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

% Reserved on: 14th September, 2017
Decided on: 14th November, 2017

\+ **CS(COMM) 447/2017**

GMR ENERGY LIMITED ..... Plaintiff
Represented by: Mr. Rajiv Nayar and Mr. Darpan Wadhwa, Sr. Advocates with Mr. Rishi Agrawala, Ms. Malavika Lal, Mr. Karan Luthra and Mr. Saurabh Seth, Advocates.

versus

DOOSAN POWER SYSTEMS INDIA PRIVATE LIMITED & ORS ..... Defendants
Represented by: Mr. Nakul Dewan, Mr. Sumeet Lall, Mr. Sidhant Kapoor, Ms. Neelu Mohan and Mr. Zain Maqbool, Advocates for defendant No.1.
Mr. A.S. Chandhiok, Sr. Advocate with Ms. Shally Bhasin, Advocate for defendant Nos. 2 and 3.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

I.A. No. 7248/2017 (under Order XXXIX Rule 1 and 2 CPC), 9068/2017 (under Order XXXIX Rule 4 CPC) and 9069/2017 (under Section 45 of Arbitration and Conciliation Act, 1996)

1. The present suit has been filed by the plaintiff GMR Energy Limited (in short 'GMR Energy') against Dossan Power Systems India Pvt. Ltd. (in short 'Doosan India'), the sole contesting defendant being the defendant No.1 and GMR Chhattisgarh Energy Limited (in short 'GCEL') and GMR

Infrastructure Ltd. (in short 'GIL'), proforma defendants impleaded as defendant Nos. 2 and 3 respectively. In the suit GMR Energy inter alia seeks 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 Centre (SIAC) being SIAC Arbitration No. 316/2016 (Arb. 316/16/ACU). SIAC Arbitration No. 316/2016 is based on the three agreements between Doosan India and GCEL all dated 22nd January, 2010 (for convenience 'EPC agreements' dated 22nd January, 2010) being (i) the Agreement for Civil Works, Erection, Testing and Commissioning (in short 'CWETC Agreement') executed between GCEL and Doosan India; (ii) the Onshore Supply Agreement executed between GCEL and Doosan India; (iii) the BTG Equipment Supply Agreement (in short 'Offshore Supply Agreement') also executed between GCEL and Doosan India; and (iv) the Corporate Guarantee dated 17th December, 2013 (in short 'Corporate Guarantee') executed between GCEL, GIL and Doosan India besides the two Memorandum of Understandings (in short the two 'MOUs') between Doosan India and GMR Energy dated 1st July, 2015 and 30th October, 2015

2. Basing its claim on the three agreements, that is, EPC agreements dated 22nd January, 2010, the Corporate Guarantee dated 17th December, 2013 and the two MOUs, Doosan India sent a notice of arbitration dated 11th December, 2016 to GIL as first respondent, GMR Energy as second respondent and GCEL as third respondent seeking enforcement of the liability of the three respondents therein jointly and severally towards Doosan India, GCEL being liable in terms of three EPC agreements, GIL in terms of the Corporate Guarantee and GMR Energy, though not a party to

the three EPC Agreements and the Corporate Guarantee, but by virtue of the two MOUs, common family governance, transfer of shareholding and being the alter ego of GCEL and GIL. In the plaint GMR Energy claims that since it was not a party to the three EPC agreements or the Corporate Guarantee which contained arbitration clause, it responded to the correspondence received from SIAC, objecting to its being arrayed as a party and sought discharge of GMR Energy as a party, respondent and termination of the reference, wrongfully and incorrectly initiated against GMR Energy by Doosan India. Since SIAC neither acceded to nor rejected the request of GMR Energy and was proceeding to appoint an arbitrator on behalf of GMR Energy, the present suit was filed with the prayers as noted above. Along with the suit, GMR Energy filed an application being I.A. No. 7248/2017 under Order XXXIX Rule 1 and 2 of Civil Procedure Code, 1908 (in short 'CPC') seeking an ad-interim ex-parte stay.

