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Arbitration Proceedings

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Introduction

It is well settled that, in most cases, the arbitral tribunal, being a creature of the arbitration agreement between signatory parties, cannot pass orders against third-parties/ non-signatories. However, recently, the Indian Judiciary has begun to apply the 'Doctrine of Piercing the Corporate Veil' or 'Alter Ego Doctrine' to arbitration proceedings in order to bind non-signatories to the arbitration agreement in certain circumstances.

The said doctrine may provide an effective solution to a party in situations where such parties are unable to procure an effective remedy against a signatory to the arbitration agreement for reasons such as the illiquidity of the signatory or fraud. This doctrine may be of particular use to investors/creditors involved in disputes with investee/debtor companies who are signatories, where there has been an intentional secretion of funds, from the signatory investee/debtor companies to third-parties who are non-signatories to the arbitration agreement, for the purpose of defeating the rights of the investors/creditors.

Given the occurrence of several unprecedented corporate frauds in recent times, the doctrine of lifting the corporate veil has become an increasingly important tool which may be used by investors/creditors to affix liability on non-signatories to whom funds of the signatories have been diverted.

This paper analyzes the evolution of the judgments of the Indian judiciary relating to the doctrine of piercing the corporate veil (alter ego doctrine). From this analysis we determine whether the said doctrine may be applied at different stages of arbitration proceedings for seeking relief against non-signatory/third-parties.

Doctrine of Piercing the Corporate Veil

What is the doctrine of piercing the corporate veil?

The doctrine of piercing the corporate veil is a legal doctrine that essentially provides that while a company has an independent and separate legal personality, in certain exceptional circumstances this corporate façade may be pierced disregarding the separation between entities organized in corporate form with limited liability of shareholders. The doctrine has been applied to fasten liability on the 'alter ego', being an entity, whether a promoter, subsidiary entity, parent entity, etc., separated by the corporate façade. It is generally applied in situations where prevailing circumstances warrant that the company's legal personality is disregarded in the interest of fairness and equity.

Judicial recognition of the doctrine of piercing the corporate veil

The doctrine of piercing the corporate veil is well recognized by the Indian Judiciary which has applied the doctrine as an exception to the theory that a company has a legal and separate entity and may be applied to extend liability to the shareholders/affiliates of the company in certain circumstances.¹

In the landmark judgment in *Life Insurance Corporation of India vs. Escorts Limited*² the Supreme Court laid down certain general circumstances where the doctrine may apply including where a statute itself contemplates lifting the veil, where fraud is intended to be prevented and where a taxing statute is sought to be evaded. However, the Supreme Court also noted that applicability of the doctrine cannot be constrained to a particular set of circumstances, it is dependent on the realities of each case and the requirement of doing justice on all the parties³.

In the judgment of the Supreme Court in *Delhi Development Authority vs. Skipper Construction Company (P) Ltd. and Anr.*⁴ the doctrine was applied to a case which clearly involved ingredients of siphoning and fraud. The Supreme Court plainly set out that in a situation where the corporate character has been employed for the purpose of committing illegality or fraud, the Court will look into the reality beyond the corporate character so as to enable it to pass appropriate orders in the interest of justice.

Applicability of the doctrine of piercing the corporate veil to the Arbitration and Conciliation Act, 1996

The doctrine of piercing veil is now a well settled doctrine which has been applied in a plethora of judgments of the Indian Courts. The Indian judiciary has applied this doctrine in various different circumstances and in relation to various different statutes. One such statute in which the Courts have applied this doctrine is the Arbitration and Conciliation Act, 1996 (as amended) (the “Act”).

It is important to note that the express language of Section 8 and Section 45 of the Act expressly provides that a non-signatory i.e. “any person” may be joined in an arbitration proceeding if the non-signatory is “claiming through or under” a signatory to the arbitration agreement. Thus, the express language of the Act contemplates the joinder of a non-signatory claiming through a signatory. However, as per the landmark decision of the Supreme Court in *Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. & Others*⁵, a signatory to the arbitration agreement may also claim “against or by someone who is not originally named as a party” to the arbitration agreement⁶ “through or under” a signatory to the arbitration agreement.

In other words, a non-signatory may make a claim through and under a signatory and a claim may also be made against a non-signatory through and under a signatory. It is important to note that the language of the said Section 45 is now reflected

in Section 8 of the Act by way of the 2015 amendment to the Act, hence the principles of *Chloro Controls (Supra)* also apply to the said Section 8.

While the Act may envisage a situation where a non-signatory is joined in arbitration proceedings, it is settled that arbitration finds its sanction in the consent of the signatory parties. Therefore, there must be some exceptional legal basis for joining a non-signatory. There are several legal theories which may be employed in this regard. While most of these theories including the agency doctrine, group companies’ doctrine, implied consent theory are consent based theories. The doctrine of lifting the corporate veil does not require the express or implied consent of the ‘alter ego’ non-signatory in order to join them in the arbitration proceedings.

