognized the imperative of third parties being joined in those proceedings while extending either the contract and agency principles or the alter ego and group of company doctrines. A whole body of precedent has thus come to hold the field straddling jurisdictions across the world. **Gary B. Born** in his seminal work on **International Commercial Arbitration, Third Edition** has while taking note of those developments observed as under:-

“SIGNATORIES AND NON-SIGNATORIES TO ARBITRATION AGREEMENT

In most cases, the parties to an arbitration agreement are - and are only - the entities that formally executed, and expressly assumed the status of parties to, the underlying contract containing the arbitration clause. In the vast majority of cases, the way to determine the parties to the arbitration clause is simply to look at the signature page, and/or the recitals of a contract, entities are designated there.

Simply, but correctly, put, it is the signature of an agreement that is the "customary implementation of an agreement to arbitrate." It is these "signatories" of an agreement that are the parties to the arbitration agreement, and that are therefore bound by, and able to enforce, the provisions of that agreement; other entities, who are "non-signatories," are ordinarily not parties to the arbitration agreement and are therefore typically not bound by, or able to enforce, its terms.

Despite the foregoing, the party that executes a contract is not necessarily a party to either that agreement or the arbitration



clause associated with it. Under most legal systems, an agent or representative may execute an agreement on behalf of its principal, producing the result that the principal is a party to the agreement (but the agent or representative is typically not). The most obvious and frequent application of this rule is when agreements are executed on behalf of corporate or other legal entities by their officers or agents, with the result that the corporate or other legal entity is a party to the agreement, but the officer or agent, in his or her personal capacity, is not a party.

The more general point is that, while signatory status is usually a basis for concluding that an entity is a party to a contract, this is ultimately an issue of applicable contract law. That law will usually, but not necessarily, provide that signatories are parties to the agreements that they execute.

Conversely, it is also clear that entities that have not formally executed an arbitration agreement, or the underlying contract containing an arbitration clause, may nonetheless be bound by the agreement to arbitrate. Notwithstanding their status as non-signatories, there are circumstances in which entities that have not signed or otherwise formally assented to an arbitration agreement may be both bound and benefited by its terms. As one U.S. court reasoned:

"Arbitration is consensual by nature. ... It does not follow, however, that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency.'"

Civil law judicial decisions adopt identical reasoning:

"in principle, an arbitration clause is binding only on those parties which have entered into a contractual agreement to submit to arbitration, whether directly or indirectly through their representatives. Exceptions to



this rule arise in cases of legal succession, retroactive approval of an arbitration clause or attempts to pierce the corporate veil of a legal entity in the case of abusive objections to the clause."

Or, in the words of a leading European commentator, "[p]ersons other than the formal signatories may be parties to the arbitration agreement by application of the theory of apparent mandate or ostensible authority or because they are third-party beneficiaries [or on other grounds]."

As discussed below, determining when a non-signatory is bound, or benefited, by an international arbitration agreement typically requires application of generally-applicable contract, agency and corporate law principles." Additionally, in a few instances, specialized rules, applicable only to international arbitration agreements, have been developed, but these are exceptional."

85. The learned author has then proceeded to notice the absence of statutory provisions which effectively regulate non-signatories. This is evident from the following extracts: -

"ABSENCE OF LEGISLATIVE PROVISIONS REGARDING NON-SIGNATORY

In virtually all instances, international arbitration conventions and national arbitration legislation provide no express guidance in identifying the parties to an international arbitration agreement. As discussed above, the New York Convention refers only to the basic principle that international arbitration agreements bind their parties, without addressing the question of how an arbitration agreement's parties are determined. The UNCITRAL Model Law and most other national arbitration legislation is substantially identical.

There are a few national arbitration statutes that address the identities of the parties to an arbitration agreement, but these



are unusual. For example, the Peruvian arbitration legislation supplements the UNCITRAL Model Law's definition of an arbitration agreement by adding that:

"[t]he arbitration agreement extends to those who consent to submit to arbitration, in good faith, as determined by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement or to which the agreement is related. It also extends to those who seek to attain any rights or benefits from the contract, according to its terms."