3. When the present suit came up before this Court on 4th July, 2017 as GMR Energy was not a party either to the three EPC agreements or to the Corporate Guarantee, this Court passed an ad-interim ex-parte order staying operation of the letter dated 8th June, 2017 addressed from Ms. Adriana noting that "in the circumstances, the President of the Court of Arbitration of SIAC will now proceed to appoint all three arbitrators and shall designate one of them to be the presiding arbitrator pursuant to Rule 12.2 of the SIAC Rules." and directed that no arbitrator be appointed on behalf of GMR Energy till the next date of hearing which interim order is continuing till date.

4. Pursuant to the service of summons two applications have been filed by Doosan India being I.A. No. 9068/2017 under Order XXXIX Rule 4 CPC

and I.A. No. 9069/2017 under Section 45 of the Arbitration and Conciliation Act, 1996 (in short 'Arbitration Act'). On completion of pleadings arguments have been heard on behalf of both the parties in the three applications, that is, under Order XXXIX Rule 1 and 2 CPC, Order XXXIX Rule 4 CPC and Section 45 of the Arbitration and Conciliation Act, 1996 (in short the Arbitration Act).

5. In support of the applications claim of Doosan India is that a valid and binding arbitration agreement exists between Doosan India, GCEL, GIL and GMR Energy being an alter ego and a guarantor of GCEL. Further as per the Independent Auditor Report of GCEL dated 27th May, 2016, GMR Energy is a holding company of GCEL and has taken over GCEL liabilities towards Doosan India. GMR Energy guaranteed to make payments and in fact made certain payments on behalf of GCEL in partial discharge of the liability of GCEL towards Doosan India and at that material time GMR Energy owned 100% stakes 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, if not any, corporate formality and separation and as such being the alter ego of GCEL, GMR Energy is bound by the arbitration agreement between Doosan India, GCEL and GIL for resolution of dispute. Further GCEL is represented to be a "*special purpose vehicle established by GMR Group specifically for development of the Project*" and entered into the three EPC contract agreements with Doosan India which is wholly owned subsidiary of Doosan India Heavy Industries and Construction, (in short 'Doosan Korea'), a company registered and existing under the laws of Korea. After GCEL failed to discharge its liability GMR Energy and Doosan India entered into a

Memorandum of Understanding dated 1st July, 2015 being MOU-I between GMR Energy, GCEL, Doosan India and Doosan Korea followed by the second Memorandum of Understanding dated 30th October, 2015 being MOU-II between GMR Energy, GCEL and Doosan India.

6. Since the three EPC agreements and Corporate Guarantee Agreement, all contain arbitration clause with the intention to resolve any dispute through arbitration under SIAC Rules with the seat in Singapore and the two MOUs are also governed by the same agreements, the payment obligation being undertaken by GMR Energy for assuring proper execution of three EPC agreements between Doosan India and GCEL, the arbitration clause would also extend to GMR Energy.

7. Learned counsel for GMR Energy submits that the three EPC agreements and the Corporate Guarantee agreement before this Court all prescribe; (1) the law governing the contract shall be Indian law (2) "the arbitration shall be conducted in Singapore" and (3) that the "arbitration shall be as per SIAC Rules". Since the relationship between GCEL, GIL and Doosan India is only domestic in nature, all parties being Indian, Part-I of the Arbitration Act would apply in view of the amendment in the definition of "international commercial arbitration" under Section 2 (1) (f) (iii) of the Arbitration Act. Reliance is placed on the decision of the Supreme Court in 2008 (14) SCC 271 *TDM Infrastructure Private Limited vs. UE Development India Private Limited*. Further observation of the Supreme Court in *TDM Infrastructure* (supra) has been followed by Bombay High Court in 2012 MhLJ 822 *Seven Islands Shipping Ltd. vs. Sah Petroleums Ltd.*, as well as 2015 SCC Online Bombay 7752 *Aadhar Mercantile Private Limited vs. Shree Jagdamba Agrico Exports Private Ltd.*

Since the arbitration is between two Indians, it cannot be termed as international commercial arbitration and the Indian substantive law cannot be derogated from by and between two Indian parties as held by the Constitution Bench in the decision reported as 2012 (9) SCC 552 *Bharat Aluminum Company and Ors. etc. etc. vs. Kaiser Aluminium Technical Service, Inc. and Ors. etc. etc.*