Judicial Precedents wherein the doctrine of lifting the corporate has been considered in relation to arbitration proceedings

The Courts willingness to apply this principle to arbitration has undergone significant change over the last three decades. The rest of this paper examines the various judicial precedents in which the doctrine of lifting the corporate veil has been applied at different stages of such arbitration proceedings.

Does the Court have the power to lift the corporate veil in arbitration proceedings?

- Proceedings for referring a third-party ‘alter ego’ to arbitration under Section 8 or Section 45 of the Act:

In the celebrated decision of *Chloro Controls (Supra)* a full bench of the Supreme Court of India dealt with joinder of non-signatories to an arbitration under Section 45 of the Act. The Supreme Court held that a non-signatory or third party could be subjected to arbitration without their prior consent in exceptional cases. One of the grounds mentioned by the Supreme Court for joinder of a non-signatory in an arbitration was the doctrine of piercing of the corporate veil.



More recently, the Supreme Court in the decision of *Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Anr.*⁷ while applying the principles laid out in *Chloro Controls (Supra)*, referred certain non-signatories to arbitration by applying the alter ego doctrine due to the existence of common control between the non-signatory and signatory to the arbitration agreement as well as the presence of fraud. In doing so, the Court established that non-signatories may be referred to arbitration even under Section 8 of the Act, by application of the alter ego principle.

Consequently, it is now settled law that the Court is empowered to refer a non-signatory to arbitration by application of the doctrines of piercing the corporate veil under Section 8 and Section 45 of the Act.

- Proceedings for appointment of an arbitrator on behalf of a third-party 'alter ego' under Section 11 of the Act.

The judgment of the Supreme Court in *Purple Medical Solutions Private Limited vs. MIV Therapeutics Inc. & Anr.*⁸ considered two Applications under Section 11(6) and Section 11(8) of the Act seeking appointment of an arbitrator by the Court on behalf of a signatory/company and non-signatory/chairman cum president in relation to a dispute arising out of a Share-Purchase Agreement (containing an arbitration clause).

The Petitioner *inter alia* contended that the non-signatory/Chairman cum President is an alter ego of the signatory/company and that all acts/deeds/transactions on behalf of the signatory/company were performed by the non-signatory/Chairman cum President including signing of the abovementioned two agreements, making representations and assurances on behalf of the signatory/company. It is pertinent to mention despite repeated notice from the Court, the signatory/company and non-signatory/chairman cum

president did not appear and contest the proceedings under Section 11 of the Act.

The Supreme Court, relying on the decision of *Chloro Controls (Supra)* passed an order in both applications under Section 11 of the Act and appointed an arbitrator on behalf of both the signatory/company and non-signatory/chairman cum President holding that the facts of the case would justify appointment of an arbitrator on behalf of both the signatory/non-signatory and refer the matter to arbitration by lifting the corporate veil in order to determine the role of the non-signatory in the transactions.

Similarly, in *Andal Dorairaj vs Hanudev Infopark (P) Ltd. & Ors.*⁹ a Single Judge of the Madras High Court dealt with a Petition filed under Section 11(6) of the Act. In this case, the Petitioner argued that the Respondent Nos. 2 and 3 ought to be joined in the arbitration on account that the Respondent Nos. 1 to 3 are group companies having the same directors and shareholders, that the Respondent Nos. 2 and 3 are either nominees or successors in interest of the Respondent No. 1. The Court held that the Respondent Nos. 2 and 3 were alter egos of the Respondent No.1 since all the Respondents were group companies, had common directors and shareholders and the Respondent Nos. 2 and 3 were either the nominees or successors in interest of the Respondent No.1. Accordingly, the Respondent Nos. 2 and 3 non-signatories were subject to the arbitration proceedings. Interestingly, in this case, the Court also took cognizance of the 2015 amendment to Section 8 of the Act which clearly envisages the permissibility of joining a third-parties to arbitration proceedings.

Basis the aforesaid Judgments, it has been settled that the Court may adopt the doctrine of piercing the corporate veil in proceedings under Section 11 of the Act in order to appoint an arbitral tribunal on behalf of a non-signatory thus subjecting them the arbitration.

- Proceedings for grant of interim relief against a third-party 'alter ego' under Section 9 of the Act:

In *Hemant D. Shah & Ors. vs. Chittaranjan D. Shah & Ors*¹⁰, a Division Bench of the Bombay High Court considered an Appeal under Section 37 of the Act against an impugned order passed under Section 9 of the Act seeking certain interim reliefs against a non-signatory/company including an injunction restraining the non-signatory from receiving certain surplus proceeds from a sale of a property. The Petitioner contended that the non-signatory/company was an alter ego of the Respondent Nos. 1 to 6 who were signatories to the Memorandum of Understanding (containing an arbitration clause) entered into with the Appellant/Petitioner. While dismissing the Appeal, with respect to its power to lift the corporate veil, the Court held that the Court cannot lift the corporate veil in proceedings under Section 9 of the Act.