A few other national arbitration statutes, including the English Arbitration Act, 1996, refer to both "parties" and other persons claiming "under" or "through" a party, either providing or suggesting that such persons are bound by arbitration agreements and/or arbitral awards. These provisions offer only limited textual guidance, and their terms have been subject to inconsistent judicial treatment. Some national courts have taken a relatively restrictive approach to these provisions, limiting the terms to persons who would be bound under generally-accepted concepts of contract and corporate law, such as succession, assignment, subrogation, or equivalent statutory rights. Other courts have interpreted such terms more broadly, to encompass persons whose interest is derived from the party to the agreement, including on the basis of the "group of companies" doctrine.

Nevertheless, in the absence of statutory guidance, disputes over the identities of the parties to international arbitration agreements, and the application of non-signatory doctrines, have been left almost entirely to national courts, arbitral tribunals and commentary. For the most part, as discussed in the following sections, these authorities have applied generally-applicable principles of contract, agency and corporate law to resolve such non-signatory disputes."



86. Proceeding further to elaborate on the aspects relating to the legal theories which have been resorted to sustain joinder of non-signatories, the learned author observes: -

“GENERALLY-APPLICABLE RULES OF CONTRACT LAW

A variety of legal theories have been invoked by national courts and arbitral tribunals to bind entities that have not executed an arbitration agreement. These legal theories are in most cases based on generally-applicable rules of contract and commercial law, including rules regarding agency (actual and apparent), alter ego, implied consent, "group of companies," estoppel, third party beneficiary, guarantor, subrogation, legal succession and ratification or assumption theories. In each of these instances, non-signatories of a contract can be bound by, and may invoke, the arbitration clause contained within it.

In most circumstances, "general" or "ordinary" principles of contract and agency law govern the question whether a non-signatory is party to an agreement to arbitrate. This application of generally-applicable legal rules to non-signatory issues parallels the application of similar generally-applicable contract law rules to the validity and interpretation of international arbitration agreements (discussed above). Nonetheless, there are a few instances in which specialized rules, applicable only to non-signatory issues in the context of international arbitration agreements, have been developed. These include the so-called "group of companies" doctrine, rules regarding corporate officers and employees and "class arbitration."

Critically, regardless of the legal basis for application of an arbitration agreement to a non-signatory, analysis must focus on the separable arbitration agreement. Paralleling issues of contract formation and validity, the decisive question is whether a non-signatory is bound by the arbitration agreement, not by the underlying contract. This is a straightforward application of the



separability presumption, discussed in detail above, but it is fundamental to resolution of non-signatory issues.

Judicial case law and commentary on international arbitration sometimes make reference to the "extension" of an arbitration agreement to non-signatories, or to "third parties," on the basis of one or more of the foregoing theories. These expressions are inaccurate, in that they imply that an entity which is not a party to an arbitration agreement is nonetheless subject to that agreement's effects, by virtue of something other than the parties' consent. Contrary to the references to "extension" or "third parties," most of the theories discussed below provide a basis for concluding that an entity is in reality a party to the arbitration agreement-which therefore does not need to be "extended" to a "third party" - because that party's actions constitute consent to the agreement, or otherwise bind it to the agreement, notwithstanding the lack of its formal execution of the agreement." The arbitration agreement is therefore not ordinarily "extended", but rather the true parties that have consented to the arbitration agreement are identified."

87. On the subject of alter ego and veil piercing specifically, the work traces the evolution of those concepts and the precedents rendered by courts across jurisdictions as follows: -

"ALTER EGO AND VEIL-PIERCING

Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an "alter ego" of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from "the fundamental principle ... [that] 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities.'" Likewise, it departs from the general, and basic, principle that the arbitration



agreements of companies are agreements of those companies alone, and not their corporate affiliates.

The alter ego doctrine is referred to in German as "*Durchgriff*," in French as "*levée du voile social*," in Spanish as "*levantamiento del velo societario*" and in many English language contexts as "piercing" or "lifting" the "corporate veil." As discussed below, whatever the terminology, the veil-piercing doctrine has broadly similar elements in most jurisdictions, at least in the context of international arbitration agreements.

The International Court of Justice explained the veil-piercing doctrine in *Barcelona Traction* as follows:

“the process of ‘lifting the corporate veil’ or ‘disregarding the legal entity’ has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations”.

Definitions of "alter ego" vary materially in different legal systems, and are applied in a number of different contexts. Nonetheless, the essential theory of the “alter ego” doctrine in most jurisdictions is that one party so thoroughly dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity. In the context of arbitration agreements, demonstrating an "alter ego" relationship under most developed legal systems requires convincing evidence that one entity dominated the day-to-day actions of another and/or that it exercised this power to work fraud or other injustice or inequity on a third party or to evade statutory or other legal obligations.



