IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.04.2021

\+ **ARB. P. 716/2019 and I. A. No. 7836/2020**

SHAPOORJI PALLONJI AND CO. PVT. LTD ..... Petitioner

versus

RATTAN INDIA POWER LTD & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ciccu Mukhopadhaya, Senior Advocate
: with Mr Abhijeet Sinha, Mr Ravi Tyagi,
: Mr Shubhanshu Gupta and Ms Rashmi
: Gogoi, Advocates

For the Respondents : Mr Gopal Jain, Senior Advocate with
: Mr Karan Batura, Advocates.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter referred to as 'Shapoorji'), a company incorporated under the Companies Act, 1956, has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia*, praying as under:-

> "Appoint Hon'ble Mr. Justice C. K. Prasad (Retd.) Former Judge, Supreme Court of India, the Nominee Arbitrator already appointed by Respondent No.2 for the BTG contract, or any other person, as this Hon'ble Court may deem fit and proper as the Nominee Arbitrator on behalf of the Respondents for adjudication of the disputes that have arisen between the parties;"

2. Respondent no.1, previously known as Indiabulls Power Limited, (hereafter referred to as 'Indiabulls') was desirous of developing a 5x270 MW thermal power plant at Amravati, Maharashtra (hereafter referred to as the 'Project'). Respondent no. 2 (hereafter 'Elena') is a wholly owned subsidiary of Indiabulls.

3. On 19.05.2008, Indiabulls invited bids for execution of Civil and Structural Works, Boiler Turbine Generator Package (hereafter 'BTG Works'), which was a part of the Project. Shapoorji submitted its bid in response to the said invitation, which was subsequently revised. The revised bid was accepted and a Letter of Award (hereafter 'the LoA') dated 06.02.2010 for the contract of execution of the BTG Works at an estimated price of ₹180 Crores, was awarded to Shapoorji. The LoA was signed on behalf of Elena but the letterhead carried the name "Indiabulls".

4. Thereafter, on 26.03.2010 Shapoorji and Elena entered into the 'Contract for BTG Civil and Structural Works' (hereafter 'BTG Contract') for execution of BTG Works. The BTG Contract expressly

included the LoA as one of the contract documents. The initial scope of work for the BTG Works was subsequently increased through twenty-one different amendments issued by Elena and the contract price for BTG Contract was changed to ₹189,18,87,147.07/- (Rupees One Hundred and Eighty-Nine Crores Eighteen Lakh Eighty-Seven Thousand One Hundred Forty-Seven and Seven Paisa only). The Work Order bearing Amendment No. 21 is dated 31.05.2017. The said Work Order also included an arbitration clause.

5. On 03.01.2012, Work Order for Civil and Structural work for Balance of Plant (BoP Contract) was issued to Shapoorji. Prior to that, on 29.10.2010, the contract for Civil and Structural work for the Balance of Plant (BoP Works) was entered into with Gannon Dunkerley & Co. Ltd. The respondents claim that Gannon Dunkerley & Co. could not complete the BoP Works. Shapoorji agreed to complete it; therefore, the same was offloaded to Shapoorji. Shapoorji claims that the BoP Contract was supplemental to BTG Works and therefore, is covered within the Dispute Resolution Clause under the BTG Contract.

6. On 14.01.2014, a Letter of Intent dated 14.01.2014 was issued by Indiabulls to Shapoorji for civil construction for RCC Bridges.

7. On 18.10.2012, a Work Order bearing No. 332003859 (DG Contract) was awarded to Shapoorji for arrangement of DG Sets.

8. Disputes have arisen in respect of execution of the works and rendering of services under the aforementioned Contract(s). In view of the said disputes, Shapoorji issued a notice invoking arbitration in

respect of (i) Letter of Award dated 06.02.2010 (BTG Contract); (ii) Work Order no. 3451000221 dated 03.01.2012 (BoP Contract), awarded to Shapoorji for Balance of Plant Works (BoP Works); (iii) Work Order bearing No. 3382003859 dated 18.10.2012, awarded to Shapoorji for arrangement of DG Sets (DG Contract); and (iv) Letter of Intent dated 14.01.2014 issued by Indiabulls to Shapoorji for civil construction of 4 RCC Bridges (RCC Contract).

9. Shapoorji nominated Justice (Retd.) A.K. Sikri, a former Judge of the Supreme Court as an arbitrator and called upon Indiabulls and Elena to jointly nominate an arbitrator.

10. Indiabulls responded to the said notice by a letter dated 23.10.2019 contending that the Contract(s)/ Work Orders/ LOIs referred to by Shapoorji in its notice invoking arbitration were four separate and independent contracts and, except the Work Order dated 18.10.2012 for arrangement of DG Sets, none of the said Contract(s)/Work orders were entered into by Indiabulls and therefore, there was no arbitration agreement existing between Indiabulls and Shapoorji for reference of disputes arising out of the said Contract(s)/Work Orders, to arbitration. Indiabulls further stated that insofar as, the Work Order dated 18.10.2012 is concerned, the said Work Order did not include any arbitration clause. Further the amount payable under the said Work Order had been paid and its obligations in respect of the said Work Order stood discharged.

11. Elena also responded simultaneously by sending a letter dated

23.10.2019 through a common advocate, *inter alia*, stating that "*the Contract(s)/Work Orders/LOIs mentioned by Shapoorji in its notice invoking arbitration were separate and distinct*". Whilst Elena admitted existence of the arbitration agreement for reference of disputes under the BTG Contract (LoA dated 06.02.2010, Contract dated 26.03.2010, and Work Order dated 29.03.2010) for execution of BTG Works, it disputed the existence of any arbitration agreement for referring the disputes arising in relation to Work Order dated 03.01.2012. In addition, it is stated that it had no connection with the Letter of Intent dated 14.01.2014 for construction of 4 RCC Bridges, as the same was issued by another company – IIC Limited. Elena stated that IIC Limited was neither a sister concern nor an associate of Elena. Further, it was not a group company or a subsidiary of Indiabulls. Similarly, it disputed that it had any concern with the Work Order dated 18.10.2012 issued by Indiabulls for arranging DG Sets. Elena further alleged that Shapoorji was in breach of its obligations under the Contract(s) and had failed to complete the construction work within the time, as stipulated. It also sets out its claim against Shapoorji. It also stated that the said reply be treated as its notice of invocation of arbitration in respect of all the claims under the LoA dated 06.02.2010 and the Contract dated 26.03.2010. Elena appointed Justice (Retd.) C.K. Prasad, a former Judge of the Supreme Court of India as its nominee arbitrator in respect of disputes arising out of letter of Award dated 06.02.2010 and the Contract dated 26.03.2010.