Similarly, in the decision of *GL Asia Mauritius II Cayman Limited vs. Pinfold Overseas Limited*¹¹ a Single Judge of the Bombay High Court considered a Writ Petition filed against an impugned order of the District Judge disposing a preliminary objection taken by the Petitioner by holding that the Court had jurisdiction to entertain a Petition under Section 9 of the Act against a non-signatory. The Petitioner *inter alia* contended that the impugned order wrongly holds that the Petitioner (in the Section 9 Proceedings) is entitled to file an application under Section 9 of the Act against an admitted non-signatory to the arbitration agreement. The Court allowed the Writ Petition and remanded the matter to the District Judge on a separate ground that the said District Judge had failed to consider the applicability of Part I of the Act. However, in passing, the Court noted that "It is well settled that the arbitral Court cannot lift the corporate veil to ascertain a party who is not party to the agreement."

In the decision of *Gatx India Pvt. Ltd. vs. Arshiya Rail Infrastructure Limited*¹², the Delhi High Court has taken a different view point with respect to the Court's power to apply the veil piercing doctrine to pass orders against non-signatories under Section 9 of the Act. In that case, the Petitioner filed a Petition under

Section 9 of the Act which *inter alia* sought reliefs against both the holding company and subsidiary company. The holding company objected to being joined in the Section 9 Proceedings *inter alia* on the ground that it was not a party to the lease agreement and, therefore, not a party to the arbitration clause. Nonetheless, the Court applied the alter ego doctrine and passed an order against the non-signatory/holding company under Section 9 of the Act directing it to furnish security. The Court's decision was predicated on the ground that the signatory was the wholly owned subsidiary of the non-signatory and these entities substantially constituted one economic entity, that there was commonality of interest between the entities and that the signatory's financial condition was such that it would not be able to satisfy any arbitral award which may be passed against it.

From the aforesaid judgements, it is evident that the Bombay High Court and Delhi High Court have taken conflicting views regarding the power of the Court to apply the alter ego doctrine to pass orders against third parties in proceedings under Section 9 of the Act. However, it is pertinent to note that the aforesaid Judgements of the Bombay High Court which have been examined pre-date the Arbitration and Conciliation Amendment (2015) Act. In subsequent Judgments¹³, the Bombay High Court has held that the Court has the power to lift the corporate veil even in arbitration proceedings. It would stand to reason that the Court's power to lift the corporate veil would extend even to proceedings under Section 9 of the Act.

- **Can the Court apply the veil piercing theory in proceedings for execution of an arbitral award?**

The Division Bench of the Bombay High Court in the judgment of *Bhatia Industries & Infrastructure vs. Asian Natural Resources*¹⁴ has provided a detailed insight into the concept of lifting the corporate veil. In that case, the Bhatia Industries & Infrastructure Ltd. ("**BIIL**")/Appellant challenged an order passed by the Single Judge of the Bombay High Court under Section 46 of the Code of Civil Procedure, 1908 ("**CPC**") in execution proceedings taken out for the execution of an



international arbitral award passed in favour of the Vitol S.A/ Award Holder against Bhatia International Limited (“BIL”) a sister company of the Appellant.

In the execution proceedings before the Single Judge, the Award Holder contended that BIL was a group company of BIL and its promoter, who were fraudulently siphoning off funds from BIL to defeat execution of the arbitral award. Consequently, the Award Holder *inter alia* contended that if the corporate veil of BIL and BIL were lifted, it would show that these were a single entity and hence certain goods which were shown as belonging to BIL were liable to be attached in execution. The Single Judge accepted the aforesaid contention and issued an order of attachment. Consequently, BIL/Appellant preferred an Appeal. While deciding the Appeal the Division Bench noted that the doctrine of piercing the veil is also available in execution proceedings. The Court dismissed the Appeal stating that there was enough material on record to demonstrate that the BIL is trying to defeat the execution of the Award which is passed against it.

In the case of *Balmer Lawrie & Co. Ltd. vs. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.*¹⁵, a Single Judge of the Delhi High Court decided an Application filed by the Decree Holder/Applicant under Section 36 of the Act for enforcing an arbitral award against a Judgment Debtor/signatory along with an impleadment application for impleading its directors/non-signatories in the enforcement proceedings. The Applicant contended that the non-signatories were all members of the Judgment Debtor/signatory and also part of the family which owned and controlled the Judgment Debtor/signatory. Further, the Applicant alleged that the directors/non-signatories had siphoned the assets of the Judgment Debtor/signatory.

The Court held that, in the facts of this case, the grounds for lifting the corporate veil have not been established, that the mere allegation that the directors/non-signatories have siphoned off the assets without any particulars is insufficient.

Hence, the Court dismissed the application for impleading the non-signatories.

However, it is notable that the Court while considering the issue of whether the Court can lift the corporate veil while enforcing the arbitral award held that the same may be done in extraordinary circumstances and by adjudicatory process. The Court noted that a fit case for lifting the corporate veil and enforcing a decree against a third-party would be made out if the assets of the judgment debtor had been secreted, siphoned off, or by a fraudulent device placed outside of the judgment debtor in an attempt to frustrate the enforcement of a decree.