8. Distinguishing the decision in 1998 (1) SCC 305 *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. & Ors.* relied upon by learned counsel for Doosan India reliance is placed on 2013 (3) CTC 709 *National Highway Authority of India vs. Oriental Structure Engineers Ltd. - Gammon India Ltd. (JV)* to contend that the Arbitration Act is "matter of substantive law" and since governing law of the contract is Indian law, in the absence of a specific choice of law governing the arbitration agreement, the law governing the arbitration agreement would also be Indian law as held in the decision reported as 2005 (7) SCC 234 *Shin-Etsu Chemical Co. Ltd vs M/S. Aksh Optifibre Ltd. & Anr*. Reliance is placed on the decision reported as 2014 (5) SCC 1 *ENERCON (INDIA) Ltd & Ors. vs. ENERCON GMBH & Anr.* wherein interpreting a similar arbitration agreement it was held that the arbitration clause only provided that venue of arbitration was London however, the seat of arbitration was in India, as the Arbitration Act was made applicable by the parties. Further the identification of the parties to an agreement is a question of substantive law and not procedural law as held by the Commercial Court of England in 2002 EWHC 121 (Comm) *Peterson Farms Inc. and C & M Farming Ltd.* Since two Indians cannot contract out of the law of India and the Arbitration Act of 1996 is a substantive law, exclusion of Part-I of the Arbitration Act which Doosan India seeks to do,

would be hit by Section 28 of the Indian Contract Act. Simply because the place of arbitration is out of India, Part-II of Arbitration Act would not apply and as per the proviso to Section 2 (2) of the Arbitration Act engrafted through the amendment dated 23rd October, 2015 Part-I of the Arbitration Act would apply. Once the arbitration amongst two Indians ceases to be an "international commercial arbitration", it would automatically cease to be "considered as commercial under the law enforced in India" which is the principle condition for defining "a foreign award" under Section 44 of the Arbitration Act. Despite the fact that GMR Energy is not a party to the arbitration agreement Doosan India seeks to contend that GMR Energy must comply with SIAC Rules, be governed by the laws of Singapore and only file proceedings before the Court at Singapore which is clearly oppressive and vexatious apart from being illegal. Since Part-II of the Act would not apply the application filed by Doosan Indian under Section 45 of the Act is not maintainable.

9. Learned counsel for GMR Energy further contends that even if it is held that the Singapore Arbitration Laws are applicable to the arbitration amongst Doosan India, GCEL, GIL however, GMR Energy not being a signatory to any of the arbitration agreements, it cannot be roped into an international arbitration by applying the principle of alter ego or "it being a guarantor" without there being a written guarantee. Doosan India invoked the arbitration by virtue of the three EPC agreements however, Clause 25.12 of CWETW Agreement and Clauses 23.12 of the onshore and offshore supply agreements clearly provided that the parties have entered into the agreement entirely on their own and in no manner, for and on behalf of any shareholder of either party and neither party shall take recourse against such

persons for any act omission, obligation whether based upon piercing of the party's corporate veil or any other legal theory based upon exercise or control over the parties or otherwise. Reliance is placed on the decision reported as 2003 (4) SCC 341 *Modi Entertainment Network & Anr. vs. W.S.G. Cricket PTE Ltd.* and *Peterson Farms* (Supra).

10. Further even the principle of alter ego would not entitle Doosan India to invoke arbitration against GMR Energy. Relying upon the decisions reported as 2010 (5) SCC 306 *Indowind Energy Ltd. vs. Wescare (India) Ltd.*, 2017 SCCOnline Del 8345 *Sudhir Gopi vs. Indira Gandhi National Open University* and 2014 (9) SCC 407 *Balwant Rai Saluja & Anr. vs. Air India Ltd. & Ors.* it is contended that the principle of alter ego as being sought to be invoked cannot be invoked by Doosan India as each company is a separate and distinct legal entity and the mere fact that the two companies have common shareholders or common board of directors will not make the two companies a single entity. Reference is also made to the decision reported as 2017 (4) ArbLR 1(Delhi) *Ameet Lalchand Shah vs. Rishabh Enterprises* decided by Division Bench of this Court. Even in the decision reported as 2013 (1) SCC 641 *Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. & Ors*. relied upon by learned counsel for Doosan India, Supreme Court held that a heavy onus lies on the party seeking to claim under or through the principle of alter ego a non-signatory party to an arbitration and Doosan India cannot get away by showing that only a prima facie view has to be formed. Reliance is also placed on the decisions reported as 2011 (11) SCC 375 *Deutsche Post Bank Home Finance Ltd. vs. Taduri Sridhar* and 2017 (1) MhLJ 681 *Integrated Sales Services Limited vs. Arun Dev and Ors*.