12. During the course of arguments, Mr Mukhopadhaya, learned

Senior Counsel appearing for Shapoorji submitted that disputes relating to the Work Order dated 18.10.2012 for arranging DG Sets on hire as well as disputes relating to the Letter of Intent dated 14.01.2014 issued by IIC Limited be excluded from the scope of the present petition. He confined the present petition to seeking constitution of an Arbitral Tribunal to adjudicate disputes in relation to the BTG Contract (which included the LoA dated 06.02.2010) for execution of BTG Works and Work Order dated 03.01.2012 (BoP Contract) for the execution of BoP Works.

13. In view of the above, the limited controversy required to be addressed in this petition is whether *prima facie* an arbitration agreement exists between Indiabulls and Shapoorji in respect of the BTG Contract for execution of BTG Works and BoP Contract for execution of the BoP Works.

Submissions

14. Mr Mukhopadhaya referred to the LoA dated 06.02.2010 (for BTG Works) and stated that the LoA expressly provided that Shapoorji would enter into a formal contract within one month from the date of issuance of the LoA with "*Indiabulls Power Ltd. (Elena Power and Infrastructure Limited) (EPIL), for the subject work*". He contended that this clearly implied that Elena was acting on behalf of Indiabulls. Although the BTG Contract was signed by Elena, it was on behalf of Indiabulls. Second, he submitted that the revised offer made by Shapoorji to Indiabulls was a part of the BTG Contract and the said offer

was obviously, accepted by Indiabulls as Elena could not have independently accepted the revised offer that was not made to it. Since there is no dispute that Shapoorji's offer to Indiabulls was accepted and the said offer formed a part of the contract, it was not open for Elena to contend to the contrary.

15. Next, he submitted that in terms of the BTG Contract, the Bank Guarantees for due performance of the works were issued by Shapoorji. However, they were not in favour of Elena but in favour of Indiabulls. This also indicated that, Indiabulls was the true beneficiary of the works contracted to Shapoorji. In addition, the Free Issue Material was to be made at the rates approved by Indiabulls. The payments for the contracts were made directly by Indiabulls to Shapoorji. He submitted that in the circumstances, even though Indiabulls had not signed the BTG Contract, it would nonetheless, be bound by the arbitration clause.

16. He submitted that the BTG Contract also included a clause which contemplated an obligation to perform extra works. He submitted that the Work Order for the BoP Works was issued in respect of work relating to the coal handling plant, which was an integral part of the Project and thus was required to be construed as extra work under the BTG Contract. He submitted that the works to be executed under the BoP Work Order were supplemental to the BTG Works and thus, were clearly a part of the BTG Contract. He also pointed out that the BoP Work Order used the terms 'Contractor', 'Engineer In Charge' and also contemplated 'Owner's Approval'. He submitted that none of those terms were defined under BoP Contract but were defined under the BTG

Contract. Thus, it was obvious that the BoP Work Order was supplemental to and was required to be read in conjunction with the BTG Contract and not on a stand-alone basis. He submitted that the parties always conducted themselves in a manner so as to accept arbitration as a one-step method of resolving their, *inter se*, disputes. It would not make any commercial sense for the parties to agree to refer disputes regarding the main contract to arbitration and not include disputes regarding the supplemental and connected contracts.

17. Mr Jain, learned senior counsel appearing for Indiabulls submitted that Indiabulls was not a signatory to the BTG Contract and, therefore, could not be compelled to arbitrate. He further submitted that the notice invoking arbitration was a composite notice in respect of four separate contracts and thus, the same was invalid. He submitted that since the contracts were independent, a composite notice could not be issued. He submitted that Elena was an EPC Contractor and Indiabulls had entered into three separate Contract Agreements, all dated 25.03.2010, with Elena. One was for awarding the civil and related works at the project; the second was for supply of equipment and materials for the project; and, the third, for erection, testing, commissioning and handing over the project. He submitted that Elena had entered into sub-contracts with various parties for procurement of material and services and, the BTG Contract was one such sub-contract entered into by it.

Reasons and Conclusion

18. There is no dispute that the BTG Contract was signed by Shapoorji and Elena. Elena was referred to as the 'Employer'. The General Conditions of the Contract (hereafter 'GCC') defined the term 'Employer' as under:

> "1.12 Employer
>
> Employer shall mean ELENA POWER & INFRASTRUCTURE LIMITED a company incorporated under the Companies Act, 1956 having its registered office at E-29, First Floor, Connaught Place, New Delhi-110001 and corporate office at Indiabulls House, 448-451, Udyog Vihar, Phase V, Gurgaon, Haryana-122001, to whom the work of construction of 5x270 MW Power plant is awarded by the Owners, which expression shall, unless repugnant to the context or contrary to the meaning thereof, include its successors, executors and permitted assignees."

19. The GCC referred to Indiabulls as the 'Owner'. Thus, the essential question to be addressed is whether Indiabulls can be compelled to arbitrate even though it is not a signatory to the BTG Contract.

20. Undisputedly, Sub-section (3) of Section 7 of the A&C Act requires the arbitration agreement to be in writing. Sub-section (4) of Section 7 of the A&C Act further provides that that an arbitration agreement is in writing if it is contained in (a) a document signed by

parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication (including communication through electronic means), which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Sub-section (5) of Section 7 of the A&C Act also provides that a reference in a contract to a document containing the arbitration clause would also constitute an Arbitration Agreement if the contract is in writing and reference to the Arbitration Agreement is such so as to make the arbitration clause a part of the contract. The legislative intent in postulating that an Arbitration Agreement must be in writing is to ensure that the existence of the Agreement is not brought into question and the same is firmly established. Indisputably, arbitration is an alternate dispute resolution mechanism that rests on consent between the parties. Undeniably, the rule is that a non-signatory cannot be compelled to arbitrate on the assumption that the said party has not acceded to arbitration. However, the said rule is not without exceptions.