From the aforesaid judgements it is evident that both the Bombay High Court and Delhi High Court have taken a view that the doctrine may be applied in execution proceedings where the judgment debtor has adopted methods of siphoning and diversion in order to frustrate the enforcement of the arbitral award against it.

Does an arbitral tribunal have the power to lift the corporate veil?

- **An arbitral tribunal does not have the power to lift the corporate veil**

The question of whether an arbitral tribunal has the power to lift the corporate veil has come up for consideration by various Courts on a number of occasions. Given that the arbitral tribunal is a creature of the arbitration agreement between signatories, the Courts have generally taken a stand that the arbitral tribunal does not have the power to apply the doctrine to extend its jurisdiction to non-signatories and that this power rests with the Court alone.

In the judgment of *Oil and Natural Gas Corporation Ltd. vs. M/s. Jindal Drilling and Industries Ltd.*¹⁶ a Single Judge of the Company High Court dealt with a Petition filed under Section 34 of the Act challenging an arbitral award.

In this case, the Petitioners had entered into an agreement

dated 22 March 2006 with a company named DPEL. Certain disputes arose between the Petitioner and DPEL. An arbitral award dated 6 June 2013 was eventually passed in favour of the Petitioner against DPEL. The arbitral award was unchallenged by DPEL. It is pertinent to mention that in this arbitration proceeding, the Petitioner sought to implead the Respondents. However, the Respondents filed a Petition under Section 16 of the Act by way of which they were deleted as parties to the said arbitration proceedings as per order dated 27 June 2012. The Petitioners filed a Special Leave Petition against the decision of the arbitral tribunal in the said Section 16 Petition which was pending in the Supreme Court.

Due to the non-payment of dues under four independent agreements between the Petitioner and the Respondents disputes arose which were referred to arbitration by the Respondents. The arbitral tribunal passed a common arbitral award dated 9 October 2013 in relation to the disputes in favour of the Respondents. Consequently, the Petitioners filed Petitions under Section 34 of the Act which were heard together and disposed by common judgment.

The Petitioners *inter alia* contended that the Respondents had throughout acted on behalf of DEPL, DEPL was a Group Company of the Respondents, the Petitioners awarded the agreement to DEPL on the basis of representation made by the Respondents, the directors of DEPL were the son and daughters-in-law of the managing director of the Respondents, DPEL and the Respondents shared a common office and telephone numbers. The Petitioners further contended that DPEL was incorporated for the purpose of defrauding the Petitioners. Basis the aforesaid submissions, the Petitioners argued that the arbitral tribunal was required to lift the corporate veil in order to treat DPEL and the Respondents as one company and ought to have rejected the claims made by the Respondents. In other words, the Petitioners plea was that DPEL was the alter ego of the Respondents and because of the alleged nexus between the two companies, the Petitioners had awarded the contract dated 22 March 2006 to DPEL.

On the other hand, the Respondent *inter alia* contended that the Respondents and the DPEL are separate and independent legal entities. That the alleged dues of the Petitioners against DPEL under the agreement dated 22 March 2006 could not have been appropriated and/or no lien could have been claimed by the Petitioners against the amounts due and payable to the Respondents under four separate and independent agreements.

The Court held that the arbitral tribunal has no power to lift the corporate veil and only a Court can lift the corporate veil of a company, that too, only if the strongest case is made out. The Court went on to dismiss the Arbitration Petition noting that the Petitioners had not even been able to meet the criteria required to justify piercing the corporate veil which would include control of the non-signatory by the wrong doers and misuse of the company as a device to conceal their wrongdoing.

In a more recent decision in *Wind World (India) Limited v. Enercon GmbH*¹⁷ a Single Judge of the Bombay High Court decided a Petition under Section 37 of Act challenging a majority order of the arbitral tribunal under Section 17 read with Section 16 of the Act granting disclosure of documents/ transactions and certain injunctive reliefs against 5 Limited Liability Partnerships (“LLPs”) and a Private Limited Company including for preservation of assets/funds and maintaining the status quo, respectively.

It is important to note that the said LLPs and Private Limited Company were admittedly third parties to the arbitration agreement between the Petitioner No. 1- JV Company, the Petitioner Nos. 2 and 3 – Promoters/Shareholders of the Petitioner No. 1 and the Respondent No. 1/Foreign Shareholder of the Petitioner No. 1.

It was the Respondents' case *inter alia* that the Petitioner Nos. 2 and 3 used the said LLPs and Private Limited Company for large-scale siphoning/diversion of funds of the Petitioner No. 1 to these entities which were exclusively controlled by the Petitioner Nos. 2 to 3. The Court affirmed the decision in *ONGC*



(*Supra*) and held that an arbitral tribunal does not possess the power to lift the corporate veil. Consequently, the Court *inter alia* set aside the order passed by the arbitral tribunal under Section 17 of the Act.