The "alter ego" doctrine differs from principles of agency or implied consent in that the parties' intentions are not decisive; rather, the doctrine rests on overriding considerations of equity and fairness, which mandate disregarding an entity's separate legal identity in specified circumstances. In the words of one arbitral award, "[e]quity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment. Or, as a U.S. judicial decision reasoned: "The concept of 'piercing the corporate veil' is equitable in nature and courts will pierce the corporate veil to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability.'"

Many national courts have been circumspect in piercing the corporate veil or finding an alter ego relationship. In England, the corporate veil will be pierced only where the corporate structure has been used to evade mandatory legal obligations or the enforcement of existing and legitimate third party rights. This standard generally requires fraud or other misconduct calculated to avoid or conceal liability through the use of company structure. In a frequently-cited decision, an English court emphasized that it is legitimate to structure a corporate group so as to allocate risk between members of the group and limit the liability of particular companies:

"we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant which is the member of a corporate group merely because the corporate structure has been used to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law."



Likewise, Swiss courts and tribunals applying Swiss law only disregard the corporate form in exceptional circumstances, amounting to fraud or an abuse of right. In the words of a leading Swiss commentator:

"Swiss law ... is resolutely committed to the legal independence of the company in relation to its sole shareholder or of the subsidiary in relation to the parent company. It will be disregarded in exceptional circumstances, where the fact of resorting to such a subsidiary to escape one's obligations would amount to fraud or to a patent abuse of right."

German courts are also cautious in applying veil-piercing (*Durchgriff*) theories, requiring fraud or other misconduct. Indeed, some German authorities question (wrongly) whether the veil-piercing theory, which is traditionally used for purposes of substantive liability, may ever be used to bind non-signatories to arbitration agreements.

While also relying on a potentially expansive "group of companies" theory (discussed below), French courts appear willing, often without clearly distinguishing the doctrines, to disregard corporate identities in cases amounting to fraud. Courts in Canada, Ireland, India, Korea, Hong Kong and China are also prepared to pierce the corporate veil, at least in some circumstances.

U.S. courts have often been more willing than many other authorities to apply an alter ego analysis to subject a non-signatory to an arbitration agreement. According to one U.S. decision:

"To apply the alter ego doctrine to justify the disregard of a corporate entity, the court must determine that there is such unity of interest and ownership that separate personalities of the corporations no longer exist, and that failure to disregard the corporate form would result in fraud or injustice."

Even in U.S. courts, the standard for establishing alter ego status is ordinarily difficult to satisfy. The starting point is a strong presumption that a parent corporation and its affiliates are legally



separate and distinct entities. In the memorable words of one early authority:

"Normally, the corporation is an insulator from liability on claims of creditors. ... Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."

Many U.S. courts have also held that piercing the corporate veil is an exceptional action, in both international and other contexts, requiring persuasive evidence to overcome the separate corporate identities of the parties. The existence of overlapping boards of directors and management, 100% share ownership and common corporate logos or trademarks are not sufficient to establish (or even particularly probative of) alter ego status. Similarly, under capitalization of a company is ordinarily not sufficient, independently, to justify piercing the corporate veil.

Most U.S. courts have held that overcoming the presumption of separateness requires showing: (a) the domination of a corporate affiliate, including disregard of corporate formalities, such that it has no separate identity or existence, and (b) fraudulent or collusive misuse of that control, or equivalent misconduct, to the injury of other parties. In cases of complete domination or control of one company's day-to-day activities by another company, this may in some circumstances be independently sufficient to pierce the corporate veil.

U.S. judicial decisions have generally conducted fairly extensive factual inquiries in deciding claims of domination or control. Different U.S. authorities have identified a variety of factors that are relevant to an inquiry into control for purposes of alter ego status. For example, in a decision arising from the attempted recognition of an international arbitral award, the US. court identified fifteen "private law" factors, which it described as always "concerned with reality and not form":

“(1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the



subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities... (13) whether the directors of the 'subsidiary' act in the primary and independent interest of the parent'; (14) whether others pay or guarantee debts of the dominated corporation; and (15) whether the alleged dominator deals with the dominated corporations at arm's length.

Assessing these various factors, the court held that a foreign state-owned entity was not financially independent from the foreign state that owned it (Turkmenistan), and that the foreign state's intentional "bleeding [of] a subsidiary to thwart creditors is a classic ground for piercing the corporate veil." The court also noted that "[u]ndercapitalization is often critical in alter ego analysis.