21. In ***Cheran Properties Ltd. v. Kasturi & Sons Ltd.: (2018) 16 SCC 413***, the Court had noted that "*the evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.*" The Courts in different jurisdictions have evolved various principles on the basis of which, in certain exceptional circumstances non-signatories may be compelled to arbitrate. The Courts in United States of America and France have been liberal in their

approach. The Courts in United States of America have largely drawn on principles of contractual law to compel non-signatories to arbitrate. However, the Courts in Germany and Switzerland have adopted a narrower approach on the issue of compelling non-signatories to arbitrate.

22. In ***Chloro Controls*** (*supra*), the Supreme Court had referred to two theories that could be applied to compel non-signatories to an arbitration agreement to arbitrate, as under:

> "103.1 The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.
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> 103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law."

23. In addition to the above, the Supreme Court had also referred to the Group of Companies doctrine and applied the same for compelling certain parties to arbitrate in that case.

24. According to Gary B. Born, the principal legal basis for holding that a non-signatory be bound by an arbitration agreement is to "*include both purely consensual theories (Eg. agency, assumption, assignment)*

and non-consensual theories (Eg. estoppel, alter ego)". (see International Commercial Arbitration, Volume I, (Third Edition), p. 1531).

25. In several cases, implied consent is used as a basis to hold that non-signatories are bound by the arbitration agreement. It is well settled that in cases where the signatory is an agent of the principal (non-signatory), the principal can be compelled to arbitrate even though it is not a party to the agreement. This rests on the principle that the arbitration agreement may not have been signed by the non-signatory but was executed on its behalf. This principle is applied, essentially, in cases where the agent-principal relationship is established between the signatory and non-signatory and it is established that the signatories had acted under the authority of the principal. There are several cases where the Courts have found the conduct of the signatory and its principal to be sufficient evidence of their relationship.

26. The Courts/Arbitral Tribunals have also in some cases imputed implied consent on the part of the non-signatory and held the non-signatory to be bound by the arbitration agreement. These are typically cases where the Courts/Arbitral Tribunals have found that the non-signatories have played an active role in negotiations and are directly involved in the contract. In ***Gvozdenovic v. United Air Lines, Inc.,: 933 F.2d 1100, 1105 (2d. Cir. 1991)*** the Court held that "*where a party conducts itself as it were a party to a commercial contract, by playing a substantial role in negotiations and/or performance of the contract, it*

may be held to have the impliedly consented to be bound by the contract".

27. There are also cases where third party beneficiaries of a contract may be compelled to arbitrate. Similarly, in cases such as assignment or succession, the assignees or successors interest may be compelled to arbitrate although, they were not original signatories to the arbitration agreement.

28. There exists another set of cases where the Courts have compelled non-signatories to arbitrate by disregarding their corporate facade or where the Courts have found the signatory to be an alter ego of the non-signatory or *vice versa*. In ***Barcelona Traction, Light and Power Company Ltd.: (1970) ICJ Rep. 3***, the International Courts of Justice had explained the doctrine of piercing the corporate veil in the following words:

> "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."

29. Gary B. Born in his book, International Commercial Arbitration, Volume I, (Third Edition), p. 1546, had explained the concept of alter ego as under:

> "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 inequality on a third party or to evade statutory or other legal obligations.
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> 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."

30. Courts in several jurisdictions have drawn heavily on the principle of estoppel and have compelled non-signatories to arbitrate.

31. In ***Avila Group Inc. v. Norma J. of California: 426 F. Supp. 537 (S.D.N.Y. 1977)*** the court found that a party cannot assert the existence of a valid contract to base its claims and at the same time deny the contract's existence to avoid arbitration. The court observed that *"to allow [plaintiff] to claim the benefit of [a] contract and simultaneously*

avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."

32. In ***Life Techs. Corp. v. AB Sciex Prop. Ltd.: 803 F.Supp. 2d 270, 273-274 (S.D.N.Y. 2011)*** it was held that "*a non-signatory may be estopped from avoiding arbitration where it knowingly accepted the benefits of an agreement with an arbitration clause. The benefits must be direct – which is to say, flowing directly from the agreement*".

33. In addition to the above, the Courts have also applied the Group of Companies doctrine to compel a non-signatory to an Agreement to arbitrate. The Group of Companies Doctrine was first applied in the case of ***Dow Chemical v. Isover-Saint-Gobain (1984 Rev Arb 137)***. The said doctrine rests on the concept of a 'single economic reality'.

34. Dow Chemical Venezuela and Dow Chemical Europe, were both directly or indirectly owned and controlled by a parent company Dow Chemical Co. They entered into distribution agreements with several companies the rights of which were subsequently assumed by a company - Isover-Saint-Gobain. Subsequently, distribution contract with Dow Chemical Venezuela was assigned to another Dow subsidiary, Dow Chemical AG. During the course of coperations, Dow Chemical France performed the obligation under the distribution agreements instead of the formal signatories and took other action necessary to make use of business trademarks utilized under the agreements as well. Each agreement contained an ICC arbitration clause. When a dispute arose, arbitration proceeding was commenced against Isover-Saint-Gobain by

not only the two signatory Dow Chemical companies, but also by their parent company Dow Chemical Co. and Dow Chemical France, neither of which had signed the agreements or the arbitration clauses contained therein. The reasons for binding the non-signatory siblings were several. The court stated:

> "Considering that it is indisputable – and in fact not disputed – that Dow Chemical Company has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like Dow Chemical France [one of the subsidiary companies], effectively and individually participated in their conclusion, their performance, and their termination" and "irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality of which the arbitral tribunal should take account when it rules on its own jurisdiction"

35. The award was subsequently upheld by the Paris Cour d'appel; and it rejected Isover-Saint-Gobain's application for annulment of the award. [***See: Société Isover-Saint-Gobain v. Société Dow Chem. France, 1984 Rev. arb. 98 (Paris Cour d'appel), Judgement of 21 October 1983***].