In the decision of *Integrated Sales Services Limited vs. DMC Management Consultants Ltd. and Ors.*¹⁸ a Single Judge of the Bombay High Court decided an application under Section 49 of the Act read with Order XXI, Rule 1 of the CPC for execution of an arbitral award passed by a Delaware (United States) seated arbitration. In this case, the international arbitral tribunal employed the alter ego doctrine to hold a director and subsidiary company who were non-signatories as well as the signatory company jointly and severally liable to satisfy the arbitral award.

In the Application under Section 49 of the Act, the non-signatories *inter alia* contented that the arbitral tribunal has no power to lift the corporate veil and it is only a Court which can lift the corporate veil. On the other hand, the Applicant sought to rely of *Chloro Control (Supra)* that in certain circumstances non-signatories may be bound to an arbitration.

Interestingly, while deciding this matter, the Court held that “*The decision in Chloro Controls India Private Limited is not an authority for the proposition that the Arbitral Tribunal is competent or empowered either to rule on its own jurisdiction or to make non-signatories to the arbitration agreement bound by the award passed by it...*” This finding of the Court appears to be correct given that *Chloro Controls (Supra)* dealt with a Petition under Section 45 of the Act and did not consider whether an arbitral tribunal can apply the alter ego doctrine.

The Court declined to enforce the award against the non-signatories and held that the Non-Applicants No. 2 and 3 were not party to the arbitration agreement and the arbitral tribunal did not have the jurisdiction to lift the corporate veil and hold the said non-applicants jointly and severally liable as alter egos of the Non-Applicant No. 1.

In the judgment in *Integrated Sales Services Ltd., Hong Kong vs. Arun Dev s/o Govindvishni Uppadhyaya*¹⁹ a Division Bench of the Bombay High Court decided an Appeal under Section 50 of the Act filed by the Decree Holder/Petitioner against the above mentioned judgment in *Integrated Sales Services Limited vs. DMC Management Consultants Ltd. and Ors* in which it was held that a foreign arbitral award was unenforceable against certain directors and subsidiary company who were non-signatories.

The Division Bench set aside the judgment of the Single Judge to the extent that the foreign award passed by the international arbitral tribunal was held to be unenforceable in India against the non-signatories. The Division Bench’s decision was predicated on an interesting reading of Section 48 of the Act. The Court noted that while section 48(1)(a) refers to “*parties to the agreement referred to in Section 44*”, Section 48(1)(b) makes reference to “*the party against whom the award is invoked*”. The Court noted that this difference indicates that it was the legislature’s intention that Section 48(1)(b) takes into its compass even non-signatories to the arbitration agreement against whom an award is sought to be invoked. The Court held thus held that “*the enforcement of a foreign award against a party who is a non-signatory to the agreement but a party to the award is also statutorily recognized.*” In light of the aforesaid interpretation, the Court held that it the international arbitral tribunal had the power to pass an award against a non-signatory as per the laws of the seat of the arbitration and the award would be enforceable against the non-signatory under Section 48(1)(b) read with Section 49.

Thus, interestingly, in the aforesaid case, the Court held that the international arbitral tribunal’s application of the alter ego doctrine against third parties was permissible as the international arbitral tribunal had pierced the corporate veil after applying judicial precedents available under the laws of Delaware (the seat of the arbitration).

In the recent decision in *Sudhir Gopi vs. Indira Gandhi National Open University & Anr.*²⁰ a Single Judge of the Delhi High Court, while considering an application under Section 34 of the

Act, examined the issue whether the Applicant being a non-signatory/shareholder could be made liable along with the signatory/company for satisfying an arbitral award which made the said non-signatory and signatory jointly and severally liable for the amount awarded in favor of the Respondent/University.

During the course of arguments, the non-signatory submitted that while he was the principal shareholder as well as the Chairman and Managing Director of the signatory/company he is not personally liable for the contractual liability of the signatory. On the other hand, the Respondent/University contended that the non-signatory held 99 shares out of the 100 shares issued by UEIT and was the sole-in charge of running its affair, that there was no separation in the finances of the non-signatory and that essentially there was no difference between the signatory and non-signatory.

While deciding the matter, the Court held that:

“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 as arbitrator would not have the power to pierce the corporate veil so as to bind other parties who have not agreed to arbitrate.

Consequently, the Court held that in the present case, the decision of the arbitral tribunal to lift the corporate veil fell afoul of the fundamental policy of Indian law and also that the grounds for lifting the corporate veil were not satisfied, thus the Court set-aside the award in so far as it made the non-signatory liable for the award.

An arbitral tribunal has the power to lift the corporate veil

Recently, in the decision in *GMR Energy Limited vs. Doosan Power Systems India Private Limited & Ors.*²¹ the Delhi High Court has taken a different position with respect to the issue

on whether an arbitral tribunal had the power to pierce the corporate veil.