As noted above, many U.S. courts have held that there must be a showing of fraud or other wrongful or inequitable conduct in order to bind a non-signatory to an arbitration agreement. As explained by one U.S. court: "[w]hile complete domination of the corporation is the key to piercing the corporate veil,... such domination, standing alone, is not enough; some showing of *a wrongful or unjust act toward plaintiff is required.*" Other courts have expressed the same view, although a considerable body of authority holds that, in some circumstances, sufficiently extensive day-to-day control or domination is sufficient to pierce the corporate veil.

Typically, alter ego status can only be established with respect to an entity or person which owns shares (directly or indirectly), or holds a corporate position, in a company. Nonetheless, in unusual cases, other sorts of control relationships or corporate affiliations have been regarded as sufficient to establish alter ego status.

International arbitral tribunals have also generally been circumspect in applying alter ego theories. Most awards have required persuasive evidence of overlapping ownership, management and (often) involvement in negotiation and performance of the contract, as well as (occasionally) affirmative statements that the affiliated company is involved in the



transactions in question. Use of a common logo, brand, or trademark is generally not a decisive factor in alter ego analysis, nor is the mere fact of overlapping management or supervisory boards or shared employees. On the other hand, fraudulent or similarly abusive misconduct, under-capitalization of a corporate body, deliberate tortious actions, or siphoning off of assets (resulting in undercapitalization) are strong indicators of an alter ego relationship.

Some awards have also relied on the existence of reasonable, good faith mistake or con-fusion as to the identity or character of a counter-party in finding alter ego status. As one tribunal explained, in the context of an effort to subject a controlling shareholder to the arbitration agreement:

"[A]rbitration is essentially based upon the principle of consent. So too, any extension of the scope of application of the arbitration clause must have a voluntary basis. Of course, such an intention can be merely implicit, otherwise any discussion of extension would have no meaning. ... [T]he fact that two companies belong to the same group, or that a shareholder has a dominant position, are never sufficient, in and of themselves, to legally justify lifting the corporate veil.... *One would entertain this exception where confusion is fostered by the group or by the majority shareholder....* An arbitrating body must be very circumspect in matters of extending the effect of a clause to a director or manager who has acted strictly in an official capacity. Any such extension presupposes that the artificial person has been no more than the business implement of the natural person, so that one can ascribe to the natural person the contracts and undertakings signed by the artificial person."

Other awards have emphasized the importance of principles of good faith in conducting an alter ego analysis. This approach parallels that of most national courts (summarized above) and the expectations of parties engaged in international commercial transactions, being to give effect to corporate forms, save in exceptional cases, where considerations of equity and fairness will justify piercing the corporate veil.

Contrary to the suggestions of some authorities, there should be no question that veil-piercing or alter ego doctrines apply



to international arbitration agreements. As discussed above, that is the uniform conclusion of both national courts and arbitral tribunals in all jurisdictions to address the issue. Likewise, as a matter of principle, there is no reason that alter ego analysis should not apply fully to arbitration agreements—just as it does to other types of contractual (and non-contractual) relationships. Indeed, given the importance of considerations of good faith and equity in international arbitration, there is a serious argument that alter ego status can be more readily established with respect to international arbitration agreements than with respect to substantive obligations and liability under other types of contracts. That conclusion is also consistent with reduced (or neutral) standards of proof for international arbitration agreements and pro-arbitration rules of interpretation.

As with other non-signatory theories, the critical question in the alter ego context is whether one party's relationship with another justifies treating it as a party to the agreement to arbitrate (not the underlying contract). There may, for example, be instances where one party's domination of another party's participation in a particular transaction (or in an arbitration) results in it being bound by the associated agreement to arbitrate, notwithstanding the absence of any such control or alter ego relationship more generally. More frequently, however, an alter ego relationship will exist with regard to a particular commercial contract or relationship, which will also be applied with regard to the associated arbitration agreement.

Finally, as with other bases for binding non-signatories to arbitration agreements, questions of alter ego status and veil-piercing raise choice-of-law questions. Various authorities have applied the law of the state of incorporation of a company, or the law governing the arbitration agreement, or the law governing the underlying contract, to the question whether the company's corporate veil may be pierced. The weight of authority rejects these analyses," instead applying either international principles or general principles of law.