36. Several judicial decisions in the United States have also approved this view, albeit not always specifically relying upon the Group of Companies doctrine. [See also: ***Freeman v. Complex Computing Company, Inc., U.S. District Court for the Southern District of New York, 979 F.Supp. 257, 14 October 1997; Federated Title Insurers, Inc. v. Ward, District Court of Appeal of Florida,***

Fourth District, 538 So.2d 890, 15 March 1989; Coastal States Trading, Inc. v. Zenith Navigation SA, 446 F.Supp. 330].

37. Recently, the United States Supreme Court in ***GE Energy Powe Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC: 140 S.Ct. 1637, 1640 (2020),*** held that nothing in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or the domestic law (Federal Arbitration Act) prohibits courts from deciding that non-signatories may be bound by or enforce arbitration agreements based on contract, agency, equity or related principles. The Supreme Court referred to the drafting history of the New York Convention and concluded that: "*Nothing in the drafting history suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances.*" The Court found that the New York Convention does not address whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estopped and according held that *"silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of equitable estoppel doctrines."* The Supreme Court also found support in citation to cases from several New York Convention contracting states' courts that had permitted enforcement of arbitration agreements by non-signatories.

38. The said doctrine was also applied by the Supreme Court in ***Chloro Controls*** (*supra*) to compel certain companies to arbitrate

disputes that arose in connection with agreements to which they were not signatories.

39. In ***Mahanagar Telephone Nigam ltd. v. Canara Bank: (2020) 12 SCC 767,*** Canara Bank had preferred a Writ Petition before this Court challenging MTNL's decision to cancel the bonds and also sought a direction for payment of accrued interest by MTNL. The said Writ Petition was initially disposed of. It was subsequently revived. During the proceedings, the parties agreed for the issues to be referred to arbitration. The parties suggested the name of a former Chief Justice of this Court as a sole arbitrator and he was, accordingly, appointed as a sole arbitrator to resolve the disputes between the parties. In the proceedings before the learned Arbitrator, the wholly owned subsidiary of Canara Bank – CANFINA, was joined in as a party. This was objected to by Canara Bank. The learned Arbitrator ruled in favour of Canara Bank and passed an interim award holding that CANFINA had not appeared before this Court when the disputes were referred to arbitration and thus, was not a party to the Arbitration Agreement. MTNL filed an application before this Court seeking clarification of the order whereby this Court had referred the parties to arbitration. The said application was withdrawn. Thereafter, MTNL filed another application for recalling certain orders passed in the Writ Petition. The said application was also dismissed by this Court. Aggrieved by certain orders passed by this Court, MTNL filed a Special Leave Petition before the Supreme Court. One of the principal controversies raised before the Supreme Court was, whether CANFINA, who was a subsidiary of Canara Bank

and was also the initial subscribers to the bonds issued to MTNL, should be made a party to the arbitration. The Supreme Court applied the doctrine of 'Group of Companies' and held that CANFINA was undoubtedly a necessary and proper party to the arbitration proceedings. The relevant extract of the said decision is set out below:

> "**10.2.** As per the principles of contract law, an agreement entered into by one of the companies in a group, cannot be binding on the other members of the same group, as each company is a separate legal entity which has separate legal rights and liabilities. The parent, or the subsidiary company, entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group, to be bound by that agreement. Similarly, an arbitration agreement is also governed by the same principles, and normally, the company entering into the agreement, would alone be bound by it.
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> **10.3.** A non-signatory can be bound by an arbitration agreement on the basis of the "group of companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.
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> **10.4.** The doctrine of "group of companies" had its origins in the 1970s from French arbitration practice. The "group of companies" doctrine indicates the implied consent to an agreement to arbitrate, in the context of modern multi-party business transactions. It was first propounded in *Dow Chemical* v. *Isover-Saint-Gobain* [*Dow Chemical* v. *Isover-Saint-Gobain*, 1984 Rev Arb 137 : (1983) 110 JDI 899] , where the Arbitral Tribunal held that:

> "… the 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."

10.5. The group of companies doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts. [Interim award in ICC Case No. 4131 of 1982, IX YB Comm Arb 131 (1984); Award in ICC Case No. 5103 of 1988, 115 JDI (Clunet) 1206 (1988). See also Gary B. Born: *International Commercial Arbitration*, Vol. I, 2009, pp. 1170-1171.]

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, ICC Case No. 5103 of 1988.]

10.8. The "group of companies" doctrine has been invoked and applied by this Court in *Chloro Controls (India) (P) Ltd.* v. *Severn Trent Water Purification Inc.* [*Chloro Controls (India) (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689The Madras High Court has invoked the group of companies doctrine in a foreign seated arbitration in *SEI Adhavan Power (P) Ltd.* v. *Jinneng Clean Energy Technology Ltd.*, 2018 SCC OnLine Mad 13299 : (2018) 4 CTC 464.] , with respect to an international commercial agreement. Recently, this Court in *Ameet Lalchand Shah* v. *Rishabh Enterprises* [*Ameet Lalchand Shah* v. *Rishabh Enterprises*, (2018) 15 SCC 678 : (2019) 1 SCC (Civ) 308] , invoked the group of companies

doctrine in a domestic arbitration under Part I of the 1996 Act."

40. In ***Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Anr.: (2018) 15 SCC 678***, the Supreme Court took a liberal view on the issue of compelling a non-signatory to arbitration. In that case, respondent no.1, Rishabh Enterprises, had entered into two agreements with Juwi India Renewable Energies Pvt. Ltd. One was an equipment and material supply contract for purchase of power generating equipment and the second was an engineering, installation and commissioning contract, for installation and commission of the solar plant. Both the agreements included an arbitration clause. Thereafter, Rishabh Enterprises entered into an agreement with Astonfield Renewable Pvt. Ltd. (appellant no.2) for purchasing CIS Photovoltaic products, which were to be leased to Dante Energy Pvt. Ltd. (appellant no. 3). Dante Energy Pvt. Ltd. agreed to pay lease rent for the equipment. This agreement included an arbitration clause. Disputes arose between the parties. Ameet Lal Chand (appellant no.1 before the Supreme Court), an individual, was stated to be the promoter of both Astonfield Renewables Pvt. Ltd. and Dante Energy Pvt. Ltd. He also exercised control over both companies. It is also material to note that the arbitration clause contained in the agreements were identical. The Supreme Court found that all four agreements were inter-connected. The Court referred to its earlier decision in ***Chloro Controls*** (*supra*) and observed as under:

> "24. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project, namely, operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. … What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only be referring all the four agreements and the parties thereon to arbitration."