In this case, the GMR Energy Limited (“**GMR Energy**”) filed a suit against *inter alia* Dossan Power Systems Indi Pvt. Ltd. (“**Doosan India**”), the sole contesting defendant, seeking *inter alia* a decree of permanent injunction restraining Doosan India and its representatives, agents, etc. from instituting or continuing or proceeding with arbitration proceeding against GMR Energy before the Singapore International Arbitral Center (“**SIAC**”) based on three EPC agreements (“**EPC Agreements**”) between Doosan India and GMR Chhattisgarh Energy Limited (“**GCEL**”), proforma Defendant No. 3 and an agreement between Dossan India and GMR Infrastructure Ltd. (“**GIL**”), proforma Defendant No. 3, and a corporate guarantee between GCEL, GIL and Dossan India (“**Corporate Guarantee**”), besides the two Memorandum of Understanding between Doosan India and GMR Energy (“**MoUs**”).

Basis the aforesaid agreements, Dossan India invoked arbitration against GIL, GMR Energy and GCEL seeking enforcement of the liability of the three respondents jointly and severally on account of GCEL being likable under the three EPC agreements, CIL being liable under the Corporate Guarantee and GMR being liable under the MoUs and as an ‘Alter Ego’ of GCEL and GIL.

GMR Energy filed a suit seeking an anti-arbitration injunction *inter alia* on the ground that it was not a party to the arbitration agreements in the EPC Agreements or Corporate Guarantee. The Delhi High Court passed an ad-interim ex-parte order staying the arbitration. Thereafter, Dossan India filed an application under Section 45 of the Act and an application under Order XXXIX Rule 4 of the CPC In these applications, Dossan India contended that a valid and binding arbitration agreement exists between Dossan India, GCEL, GIL and GMR Energy, GMR Energy being an alter ego and a guarantor of GCEL.

The Court *inter alia* framed the following issues (i) whether a case was made out for making GMR Energy a party to the



arbitration and (ii) whether an arbitral tribunal has jurisdiction to pierce the corporate veil.

In terms of issue number (i) Dossan India *inter alia* placed reliance on an auditor's report which stated that GMR Energy was the holding company of GCEL and has taken over the liabilities of GCEL towards Dossan India, GMR Energy has guaranteed to make payments and has made certain payments on behalf of GCEL in parties discharge of its liability, GMR Energy owned a 100% stake in GCEL, co-mingled funds, was run by the same family, had the same directors and officers, interchangeably used each other's addresses and telephone numbers, observed little or no corporate formality and separation and as such being an alter ego of GCEL, GMR is bound by the said arbitration agreement.

On the other hand, GMR Energy *inter alia* argued that the 'alter ego' argument will not apply because GMR Energy, GCEL and GIL are separate and distinct corporate entities. Further, GMR Energy contended that it is settled law that a heavy onus lies on the party seeking to claim under the through and under principle of alter ego a non-signatory party to an arbitration. Based on the aforesaid contentions, the Court held that Doosan India had made out a case for proceedings against GMR Energy and subjecting GMR Energy to arbitration along with GCEL and GIL based on *inter alia* the fact that GCEL was a joint venture of GMR Group, GCEL, GIL and GMR Energy did not observe separate corporate formalities, and comingled corporate funds.

On issue number (ii), GMR Energy contended that the concept of piercing the corporate veil is within the domain of the Courts and not of the Arbitral Tribunal. GMR Energy, relying on *Sudhir Gopi (Supra)* *inter alia* argued that an arbitrator does not have the power to pierce the corporate veil which functions is essentially of the Court.

In rebuttal, Dossan India *inter alia* argued that the decision in *Sudhir Gopi (Supra)* failed to consider the issue of arbitrability of alter ego by the Arbitral Tribunal. Dossan India essentially

argued that 'alter ego' issue did not fall within the non-arbitrable disputes as per the decision of the Supreme Court of India in *A. Ayyasamy v. A. Paramasivam*²² namely (i) patent, trademarks and copyright; (ii) antitrust/competition laws; (iii) insolvency/winding up; (iv) bribery/corruption; (v) fraud; and (vi) criminal matters.

In the aforesaid case, the Delhi High Court formed a prima facie opinion that GMR Energy is an alter ego of GCEL and GIL, directed GMR Energy to arbitration. It is pertinent to note that in this case, the Court held that, in the facts of the case, the arbitral tribunal may decide the issue of alter ego in terms of passing an award against GMR Energy. However, the Court differentiated between an arbitration reference with and without the intervention of the Court, holding that in case of the later, an arbitral tribunal may not apply the alter ego principle.

As per the decision in *GMR Energy (Supra)*, the Delhi High Court has held that a domestic arbitral tribunal may decide on the issue of alter ego as long as the same does not include fraud. The judgment in *GMR Energy (Supra)* may be viewed as a progressive judgment which applies a liberal view towards the principle of *kompetenz/kompetenz*. However, it can be argued that the decision has been reached *per incuriam* as it has not considered an earlier Judgement of the Delhi High Court including *Balmer Lawrie (Supra)* which held that "an arbitrator cannot lift the corporate veil and proceed against non-parties." Pertinently, the decision also does not consider the decisions of the Bombay High Court in *ONGC(Supra)* and *Wind World (Supra)*. It may be noted that the decision in *GMR Energy (Supra)* has been appealed which is pending appeal in the Delhi High Court as on the date of the present Memo.