Thus, a leading U.S. Supreme Court decision held that the question whether to pierce the veil of a Cuban state-owned company was governed by principles of international law (rather than Cuban law). The Court reasoned:



“To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts.”

Accordingly, the Court applied veil-piercing principles “common to both international law and federal common law”, reflecting an approach bearing some similarities to the “cumulative” choice-of-law analyses adopted in a number of contemporary arbitral awards:

“Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice.”

This authority is persuasive, and applies more broadly to veil-piercing issues arising in determining whether either state or non-state entities are parties to an international arbitration. As with the doctrines of apparent authority and estoppel, it is artificial to select the law of any particular national jurisdiction to define those circumstances in which basic principles of fairness and good faith in international business dealings require disregarding a corporate identity conferred by national law and subjecting a party to an international arbitration agreement. Rather, uniform international principles better achieve the purposes of the veil-piercing doctrine, without materially interfering with the parties' expectations.”

J. GROUP OF COMPANIES AND ALTER EGO DOCTRINES - THE INDIAN PANORAMA

88. The group of companies and alter ego doctrines were elaborately spelt out in the celebrated decisions of the Supreme Court in *Chloro Controls* and *Cheran Properties*. However, and more recently, three learned Judges of the Supreme Court in **Cox & Kings**



Ltd. v. SAP India (P) Ltd.³² have framed questions relating to the applicability of those precepts for the consideration of a larger Bench. In *Cox & Kings*, N.V. Ramana, CJ. in his opinion observed as follows:-

“24. The Court noticed distinction in the language under Section 45 and Section 8 of the Arbitration Act in the following manner : (*Chloro Controls case* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , SCC pp. 681-82, paras 69-70)

“69. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. *In Section 45, the expression “any person” clearly refers to the legislative intent of enlarging the scope of the words beyond “the parties” who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party.* Once this link is established, then the court shall refer them to arbitration. The use of the word “shall” would have to be given its proper meaning and cannot be equated with the word “may”, as liberally understood in its common parlance. The expression “shall” in the language of Section 45 is intended to require the court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the prerequisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the

³² (2022) 8 SCC 1



arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. *But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming “through” or “under” the signatory party as contemplated under Section 45 of the 1996 Act.* Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England* (2nd Edn.) by Sir Michael J. Mustill:

- ‘1. The claimant was in reality always a party to the contract, although not named in it.
2. The claimant has succeeded by operation of law to the rights of the named party.
3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence.’ ”

(emphasis supplied)

From the above it is clear that the Court was of the firm opinion that there must be a legal relationship between the non-signatory and the party to the arbitration agreement.

25. While expounding on the legal relationship, the Court in *Chloro Controls case* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] accepted the group of companies doctrine as a sufficient basis to establish this legal relationship. However, while expounding on the ingredients of doctrine itself, the Court brought in the intention of the parties as to whether they were ad idem 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.

27. An attempt was made by the Court to find a basis for reading the group of companies doctrine within the language of Section 45 of the Arbitration Act in the following manner : (*Chloro Controls case* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , SCC p. 693, paras 99-100)

“99. Having examined both the abovestated views [Ed. : The reference is to *Roussel Uclaf v. G.D. Searle & Co. Ltd.*, (1978) 1 Lloyd's Rep 225 and *City of London v. Sancheti*, 2009 Bus LR 996 : 2008 EWCA Civ 1283 (CA)] , we are of the considered opinion that it will be the facts of a given case that would act as precept to the jurisdictional forum as to whether any of the stated principles should be adopted or not. If in the facts of a given case, it is not possible to construe that the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party, then the case would not fall within the ambit and scope of the provisions of the section and it may not be possible for the court to permit reference to arbitration at the behest of or against such party.

100. We have already referred to the judgments of various courts that *state that arbitration could be possible between a signatory to an agreement and a third party. Of course, heavy onus lies on that party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated under Section 45 of the 1996 Act.*”

(emphasis supplied)

29. In any case, the Court of Appeal in *City of London v. Sancheti* [*City of London v. Sancheti*, 2009 Bus LR 996 : 2008 EWCA Civ 1283 : (2009) 1 Lloyd's Rep 117 (CA)] overruled the *Uclaf case* [*Roussel Uclaf v. G.D. Searle & Co. Ltd.*, (1978) 1 Lloyd's Rep 225 : 1978 FSR 95 (CA)] . 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 on the basis of the rights of a signatory to an arbitration agreement. It is noticed that this Court in *Chloro Controls* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , while observing both cases as persuasive, however, does not provide reasoning to favour one interpretation over the other, in the following manner : (*Chloro Controls case* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , SCC pp. 692-93, para 98)