41. The controversy in the present case – that is, whether Indiabulls can be compelled to arbitrate regarding the disputes that have arisen with Shapoorji –must be addressed in view of the principles as noted above.

42. In the present case, it is evident that Indiabulls had fully participated in the formation of the BTG Contract. It is material to note that the thermal power plant in question was being developed by Indiabulls as its undertaking. Undisputedly, Indiabulls is a beneficiary of the works being executed by Shapoorji. As noted above, whether a non-signatory is a direct beneficiary of the contract containing the arbitration clause is material in determining whether the said beneficiary can be compelled to arbitrate even though it is not a signatory to the Agreement. However, this is coupled with the condition that such benefit should be direct and not indirect.

43. In the present case, Indiabulls (and not Elena) had invited offers for BTG Works. Shapoorji had submitted its bid (revised offer) directly to Indiabulls pursuant to the invitation issued by Indiabulls. The said bid was accepted and such acceptance constituted a binding contract. Concededly, on Shapoorji's bid (revised offer) being accepted, it was no longer open for Shapoorji to resile from its commitments. In this view, there is ample evidence to show that Indiabulls had directly participated in the negotiations and formation of the contract for execution of the BTG Works even though it was not a signatory to the BTG Contract that was executed subsequently.

44. There is also ample material on record to show that Indiabulls had a direct involvement in the BTG Contract. It is not disputed that in terms of Clause 6 of the LoA, Shapoorji was obliged to provide Bank Guarantees to Indiabulls. It is also not disputed that in terms of the LoA, Shapoorji had furnished Bank Guarantees against the advances received as well as a Performance Bank Guarantee and the same were in favour of Indiabulls and not Elena. Thus, Indiabulls had secured itself against performance of the BTG Contract by Shapoorji.

45. It is also not disputed that Indiabulls had directly issued Letters of Credit to Shapoorji and made certain payments to Shapoorji, which were due under the BTG Contract. In the given facts, this Court finds it difficult to accept that Indiabulls can avoid its obligation to arbitrate even though it has been a direct beneficiary of the BTG contract and to some extent been directly involved with Shapoorji in negotiating and execution of the contract.

46. As noted above, Shapoorji had submitted its offer to Indiabulls on 01.02.2010 and the same was followed by a revised offer dated 06.02.2010. Shapoorji's bid was accepted and the same was communicated by the LoA dated 06.02.2010. It is important to note that the LoA was issued on a letterhead carrying the name 'Indiabulls'. However, it was signed on behalf of Elena.

47. Clause 8 of the said LoA is relevant and is set out below:

> "8.0 CONTRACT AGREEMENT
>
> The Contractor shall enter into a formal contract agreement within one month from the date of issuance of the LOA with Indiabulls Power Ltd. (Elena Power and Infrastructure Limited (EPIL), for the subject work, incorporating detailed terms and conditions, which forms part of Bid Document. The following documents shall govern the execution of the said Contract till agreement is signed:
>
> (i) This Letter of Award along with the Annexures
> (ii) Special conditions of Contract (forms part of Bid Document)
> (iii) General Conditions of Contract (GCC) (forms part of Bid Document)
> (iv) Technical Specifications (forms part of Bid Document)
> (v) Construction Safety, Health and Environment (SHE) manual (fonns part of Bid Document)
> (vi) All Applicable commercial/technical requirements, specifications, data sheets and drawings
> (vii) All relevant codes and standards

(viii) Your Offer letter dated 6th Feb 2010

> All conditions and deviations/exceptions, explicit or implicit, contained in your offer or any subsequent communication/ discussions, unless specifically agreed during meetings and recorded herein, shall be deemed to be withdrawn and considered invalid."
>
> Subsequent to the signing of the contract agreement, documents mentioned in the contract agreement and this LOA shall govern the Contract."

48. The opening sentence of Clause 8 required Shapoorji to enter into a formal contract agreement within one month from the date of issuance of the said LoA with Indiabulls. The name of Elena was mentioned in parenthesis. Parenthesis is used to provide an explanation or clarification.

49. In ***Fuerst Day Lawson Limited v. Jindal Exports Limited: (2011) 8 SCC 333***, the Supreme Court referred to meaning of brackets/ parenthesis as defined in various dictionaries and held as under:

> "45. According to *The New Oxford Dictionary of English*, 1998 Edn., brackets are used to enclose words or figures *so as to separate them from the context*.
>
> 46.*Oxford Advanced Learner's Dictionary*, 7th Edn., defines "bracket" to mean
>
> "either of a pair of marks, ( ) placed around *extra information* in a piece of writing or part of a problem in mathematics."

47.*The New Oxford Dictionary of English*, 1998 Edn., gives the meaning and use of parenthesis as:

"*Parenthesis*.—noun (pl. parentheses) a word, clause, or sentence inserted *as an explanation or afterthought into a passage which is grammatically complete without it*, in writing usually marked off by brackets, dashes, or commas.

—(usu. Parentheses) a pair of round brackets ( ) used to include such a word, clause, or sentence."

(emphasis supplied)

48.*Oxford Advanced Learner's Dictionary*, 7th Edn., defines the meaning of parenthesis as:

> "a word, sentence, etc. that is added to a speech or piece of writing, especially in order to give extra information. In writing, it is separated from rest of the text using brackets, commas or dashes."

49.*The Complete Plain Words by Sir Ernest Gowers*, 1986 Revised Edn. by Sidney Greenbaum and Janet Whitcut, gives the purpose of parenthesis as follows:

> "*Parenthesis*.—The purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition, or additional piece of information of any sort *into a sentence that is logically and grammatically complete without it*. A parenthesis may be marked off by commas, dashes or brackets. The degree of interruption of the main sentence may vary from the almost imperceptible one of explanatory words in apposition, to the violent one of a separate sentence complete in itself."