11. Learned counsel for GMR Energy further contends that GMR Energy is also not liable to be made a party to the arbitration on the basis of being guarantor by virtue of the two MOUs for the reason admittedly the two MOUs stood terminated vide letter dated 3rd November, 2016 of Doosan India which letter was not made a part of the notice of arbitration. Relying upon the decision reported as 1994 Suppl. (3) SCC 126 *M/s P.K. Ramaiah and Co. vs. Chairman & Managing Director, National Thermal Power Corpn*, it is contended that having terminated the two MOUs, Doosan India cannot claim that there is arbitrable dispute. Referring to Rule 7 of the SIAC Rules it is contended that GMR Energy being a non-signatory of the arbitration agreement its impleadment was permissible only after compliance of Section 7 of the SIAC Rules which admittedly Doosan India has not complied with. Reliance is also placed on 2013 SGCA 57 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) vs. Astro Nusantara International BV & Ors.*

12. Since admittedly there is no arbitration clause governing GMR Energy and Doosan India in view of the decision of this Court in 2009 SCCOnline Del 3213 *Lucent Technologies Inc. vs. ICICI Bank Limited & Ors.* GMR Energy has remedy before this Court and cannot be compelled to defend itself in proceedings before the Arbitral Tribunal which are without jurisdiction and would cause irreparable loss and damage to GMR Energy. Reliance is also placed on the decisions reported as in 2011 EWHC 1624 (Comm) *Excalibur Ventures LLC and Texas Keystone Inc. & Ors.* and 2002 (7) SCC 46 *Prakash Narain Sharma vs. Burmah Shell Cooperative Housing Society Ltd*.

13. Countering the arguments advanced on behalf of GMR Energy, learned counsel for Doosan India submits that invocation of arbitration against the alter ego of a signatory is a well recognized principle not only in India but also in Singapore which is the chosen seat of arbitration. Reliance is placed on the decision reported as *Chloro Controls* (supra). Relying upon 2009 SGHC 42 *Jiang Haiying vs. Tan Lim Hui and Anr.* a decision of the High Court of Singapore, learned counsel contends that since parties agreed to arbitration under the SIAC Rules with the seat of arbitration being at Singapore, Part-II of the Arbitration Act would apply. Referring to Sections 44 and 45 of the Arbitration Act it is contended that the two provisions recognize a situation where an arbitration agreement would extend to a non-signatory to a contract.

14. Learned counsel for Doosan India further submits that if there is an ex-facie or a prima facie basis for arbitration to proceed against the non party to the agreement, Section 45 of the Arbitration Act warrants that the judicial proceedings must be stayed in favour of the arbitration. Reliance is placed on *Shin-Etsu Chemical* (supra), 2016 (4) Arb. LR 250 Delhi *Mcdonald's India Private Limited vs. Vikram Bakshi and Ors*. and 2015 SGHC 225 *Malini Ventura vs. Knight Capital Pte. Ltd. & Ors.* which decision of the Singapore High Court has been affirmed in the decision reported as 2015 SGHC 57 *Tomolugen Holdings Ltd & Anr vs. Silica Investors Ltd. and Ors.* It is further contended that the Arbitral Tribunal is the appropriate forum to adjudicate on the issue of alter ego and the same being determinable by the Arbitral Tribunal, this Court will not proceed with the present suit to determine whether GMR Energy is liable to be proceeded in the arbitration or not. Reliance is placed on the decision of Division

Bench of Bombay High Court in *Integrated Sales Services* (supra), of the High Court of Singapore reported as 2006 (3) SGHC 78 *Aloe Vera of America, Inc. vs. Asianic Food (S) Pte. Ltd. & Anr.*, and *M/s Sai Soft Securities Ltd. vs. Manju Ahluwalia*, FAO(OS) No. 65/2016 decided by the Division Bench of this Court. Distinguishing the decision of the learned Single Judge of this Court in *Sudhir Gopi* (supra) it is contended that in the said matter this Court was not dealing with an international arbitration but under Part-I of the Arbitration Act, hence the said decision has no application to the facts of the present case.