Additionally, it may be noted that the decision in *GMR Energy (Supra)* proceeds on the reasoning that an arbitral tribunal can decide on the question of alter ego since the issue of alter ego does not fall within the category of non-arbitrable disputed laid out by the Supreme Court in *A. Ayyasamy vs. A. Paramasivam*.²³ However, the Court may have been able to better address the

issue of the arbitral tribunal deriving its jurisdiction from the consent of parties, which very fact curtails the arbitral tribunal from extending its own jurisdiction to non-parties.

Arbitral Tribunal may be directed to decide the question of its own jurisdiction

In the matter of *Maharana Infrastructure and Professional Services Limited & Others vs. Matrix Partners India Investment Holdings, LLC & Others*²⁴ the Supreme Court dealt with a case involving a dispute between three foreign investors/signatories, their investee company/signatory, the promoter/signatory and certain societies who were related parties to the investee company as well as being non-signatories to the arbitration agreement. The investee company filed a Petition under Section 11 of the Act seeking constitution of three separate arbitral tribunals to decide the disputes between the foreign investors, investee company and promoters. The foreign investors also filed a Petition under Section 11 of the Act seeking constitution of a single arbitral tribunal to adjudicate the disputes between all the parties including the non-signatories to the arbitration agreement.

The foreign investors sought to subject the non-signatories to the arbitration on account of their investment in the investee company having been intentionally siphoned/diverted to the non-signatories/societies. The foreign investors contended that the investee company, promoters and the societies were 'alter egos' since they shared common control (by the promoters), they shared common addresses, they intermingled funds, that the affairs of the investee company was being run in a manner which was to its detriment and for the benefit of the non-signatories, etc. In order to substantiate that a fraud had been committed upon them, the foreign investors relied on a forensic report which evidenced diversion of funds from the signatory/investee company to the non-signatories/societies. In addition to the doctrine of piercing the corporate veil the foreign investors also relied upon the group companies' doctrine to argue that the non-signatories should be made party to the arbitration.

In its order, the Supreme Court recorded that the parties including the non-signatory consented to the disputes being referred to arbitration and directed that "*The question as to whether the other alleged non-signatories to the Agreement are to be parties in the present proceedings will be decided by the learned Arbitrator.*" This decision gains significance since it deals with a situation where the arbitral tribunal has been empowered to decide on its own jurisdiction including by consideration of the various doctrines advanced before the Supreme Court including the doctrine of piercing the corporate veil.

The authors of this paper represented the foreign investors before the Supreme Court and are presently representing them before the arbitral tribunal.

What is a fit case for a Court or Tribunal to lift the corporate veil?

From the aforesaid cases, it may be noted that the veil may be pierced in exceptional cases. It is also evident that two essential ingredients which are required in order to invoke the alter ego theory. First, the claimant/petitioner must clearly establish that there is common control between the signatory and non-signatory such that they are in essence a single economic reality. Second, it is essential for the claimant/petitioner to establish that the corporate form has been misused to perpetuate fraud, circumvent a statute or other misdeed, to the detriment of the claimant/petitioner.

- What factors does the Court examine for determining the existence of an alter ego relationship?

From the conspectus of decisions above, a number of factors emerge which are routinely relied upon by a claimant/petitioner to demonstrate that a non-signatory is an alter ego of a signatory. These include the absence of corporate formalities, under capitalization or illiquidity of the signatory, common ownership, common management, common addresses/phone numbers, lack of arm's length transactions, intermingling of funds, business decisions of the signatory are self-detrimental and for the benefit of the non-signatory, filing of consolidated



financial statements, common trademarks, etc. Invariably, a claimant/petitioner is required to demonstrate a culmination of the aforesaid factors in order to establish an alter ego relationship between the signatory and non-signatory. If a party is able to establish the aforesaid facts, the principle of corporate veil piercing may be an effective argument that may be adopted for extending an arbitration agreement to non-signatories and to fasten liability on these 'alter egos'.

Takeaways

Given the sudden spurt in incidence of large scale-fraud in the country, the doctrine of lifting the corporate veil (alter ego doctrine) is being exceedingly adopted by creditors/investors who find themselves embroiled in disputes with their debtors/investees, when such dispute involves an angle of fraud.

From our experience, invariably, the fraud committed would entail a situation where the debtor/investee has siphoned funds/assets away from the signatory to the arbitration agreement (between the creditor/investor and debtor/investee) to a non-signatory entity in a bid to defeat the creditor/investor's claim. Upon siphoning the funds, in a bid to keep the siphoned funds beyond the creditor/investor's reach, the delinquent debtor/investee places reliance on the dual argument that a non-signatory cannot be made a party to an arbitration proceeding and that the liability of the signatory is limited, thus, cannot be extended to the non-signatory.