(emphasis supplied)

50. *The Merriam-Webster Online Dictionary* defines "parenthesis" as follows:

"1 *a* : an amplifying or explanatory word, phrase, or sentence inserted in a passage from which it is usually set off by punctuation *b* : a remark or passage that departs from the theme of a discourse : DIGRESSION

2: INTERLUDE, INTERVAL

3: one or both of the curved marks ( ) used in writing and printing to enclose a parenthetical expression or to group a symbolic unit in a logical or mathematical expression."

51. *The Law Lexicon, The Encyclopaedic Law Dictionary* by P. Ramanatha Aiyar, 2000 Edn., defines "parenthesis" as under:

"*Parenthesis*.—a parenthesis is defined to be an explanatory or qualifying clause, sentence, or paragraph, inserted in another sentence, or in course of a longer passage, without being grammatically connected with it. (*Cent. Dist.*)

Parenthesis is used to limit, qualify or restrict the meaning of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets (*United States* v. *Schilling* [53 Fed 81 : 3 CCA 440]).

52. Having regard to the grammatical use of brackets or parentheses, if the words "(and from no others)" occurring in Section 39 of the 1940 Act or Section 37 of the 1996 Act are viewed as "an explanation or afterthought" or extra information separate from the main context, then, there may be some substance in Mr Dave's submission that the words in parenthesis are surplusage and in essence the provisions of Section 39 of the 1940 Act or Section 37 of the 1996 Act are the same as Section 50 of the 1996 Act. Section 39 of the 1940 Act says no more and no less than what is stipulated in Section 50 of the 1996 Act. But there may be a

different reason to contend that Section 39 of the 1940 Act or its equivalent Section 37 of the 1996 Act are fundamentally different from Section 50 of the 1996 Act and hence, the decisions rendered under Section 39 of the 1940 Act may not have any application to the facts arising under Section 50 of the 1996 Act. But for that we need to take a look at the basic scheme of the 1996 Act and its relevant provisions."

50. In ***Dozco v. Doosan Infracore Co. Ltd: (2011) 6 SCC 179*** the Supreme Court has taken a similar view. In that case, the question was of interpreting the arbitration agreement between the parties, which has been set out in paragraph 4 of the aforesaid decision and reads as follows:

4. The petition is countered on behalf of the respondent who opposes the same on account of maintainability. According to the respondent, only the rules of arbitration of the International Chamber of Commerce would apply in accordance with the agreement between the parties. It is contended by the respondent that this Court will have no jurisdiction much less under Section 11(6) of the Act to appoint an arbitrator, particularly, because it has been specifically agreed in Articles 22 and 23 which are as under:

"*Article 22. Governing Laws — 22.1*: This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.

Article 23. Arbitration — 23.1: All disputes arising in connection with this agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the *International Chamber of Commerce.*"

51. While interpreting the words in the brackets as appearing in Article 23.1, the Supreme Court held as under:

> "15. If we see the language of Article 23.1 in the light of Article 22.1, it is clear that the parties had agreed that the disputes arising out of the agreement between them would be finally settled by the arbitration in Seoul, Korea. Not only that, but the rules of arbitration to be made applicable were the Rules of the International Chamber of Commerce. This gives the prima facie impression that the seat of arbitration was only in Seoul, South Korea. However, Ms Mohana, learned counsel appearing on behalf of the petitioner drew our attention to the bracketed portion and contended that because of the bracketed portion which is to the effect "or such other place as the parties may agree in writing", the seat could be elsewhere also. It is based on this that Ms Mohana contended that, therefore, there is no express exclusion of Part I of the Act. It is not possible to accept this contention for the simple reason that a bracket could not be allowed to control the main clause. The bracketed portion is only for the purposes of further explanation. In my opinion, Shri Gurukrishna Kumar, learned counsel appearing on behalf of the respondent, is right in contending that the bracketed portion is meant only for the convenience of the Arbitral Tribunal and/or the parties for conducting the proceedings of the arbitration, but the bracketed portion does not, in any manner, change the seat of arbitration, which is only Seoul, Korea."

52. It can be discerned from the aforesaid decisions that words, clauses or a sentence appearing in parenthesis are inserted in a passage as an explanation, which is otherwise also, grammatically complete without it. In other words, the purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition or additional piece of information of any sort in a sentence that is logically and grammatically complete without it. The clause clearly indicated that the formal contract would be with Indiabulls. This court is of the view that mentioning Elena

between brackets was done to indicate that Indiabulls and Elena were one and the same. Thus, the formal contract with Indiabulls may be entered by Elena. The facts and circumstances also bear out that Elena is an Alter-Ego of Indiabulls.

53. The LoA formed a part of the BTG Contract. It is relevant to note that Clause 7 of the LoA also contained an arbitration clause. Clause 7 of the LoA is set out below:

> "7.0 **GOVERNING LAW AND ARBITRATION**
>
> This LoA shall be construed in accordance with and governed by the laws of India and the parties have decided that in the event of any litigation the courts in New Delhi shall have exclusive jurisdiction.
>
> All disputes arising out of this LoA shall be resolved amicably. In the event that the dispute cannot be resolved amicably, the same shall be referred for arbitration in accordance with the Arbitration and Conciliation Act, 1996 as prevalent in India. Each party shall nominate one Arbitrator and the two Arbitrators so nominated shall jointly nominate a third presiding Arbitrator. The Arbitrators shall give a reasoned Award. The place of arbitration shall be New Delhi, India and the Language of arbitration shall be English.
>
> The Parties agree that any arbitration award shall be final and binding upon the Parties. The Parties hereto agree that the Contractor shall be obliged to carry out its obligations under the Contract even in the events dispute is referred to Arbitration."

54. In view of the above, there is material on record to impute that Indiabulls is a party to the arbitration agreement. There is also merit in Mr Mukhopadhyay's contention that since Shapoorji had made a revised offer to Indiabulls and it is not disputed that the same was accepted, it must follow that the resultant contract was also made with Indiabulls. Clearly, a third party cannot accept an offer to constitute binding contractual obligations and it is not disputed before this Court that the LoA did give rise to a contract that bound Shapoorji to the terms contained therein. The LoA was accepted by Shapoorji. Thus, it also agreed to the terms thereof which are stated above, which included a specific condition that it would enter into a formal contract agreement with Indiabulls.