“98. In *Roussel Uclaf v. G.D. Searle & Co. Ltd.* [*Roussel Uclaf v. G.D. Searle & Co. Ltd.*, (1978) 1 Lloyd's Rep 225 : 1978 FSR 95 (CA)] the Court held:

‘The argument does not admit of much elaboration, but I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. *The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is “claiming through or under” the parent to do what it is in fact doing whether ultimately held to be wrongful or not.*

However, the view expressed by the Court in *Roussel Uclaf case* [*Roussel Uclaf v. G.D. Searle & Co. Ltd.*, (1978) 1 Lloyd's Rep 225 : 1978 FSR 95 (CA)] does not find approval in the decision of the Court of Appeal in *City of London v. Sancheti* [*City of London v. Sancheti*, 2009 Bus LR 996 : 2008 EWCA Civ 1283 : (2009) 1 Lloyd's Rep 117 (CA)] . In para 34, it was held that the view in *Roussel Uclaf* [*Roussel Uclaf v. G.D. Searle & Co. Ltd.*, (1978) 1



Lloyd's Rep 225 : 1978 FSR 95 (CA)] need not be followed and stay could not be obtained against a party to an arbitration agreement or a person claiming through or under such a party, as mere local or commercial connection is not sufficient. But the Court of Appeal hastened to add that, in cases such as the one of Mr Sancheti, Corporation of London was not party to the arbitration agreement, but the relevant party is the United Kingdom Government. The fact that in certain circumstances, the State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of the local authorities, does not make the local authority a party to the arbitration agreement.”

30. This Court ultimately concluded that *Sukanya Holdings* [*Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531] was not applicable for interpreting Section 45 of the Arbitration Act. The ratio of the *Sukanya Holdings* [*Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531] was restricted to arbitrations under Part I of the Arbitration Act as such.

34. The 2015 Amendment brought in four amendments to Section 8(1). Firstly, the scope of the concept of “party” has been expanded to include persons claiming “*through or under*”. Secondly, the amendment also clarified the scope of judicial interference, and that the same is to be limited only to the prima facie examination regarding the existence of the arbitration agreement. Thirdly, the cut-off for submitting an application under Section 8 of the Arbitration Act has been stated to be “the date of” submitting the first statement on the substance of the dispute. Fourthly, the aforesaid amendment shall apply notwithstanding prior judicial precedent. However, it may be observed that Parliament has not carried out any amendment to Section 2(1)(h) of the Arbitration Act. The impact of the absence of such an amendment needs to be clearly examined by this Court. This has created an anomalous situation wherein potentially a party “claiming through or under” could be referred to an arbitration, but would not have the right to seek relief under Section 9 of the Arbitration Act. This is merely an illustrative example to indicate a potentially anomalous result.

36. The interpretation of *Chloro Controls* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] was further expanded in the three-Judge



Bench decision of this Court in *Cheran Properties Ltd. v. Kasturi & Sons Ltd.* [*Cheran Properties Ltd. v. Kasturi & Sons Ltd.*, (2018) 16 SCC 413 : (2019) 1 SCC (Civ) 486] In that case, this Court interpreted Section 35 of the Arbitration Act to enforce an award against a non-signatory, even though it did not participate in the proceedings.

38. In the Division Bench decision of this Court in *MTNL v. Canara Bank* [*MTNL v. Canara Bank*, (2020) 12 SCC 767] , it was observed that the group of companies doctrine can be utilised to bind a third party to an arbitration, if a tight corporate group structure constituting a single economic reality existed. The Court held as under : (SCC pp. 779-80, para 10)

“10.6. The circumstances in which 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. A “composite transaction” refers to a transaction which is interlinked 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.

10.7. *The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory 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.* [ICC Case No. 4131 of 1982 : (1984) 9 Yearbook of Commercial Arbitration 131; ICC Case No. 5103 of 1988 : (1991) 2(2) ICC Bull 20.] ”

(emphasis supplied)



41. It may be noted that the doctrine, as expounded, requires the joining of non-signatories as “parties in their own right”. This joinder is not premised on non-signatories “claiming through or under”. Such a joinder has the effect of obliterating the commercial reality, and the benefits of keeping subsidiary companies distinct. Concepts like single economic entity are economic concepts difficult to be enforced as principles of law.