In such scenarios, the most effective tool to overcome the creditor/investor's endeavor to keep the ill-gotten funds out of the jurisdiction of the arbitral tribunal is the doctrine of piercing the corporate veil, which may be used to rope in and fasten liability on the non-signatory. As is evident from the various cases discussed, the Courts have been increasingly willing to apply the said doctrine to pass interim orders against such non-signatories for securing the claim or to subject such non-signatories to the arbitration thus making them amenable to the jurisdiction of the arbitral tribunal whom may pass both interim and/or final relief against such non-signatories.

However, it is important to bear in mind that in order for an investor/creditor to meet this minimum threshold required for invoking the doctrine, various evidence will have to be placed before the Court establishing the existence of the alter ego relationship and presence of fraud. The debtor/investor will have to demonstrate the existence of number of the factors provided in preceding paragraphs. It would also be imperative for the investor/creditor to establish the existence of fraud/siphoning of funds. A common manner in proving the existence of the same is the conduct of a forensic audit which is able to establish that money has been illegally siphoned/diverted from the signatory.

However, it is important to bear in mind, on account of the conflicting decisions, it is still somewhat unsettled whether a domestic arbitral tribunal can extend its own jurisdiction and pass an award against a non-signatory by applying the alter ego doctrine, such award may be at risk to being set-aside under Section 34 of the Act depending on the jurisdiction in which the setting-aside application has been filed. It may be noted that presently the Bombay High Court has taken the position that a domestic arbitral tribunal cannot lift the corporate veil. The Delhi High Court has provided somewhat conflicting judgments in this regard. Consequently, the investor/creditor may be better off filing a Petition under Section 11 or Section 8, as the case may be, seeking reference of the non-signatory to the arbitration by the Court's application of the doctrine as opposed to the tribunal. The tribunal can certainly decide this issue once the same is referred by the Court for adjudication and in such a case the parties cannot object to the jurisdiction. It is notable to mention that in the event that the arbitration is taking place in a seat which allows the arbitral tribunal to lift the corporate veil, an award by such tribunal against non-signatories by application of this doctrine may be enforced in India.

Going further, it is now well settled that a Court may apply the doctrine of lifting the corporate veil during execution proceeding. As a result, it is open to the creditor/investor to seek execution of an arbitral award against a non-signatory at the execution stage irrespective of whether the non-signatory



was a party to the arbitration proceedings. However, it may be noted that a failed attempt to extend the arbitration agreement to a non-signatory at an earlier stage of the arbitration proceedings, for example in proceedings under Section 9 or Section 11 of the Act, in which the Court passes a finding that the veil cannot be pierced against the non-signatory, could be viewed adversely by the Execution-Court and may be taken as a ground for not allowing enforcement of the award against such non-signatory. Again this would depend upon facts of each case.

From the aforesaid, it is apparent that the doctrine of piercing the corporate veil is an evolving concept that is being

increasingly relied upon in arbitration proceedings in India. The Court's willingness to apply this doctrine to safeguard the interest of investors/creditors from being defrauded is an obvious step in the right direction. More so, given the current investment climate and large scale infusion of private equity capital into India. While it has become increasingly well settled that the Courts can apply this doctrine in arbitration proceedings, a contentious emerging issue is the power of a domestic arbitral tribunal to apply this doctrine. This issue will require a detailed examination by the Courts as it will have a far reaching impact in terms of the jurisdiction of domestic arbitral tribunals.

1 *Tata Engineering Locomotive Co. Ltd. vs. State of Bihar and Ors* (1964) 6 SCR 885

2 (1986) 1 SCC 264

3 *State of UP vs. Renuagar Power Co.* (1988) 4 SCC 59

4 (1996) 4 SCC 622

5 (2013) 1 SCC 641

6 paragraph 70 of *Chloro Controls* (Supra)

7 Civil Appeal No. 4690 of 2018 arising out of SLP (C) No.16789 of 2017

8 (2016) 3 SCC (Civ) 434

9 (2016) 2 LW 9 (Mad)

10 Appeal No. 658 of 2006 in Arbitration Petition No. 295 of 2006

11 (2013) 4 AIR Bom 1063

12 (2015) 216 DLT 20

13 239 (2017) DLT 217 and 2017 (1) Mh.LJ 681

14 2016 SCC OnLine Bom 10695

15 239 (2017) DLT 217

16 (2015) 7 Bom CR 62

17 2016 SCC Online Bom 1404

18 2016 (6) MhLj 195

19 2017 (1) Mh.LJ

20 2017 SCC OnLine Del 8345

21 2017 SCC Online Del 11625

22 (2016) 10 SCC 386

23 2016 (10) SCC 386

24 Arbitration Petition No. 39 of 2017 decision date 1 December 2017. Shardul Amarchand Mangaldas & Co. and the authors acted for the foreign investors in this matter.

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