55. The BTG Contract was amended several times. The last amended Work Order bearing Amendment No. 21 for executing the BTG Works for a total consideration of ₹189,18,87,147.07/- was issued on 31.05.2017. The said Work Order specifically contemplated reference of disputes between Shapoorji and the "Owner" to arbitration. The term 'Owner' is defined to mean Indiabulls under the BTG Contract. The terms and conditions as included in Amendment No. 21 as well as the arbitration clause is set out below:

> "Terms & Condition:
>
> Note : For Detailed Terms & Conditions refer to the Contract Agreement (With Annexer)
>
> 1. Payment Terms

The contractor shall be entitled to receive the payment in following manner, subject to such adjustments/ variations as allowed in the SCC and GCC:

I) 5% of the contract prince shall be paid as mobilization advance on acceptance of LOA and submission of necessary Bank Guarantee/Security. Another 5% advance shall be paid on completion of initial mobilization duly approved by Engineer in charge at Site and submission of L-2 SCHEDULE.

II) 85% of the contract price shall be paid on Pro-rated basis against monthly RA Bills.

III) Balance 5% of Contract price shall be paid after defect liability period.

All payments shall be made within 30days upon submission of invoice and all necessary documents duly certified by owner's Engineer in charge at site.

All free issue materials as specified in the special conditions of the contract and schedule of quantities shall be arranged by the contractor at predetermined rates duly approved by the owner. The payment of such material can be done either to the contractor or directly to vendor as per mutual agreement. No extra payment shall be payable to the contractor on this account."

XXXX XXXX XXXX

"3.0 ARBITRATION

3.1 If any dispute or difference of any kind whatsoever shall arise between the Owner and the Supplier, arising out of the Contract for the performance of the Works whether during the progress of the Works or after its completion or whether before or after the termination, abandonment or breach of the Contract, it shall, in the

first place, be referred to and settled by the Owner, who, within a period of 30 (thirty) days after being requested to do so, shall give written notice of his decision to the Supplier.

3.2 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties and the completion of the entire work under the Contract and shall forthwith be given effect to by the Supplier who shall comply with all such decisions, with all due diligence, whether he requires conciliation and/or arbitration as hereinafter provided or not.

3.3 If after the Owner has given written notice of his decision to the Supplier and no claim to conciliation and/or arbitration has been communicated to him by the Supplier within 30 (thirty) days from the receipt of such notice, the said decision shall become final and binding on the Supplier.

3.4 in the event of the Owner failing to notify his decision, as aforesaid, within 30 (thirty) days after being requested, or in the event of the Supplier being dissatisfied with any such decision, or within 30 (thirty) days after the expiry of the first mentioned period of 30 (thirty) days, as the case may be, either party may require that the matters in dispute be referred to arbitration as hereinafter provided.

3.5 All disputes or differences in respect of which the decision, if any, of the Owner has not become final and binding as aforesaid, shall be settled by arbitration, under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification,

in the manner hereinafter provided. The venue of arbitration shall be New Delhi, India.

3.6 The arbitration shall be conducted by a sole arbitrator appointed by the Owner.

3.7 The decision of the sole arbitrator shall be final and binding upon the parties. The expense of the arbitration shall be paid as may e determined by the arbitrator. The arbitrator may, from time to time, with the consent of both parties increase the time for the award.

3.8 During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out their respective obligations under the Contract."

56. Indiabulls cannot claim that was not aware of the terms of the said Amendment considering it had made payments/issued LCs; approved rates of certain material; and also issued the Final Acceptance Certificate. The Final Bill for the BTG Contract was also submitted to and received by Indiabulls. It is not the case of Indiabulls that it had objected to Amendment No.21 at any time during the execution of the BTG Works or thereafter. Indiabulls is thus estopped from contending to the contrary.

57. Estoppel principles have frequently been applied by Courts in the United States of America to hold that a party is bound by the arbitration clause associated with the substantive contractual agreement.

58. In ***Life Techs Corp.v. AB Sciex Prop. Ltd: 803 F.Supp.2d 270, 273-74 (S.D.N.Y. 2011)*** it was held that "*a non-signatory may be*

estopped from avoiding arbitration where it knowingly accepted the benefits of an agreement with an arbitration clause." Even in ***Deloitte Noraudit v. Deloitte Haskins Sells: 9 F.3d 1060 (2d Cir. 1993)],*** the court held that a non-signatory can be compelled to arbiter under equitable estoppel principles, because it received a copy of the contract, did not object to it, offered no persuasive reason for its inaction and knowingly accepted benefits of contract.

59. The next aspect to be examined is whether the relationship between Indiabulls and Elena and their conduct, is sufficient to compel Indiabulls to be a party to the arbitration regarding the disputes raised by Shapoorji. In this regard, it is not disputed that Elena is a wholly owned subsidiary of Indiabulls. Indisputably, Elena is a separate legal entity by virtue of it being incorporated as a company. However, it is well settled that the corporate veil can be pierced in certain circumstances as noticed hereinbefore. In the present case, Shapoorji had claimed that Elena was a Special Purpose Vehicle (SPV) for executing the Project. Therefore, it had no other purpose but to facilitate setting up the Thermal Power Plant. Although, this averment was denied by the respondents; they have not produced any material which would effectively counter the said assertion. There is no assertion that Elena is engaged in any other business other than its participation in execution of the projects for Indiabulls. This Court is inclined to accept the contention that Elena is a Special Purpose Vehicle and it would be apposite to treat Elena as an extended division of Indiabulls as it is not involved in any other business other than executing the projects for

Indiabulls. Although it is contended that Elena is an independent contractor and was awarded three separate contracts by Indiabulls, there is no material on record to indicate that Elena and Indiabulls function as independent and separate organisations. On the contrary, there is material to indicate that Elena is not organized and staffed separately and is independent of Indiabulls.

60. It was also pointed out that one Mr Shanker Dutt who was the General Manager of Indiabulls, had issued the Work Completion Certificate for both the BTG and BoP Works on behalf of Elena. He had also signed a letter dated 24.01.2017 as an authorized signatory of Indiabulls. It does appear that Indiabulls and Elena share common resources. It is also seen from the affidavits placed on record that both Indiabulls and Elena share a common office space (at A-49, Ground Floor Road No. 4, Mahipalpur, New Delhi-110037). Further as mentioned above, the LoA was issued on the letterhead mentioning Indiabulls even though it was signed on behalf of Elena. It would be reasonable to draw an inference that Elena also used stationery which prominently mentions "Indiabulls".