50. It is evident from the discussion above that the group of companies doctrine must be applied with caution and mere fact that a non-signatory is a member of a group of affiliated companies will not be sufficient to claim extension of the arbitration agreement to the non-signatory. In this context Gary Born [Gary B. Born's, *International Commercial Arbitration*, 3rd Edn., Vol. I, pp. 1558-59.] notes as under:

“GROUP OF COMPANIES” DOCTRINE

Another significant, but controversial, basis for binding non-signatories to an arbitration agreement is the “*Group of Companies*” doctrine. Under this principle, non-signatories of a contract may be deemed parties to the associated arbitration clause based on factors which are often roughly comparable to those relevant to an alter ego analysis. In particular, where a company is a part of a corporate group, is subject to the control of (or controls) a corporation affiliate that has executed a contract and is involved in the negotiation or performance of that contract, then that company may in some circumstances invoke or be subject to an arbitration clause contained in that contract, notwithstanding the fact that it has not executed the contract itself.

Unlike other bases for binding a non-signatory to an arbitration agreement (such as agency, alter ego, estoppel, third-party beneficiary, or assignment), the group of companies doctrine was developed specifically in the arbitration context and is not typically invoked outside that context. At least thus far, the group of companies doctrine has also been explicitly accepted in only a limited number of jurisdictions (in particular, as discussed below, France). In part for that reason, the doctrine has given rise to substantial controversy.



Gary B. Born also refers (in footnotes 222 and 223) to the fact that only a small number of jurisdictions France and India, appear to have applied the group of companies doctrine in the context of international arbitration and to the prevalent criticism of the group of companies doctrine.”

89. The learned Chief Justice thereafter proceeded to formulate the questions which warranted further enunciation in the following terms:-

“**54.** In view of the aforesaid discussion, we deem it appropriate to refer this matter to a larger Bench to expound on the intricacies of the Group of Companies doctrine and answer the following questions:

54.1. (a) Whether phrase “claiming through or under” in Sections 8 and 11 could be interpreted to include “*Group of Companies*” doctrine?

54.2. (b) Whether the “*Group of Companies*” doctrine as expounded by *Chloro Controls case* [*Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] and subsequent judgments are valid in law?”

90. In a concurring opinion penned by Surya Kant, J. the questions which according to the learned Judge merited consideration by a larger Bench were re-framed as under:-

“**104.** In view of the above discussion, respectfully, I am of the opinion that the questions that are sought to be referred to a larger Bench deserve further elaboration. With all the humility at my command, the following substantial questions of law also arise for authoritative determination by a larger Bench in addition and in conjunction with those formulated by Hon'ble the Chief Justice:

104.1. (A) Whether the Group of Companies doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision?



104.2. (B) Whether the Group of Companies doctrine should continue to be invoked on the basis of the principle of “single economic reality”?

104.3. (C) Whether the Group of Companies doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?

104.4. (D) 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?”

91. However, and while the decision of the larger Bench is still awaited, this Court finds that the various decisions rendered on the subject and as were noticed in *Cox & Kings* essentially related to cases where courts were called upon to invoke those theories and hold parties, who even though may not have been signatories to the arbitration agreement, to be bound by the same. In fact, some of the decisions which were noticed in *Cox & Kings* had been rendered in the context of Section 45 which, as was noticed above, specifically employs the expression “*any person claiming through or under him*”. The more fundamental question which remains to be answered by the Court is whether an AT would be justified in invoking those doctrines. This Court is of the firm opinion for reasons which are set out hereinafter that such a power cannot be recognised to inhere in an AT.

K. CONCLUSIONS

92. As was held hereinbefore, the AT owes its origin principally to well recognised and identifiable sources. The principal source would be the agreement in terms of which parties may have resolved for all



disputes being referred to an AT and thus choose a forum falling outside the circuit of national courts and the ordinary hierarchy of judicial authorities. The other would be rules framed by a body where the agreement contemplates institutional arbitration. Last but not the least would be the statutory laws framed by countries which are intended to govern and regulate ATs'. The agreement, institutional rules or national statutes would thus constitute the code or the body of laws specifying the powers that may be available to be exercised by the AT. As was pertinently observed by **Redfern and Hunter**, parties cannot by agreement invest powers upon an AT which are otherwise reserved to be exercised by courts and judicial institutions created by the State.