15. Rebutting the arguments on behalf of GMR Energy that the parties being Indian entities, the arbitration between them cannot be construed as an International arbitration under Section 2 (1) (f) of the Arbitration Act and they cannot choose a foreign seat of arbitration as the same would contravene Section 28 of the Act, it is contended that even Indian parties can agree to choose a foreign seat as has been done in the present case and as held by the Supreme Court in 1998 (1) SCC 305 *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. & Ors.* which recognizes that once arbitration commences three laws are applicable, that is, substantive law of contract, curial law and the proper law of the arbitration agreement. Reference is also made to *Redfern and Hunter on International Arbitration*, 6th Edn. (Blackaby, Partasides, Redfern, el al.; Sep 2015 at pp. 157) and the decisions reported as 1999 (7) SCC 61 *Atlas Exports Industries vs. Kotak & Co.* and 2015 SCCOnline M.P. 7417, *Sasan Power Limited vs. North American Coal Cornpn (India) (P) Ltd*

16. Refuting the reliance of learned counsel for GMR Energy on *TDM Infrastructure* (supra), it is contended that the observations of the Supreme

Court in the said case was in respect of proceedings under Section 11 of the Arbitration Act and for no other purpose, thus the decision would not constitute a binding precedent as held by the Supreme Court in the decision reported as 2015 (3) SCC 49 *Associate Builders vs. Delhi Development Authority*. Neither of the two decisions relied upon by learned counsel for GMR Energy i.e. *Seven Islands* (supra) and *Aadhar Mercantile* (supra) referred to the earlier decision of the Supreme Court in *Atlas Exports* (Supra).

17. It is further contended that the parties in the present case have agreed to seat the arbitration in Singapore in accordance with the SIAC Rules while the merits of the disputes to be conducted in accordance with laws of India which is permissible and not barred under the Indian law. Since the seat of arbitration is in Singapore, Part-II of the Arbitration Act would apply and the averments of learned counsel for GMR Energy that since all parties, that is, GMR Energy, GCEL, GIL and Doosan India are Indian parties, Part-I of the Arbitration Act would govern, is liable to be rejected. Reliance is placed on the decisions reported as *Bharat Aluminum* (supra), *Sasan Power* (supra), 2014 (7) SCC 603 *Reliance Industries Limited and Anr. vs. Union of India*, 2016 (11) SCC 508 *Eitzen Bulk A/S and Ors. vs. Ashapura Minechem Ltd. and Ors.*, 2017 (5) SCC 331 *IMAX Corporation vs. E-City Entertainment (I) Pvt. Ltd.* and 2017 (7) SCC 678 *Indus Mobile Distribution (P) Ltd. vs. Datawind Innovations (P) Ltd.* It is further contended that the three EPC agreements do not set out the law governing arbitration and thus this issue must be determined.

18. Rebutting the contention of learned counsel for GMR Energy that lifting of the Corporate Veil or determining the issue of alter ego can only be

based on the allegation of fraud which can be determined by a judicial forum as held in 1996 (4) SCC 622 *DDA vs. Skipper Construction Co. (P) Ltd.* and *Sudhir Gopi* (supra), it is contended that fraud is not the only ground on which the corporate veil can be pierced as held by the Supreme Court in 1988 (4) SCC 59 *State of U.P. and Ors. vs. Renusagar Power Co. and Ors*. The concept of single common entity has been recognized by the House of Lords in 1976 (3) ALL ER 462 *DHN Food Distributors Ltd. v. Tower Hamlets London BC*. Reiterating that the principle of alter ego is arbitrable and it will be for the arbitral tribunal to decide the issue, reliance is placed on 2016 (10) SCC 386 *A. Ayyasamy vs. A Paramasivam* wherein the Supreme Court has laid down the categories which are non arbitrable and the issue of alter ego does not find mention therein.