61. In ***Fisser v. Int'l Bank: 282 F.2d 231, 238 (2nd Cir. 1960)***, the Court analysed the situation in which a claimant alleged that the respondent is just an alter ego of its mother company. It held that, if there is a valid arbitration agreement between the claimant and respondent, but respondent is a mere puppet of the mother company, such corporate mother must be bound by arbitration as well.

62. Similarly, in ***Builders Federal (Hong Kong) v. Turner Const.: 655 F. Supp. 1400, 1406 (S.D.N.Y. 1987)***, the court considered a construction case involving a foreign project where the sub-contractors sought to compel the American corporate parents to enter arbitration abroad of a dispute involving claims against the main contractor. The Court considered that the allegations that the parent corporation exercised dominance and control over the main contractor were sufficient to "*state a claim for alter ego liability*" even in the absence of any allegation of fraud. The relevant extract of the said decision is set out below:

> "The petition is replete with allegations that defendants exercised dominance and control over TEA, and that TEA was under-capitalized. Those allegations are not sufficient of themselves to "pierce a corporate veil" so as to visit upon parent corporations the obligations of a subsidiary. *Walkovszky v. Carlton*, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6 (1966). But the petition alleges more than that. It alleges that the subcontract between plaintiff's and TEA obligated TEA to make certain payments to plaintiffs upon termination of the main contract; and that defendants decided that TEA would breach those obligations, sending implementing instructions to TEA. Petition, ¶ 38. These allegations, even in the absence of allegations of fraud requiring Rule 9(b) particularity, are sufficient to state a claim for alter ego liability. *Gorrill v. Iceland Air/Flugleidir*, 761 F.2d 847, 853 (2d Cir.1985) (construing New York law)."

63. In ***Thomson-CSF, S.A. v. American Arbitration Association: 64 F.3d 773 (2d Cir. 1995)***, it was held that the corporate parent must exert a degree of control over the subsidiary that there is abandonment of separate corporate structures, intermingling of corporate finances and directorship and in essence, the subsidiary must cease to function as a distinct entity. A similar view was expressed in ***Craig v. Lake Asbestos of Quebec Ltd.: 843 F.2d 145 (3rd Cir. 1988)***.

64. In ***Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.: 933 F.2d 131, 32, 32 Fed. R. Evid. Serv. 1218 (2d Cir. 1991)***, the Court listed some grounds on which piercing the corporate veil would be justified, such as, where the parent and subsidiary are run by common officers, do not deal at arm's length with each other, are not treated as separate profit centres and share common office space. The law in this regard has been summarised in ***ARW Exploration Corp. v. Aguirre: 45 F.3d 1455 (10th Cir, 1995)***, where the Court held that "*a corporation will be bound to arbitrate when it is merely the "alter ego" of an individual or previously established corporation that has entered into the arbitration agreement*".

65. Given the facts and circumstances of the case, this Court is of the view that it would be apposite to compel Indiabulls to arbitrate as there is sufficient material to show that Elena is its alter ego. This is evident from the fact that Elena's name has been mentioned in parenthesis against the name of Indiabulls in the LoA. The shareholding pattern confirms that Indiabulls does exercise complete control as a shareholder over Elena. The fact that the officials of Indiabulls acted on behalf of

Elena also indicate that Indiabulls exercises substantial and dominant direct control over the affairs of Elena.

66. In addition, Indiabulls has a direct involvement in the BTG Contract.

67. Shapoorji has raised claims against Indiabulls as well as Elena. These claims arose from the same contract (BTG Contract). Clearly, this Court is unable to hold that, Shapoorji's claim that Indiabulls is liable to pay its dues, is unsubstantial or frivolous and should be rejected at the threshold. In the circumstances, rejecting Shapoorji's prayer to compel Indiabulls to arbitrate would effectively relegate Shapoorji to institute separate proceedings against Indiabulls on the same cause of action. This would not be an apposite recourse and the cause of action cannot be split. Considering the above, and the fact that Indiabulls was directly involved in the contract, this Court is of the view that Indiabulls should also be referred to arbitration for adjudication of the subject disputes relating to or arising from the BTG Contract.

68. Insofar as the BoP Works is concerned, it is admitted that the said contracts for plant works were awarded to another agency (Gannon Deunkerley Co. Ltd. The said contract was terminated midway as it was alleged that Gannon Dunkerley Co. Ltd. was unable to perform the same. The remaining part of the BoP Work was thereafter awarded to Shapoorji. It appears that quotes were invited from Shapoorji and a Work Order was issued. Admittedly, that was not a part of the BTG Contract as initially awarded but a part of a separate contract awarded

to Gannon Dunkerley & Co. Ltd. The said contract does not include an arbitration clause.

69. It is also important to note that the amounts due against the BoP Works were not included in the Final Bill for the BTG Contract. Shapporji had submitted a separate Final Bill for the BoP Contract and therefore the contention that works executed under the BoP Contract, should be considered as additional items under the BTG Contract cannot be readily accepted. In this view, this Court is unable to accept that an agreement exists between the parties for referring the disputes relating to the BoP Contract to arbitration.

70. Before concluding, it is apposite to clarify that none of the findings recorded in this order would preclude the parties from agitating their respective contentions before the Arbitral Tribunal. As indicated by the Supreme Court in ***Vidya Drolia v Durga Trading Corporation: (2021) 2 SCC 1***, this Court has conducted an "*intense yet summary prima facie review*" of the controversy involved. None of the observations made in the present petition should be construed as foreclosing the rights of the parties to a full contest before the Arbitral Tribunal.

71. Elena had appointed Justice C.K. Prasad as its nominee arbitrator. He would also be considered as the nominee Arbitrator of Indiabulls. He, along with the learned Arbitrator nominated by Shapoorji, shall nominate the third Arbitrator to constitute an Arbitral Tribunal within a further period of two weeks from date, failing which

the parties are at liberty to approach this Court for appointment of the third Arbitrator.

72. The petition is allowed in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

APRIL 07, 2021
PKV/RK