93. What needs to be emphasised is that an AT cannot arrogate to itself powers which are neither conferred by the statute or the rules which govern the arbitration nor can it take recourse to inherent powers, which as has been found hereinabove, are acknowledged to inhere in courts and judicial authorities only. The AT, cannot, therefore, expropriate for itself powers which are vested solely in judicial institutions. It remains bound by the provisions of the statutes which prevail and which in this case undisputedly is the Act. In the absence of a power of impleadment having been conferred upon the AT in terms thereof, it would have no authority or jurisdiction to join or implead parties to the proceedings. The Court has already found that the power to implead cannot be sustained or traced to Sections 16



or 17 or 19 of the Act. In fact, the Act incorporates no provision which could be even remotely considered as being liable to be read as being the repository of the power of the AT to implead.

94. The Act, wherever it was intended to expand the meaning to be ascribed to the word “*party*” has done so by introducing specific provisions in that respect. Even where such recourse was taken, the power has come to be conferred upon a judicial authority. If the AT were recognised to have the authority to invoke the alter ego or group of companies principles, it would undoubtedly result in the Court recognising a power vesting in the AT to compel the presence of a party who had never, at least ostensibly, agreed or conceded to its jurisdiction or authority to decide. Such a party would necessarily be one who had not even made party to the proceedings by the referral court. This would clearly result in the AT seeking to exercise authority over a party and compelling it to join the proceedings even though it may have never been ad idem on disputes being resolved by way of arbitration. This would not only result in the AT travelling far beyond the contours of the arbitration agreement but negate against the fundamental tenet of arbitration which is founded on consensus and agreement. The Court for all the aforesaid reasons, thus, finds itself unable to countenance the position as taken by the Sole Arbitrator in the present case.



95. Quite apart from the Court having found for reasons aforementioned that the AT stands conferred with no authority to implead or join parties, a reading of the impugned order would clearly appear to indicate that the Sole Arbitrator has proceeded to join the appellants on considerations which are recognized to constitute the basis for the exercise of power under Order I Rule 10 of the CPC. However, the Sole Arbitrator has failed to bear in mind that the Act confers no authority upon an AT to wield powers akin to Order I Rule 10 of the CPC as specifically conferred on national courts. We have also found for reasons aforementioned that Section 19(2) cannot be read as enabling the AT to adopt Order I Rule 10 of the CPC.

96. The Court also finds itself unable to sustain the order impugned herein in light of the Sole Arbitrator itself having deleted parties who had not been arrayed in the original reference proceedings. Although, those parties came to be referred subsequently and are presently before the Sole Arbitrator, the very same logic and reasoning would have been applicable to the appellants here.

97. Before closing, the Court deems it apposite to enter the following observations insofar as the decision in *GMR Energy* is concerned. It becomes pertinent to note that in *GMR Energy* the decision of the learned Judge in *Sudhir Gopi* was duly cited. However, the learned Judge ultimately and while dealing with the question of whether the AT could exercise the jurisdiction to pierce



the corporate veil observed in Para 76 of the report that since the issue of alter ego would not fall in the category of non-arbitrable questions as enunciated in **A. Ayyasamy v. A. Paramasivam**³³, the question of alter ego could be decided by the Court as well as the AT.

98. However, the aforesaid conclusion is prefaced with the learned Judge significantly observing that the issue of alter ego was being answered in light of the facts obtaining in that case. It becomes pertinent to further observe that the Court in *GMR Energy* had ultimately found that the arbitration in question would fall under Part II as opposed to Part I of the Act. Additionally, the arbitration undisputedly was being conducted in accordance with the SIAC Rules which, as noticed hereinbefore, do incorporate specific provisions relating to joinder and intervention of parties.

99. This Court further is of the firm opinion that *Sudhir Gopi* was a decision rendered by a coordinate Bench prior in point of time to *GMR Energy* and was thus a binding precedent. This Court in any case finds no justification to differ with the principles enunciated in *Sudhir Gopi*. In fact, the legal position as enunciated therein deserves to be endorsed and reiterated.

³³ (2016) 10 SCC 386



L. OPERATIVE DIRECTIONS

100. Accordingly, and for all the aforesaid reasons, the instant appeals shall stand allowed. The impugned order dated 23 December 2021 passed by the Sole Arbitrator is hereby set aside. The present judgment, however, shall not preclude the respondents from taking such further steps as may, otherwise be permissible in law, if impleadment of the appellants be deemed expedient and imperative.

YASHWANT VARMA, J.

JULY 24, 2023

Neha/bh/SU