19. Further refuting the contention of learned counsel for GMR Energy that a non-party to the arbitration agreement can be impleaded only after invocation of Rule 7 of the SIAC Rules it is contended that the concept of joinder is different from invoking an arbitration agreement against an alter ego. Rule 7 of the SIAC Rules would apply after Rule 3 and as GMR Energy has been named as a party to the arbitration in accordance with Rule 3, Rule 7 has no application. In any case, Rule 7 of the SIAC Rules is not mandatory but directory in nature and has no application to the facts of the present case. It is thus prayed that the injunction granted in favour of GMR Energy be vacated and arbitration be permitted to be carried out as the Tribunal under the Singapore law is competent to decide the issue of alter ego.

20. On contentions raised by the parties five issues which need determination by this Court are : (i) Whether the arbitration that commenced

at Singapore pursuant to Arb. 316/16/ACU would fall under Part-I or Part-II of the Arbitration Act ? (ii) Whether on the basis of pleas in the notice of arbitration issued by Doosan India a case is made out by Doosan India to subject GMR Energy to arbitration with GCEL and GIL? (iii) Whether the Arbitral Tribunal has no jurisdiction to pierce the corporate veil? (iv) In the present suit whether this Court will form a prima facie opinion on the issue of alter ego or return a finding? (v) Whether the invocation of arbitration against GMR Energy is contrary to Rule 7 of the SIAC Rules?

21. Before dealing with the rival contentions of the parties it would be appropriate to note the salient averments in the notice of arbitration dated 11th December, 2016 issued by Doosan India to GMR Energy, GCEL and GIL which is the foundation of subjecting GMR Energy to arbitration as under:

> ***B. GMR Infra – First Respondent***
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> *12. GMR Infra is a company incorporated and existing under the laws of India. According to GMR Infra's recent press release, GMR Infra operates in the name of GMR Group, which is "a leading global infrastructure conglomerate with interests in Airport, Energy, Transportation and Urban Infrastructure." GMR Infra is the flagship holding company formed to fund the capital requirements of GMR Group's various infrastructure projects, which it undertakes through its various subsidiaries.*
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> *13. GMR Group represents that it is run by "Family Governance guided by Family Constitution." The founder and chairman of GMR Group is Mr. GM Rao. As of November 2016, GMR Infra's Chairman is Mr. G. Kiran Kumar, Mr. GM Rao's younger son. The chairman of the Energy arm of GMR Group (GMR Energy and other Energy assets) is Mr. GBS Raju, Mr. GM Rao's older son. The chairman of the Airports arm of GMR Group is Srinivas Bommidala, Mr. GM Rao's*

son-in-law. The CEO of GMR Group's Corporate Affairs arm is Mr. G. Subba Rao, Mr. GM Rao's first cousin.
14. .....

C. GMR Energy's – Second Respondent
15. .....
16. GMR Energy is a company incorporated under the laws of India and is the Energy arm of GMR Group. While GMR Energy had a 100% stake in GCEL during their dealings with Doosan India, GMR Energy no longer owns GCEL. As noted above, its Chairman is the elder son of GM Rao and brother of GMR Infra's Chairman.
17. .....

D. GCEL- Third Respondent
18. GCEL is the owner of the Project and is registered and existing under the laws of India. GCEL is represented to be a "special purpose vehicle established by GMR Group specifically for development of the Project" and was wholly owned by GMR Energy until recently. As of November 2016, GMR Infra directly and indirectly owns a 100% stake in GCEL. During its dealings with Doosan India, Mr. S.N. Barde doubled as President of both GCEL and GMR Energy.
19. .....

C. GMR Energy and Doosan Korea negotiate a payment schedule for the Outstanding Debt, resulting in MOU I between GCEL and Doosan India

27. In recognition of its responsibility to pay the Outstanding Debt, GCEL agreed to a revised payment plan under which GCEL committed to pay the sums initially due 31 July 2013 (i.e., approximately USD 170 million and INR 186 Crores) by December 2013, and the remaining sums in the upcoming years of 2014 and 2015 as per the milestones and other terms of the EPC Agreements. After a few months, however, GCEL notified Doosan India that it would not be able to comply with the above payment plan due to "further complications with

some of the project lenders" and requested a meeting to discuss a modified payment plan for 2013.

28. Accordingly, on 14th November, 2013, senior executives representing the interests of Doosan India and GCEL met in Seoul. On behalf of GCEL, Mr. GBS Raju, Chairman of GMR Energy and elder son of GMR Group's Chairman (GM Rao), and Mr. Sanjay Barde, President of both GMR Energy and GCEL, negotiated.

29. During the Seoul meeting, the senior executives of GMR Energy and GCEl fully acknowledged their responsibility to pay the Outstanding Debt and agreed to a detailed revised payment and commissioning schedule, as well as terms relating to payment security and cost incurred during slow-down. These terms that were negotiated and agreed upon between GMR Energy/GCEL and Doosan Korea/ Doosan India were memorialized, signed and executed by Doosan India and GCEL in a Memorandum of Understanding dated 12th December, 2013 ("MOU I") , a copy of which is appended as Appendix A.

30. Among other things, MOU I stated that:"it is acknowledged between the GCEL and Doosan [India], that there was some delay on the part of GCEL for the reasons despite its best effort, in making timely payment to [Doosan India] as per the EPC Agreement, which resulted in impacting the execution of the project."

31. Under MOU I, GCEL without qualification acknowledged its obligation to pay the Outstanding Debt of over USD 400 million, including USD 311.50 million plus 619.85 Crores, to be broken down into the following payment stages (the "Revised Payment Schedule"):

Amount	*Payment due date*
INR 300 Crores (approximately USD 45 mil.)	*On or before 20 December, 2013*

INR 600 Crores (approximately USD 91 mil.)	*June 2014*
INR 600 Crores (approximately USD 91 mil.)	*December 2014*
USD 311.50 million + INR 619.85 Crores – 1,950 Crores (approximately USD 117 million)	*Per milestones and other contractual provisions*

32. As memorialized in MOU I, GCEL and Doosan representatives further agreed that "GMR Infrastructure Limited will provide a primary, independent and absolute Corporate Guarantee" by 20 December 2013, and that "in case GCEL fails to make any of the monthly payments in the Payment Plan or Corporate Guarantee...Doosan shall be entitled to enter into suspension of work immediately upon notice of suspension to GCEL notwithstanding anything stated in the EPC Agreements..." GCEL further "expressly agree [d] that GCEL shall not raise any objection or make any claims with regards to Doosan's decision to immediate suspension/ slowdown or the scope of such suspension/slowdown." See Appendix A, at 2. A copy of a draft "Corporate Guarantee" bearing the parties' initials is attached to MOU I.

E. GMR Energy acknowledges its responsibility for the Outstanding Debt and signs MOU II with Doosan India

37. However, even after Doosan India resumed the Works, GCEL continued to be delinquent in its payments, prompting Doosan India to demand further assurance.

38. Doosan India was able to achieve the Commercial Operations Date ("COD") for unit I on 2 May, 2015, despite GCEL's failure to make timely payments and ensuing subcontractor issues.

39. On 1 July, 2015, GMR Energy, which then owned a 100% stake in GCEL, represented in writing that it "agreed to make payment of [INR 500 crores] directly to [Doosan India]

and [Doosan Korea]". GMR Energy further represented that its payment to Doosan India will "amount to proper and effective discharge of [GCEL]'s payment obligations."

40. Subsequently, on 1 September, 2015, GMR Energy, in response to Doosan India's request for payment of INR 200 Crores owing by GCEL, represented that "we are already committing [INR] 62.5 + 51 Crores i.e. 113.5 Crores by December 2015.

41. However, GCEL continued to miss its payments. On 30 October, 2015, GCEL, Doosan India and GMR Energy entered into a Memorandum of Understanding ("MOU II"). Pursuant thereto, GCEL and GMR Energy agreed to make payment of INR 92.5 Crores by 20 December, 2015. GCEL also agreed to pledge to Doosan India its stock equivalent to any overdue amount not exceeding INR 437.50 Crores on the following due date until full payment was made on the overdue amounts:

Amount	*Payment due date*
For overdue payment up to December 2015	*By the end of January 2016*
For any overdue payment in 2016	*31 days following receipt of invoice by GCEL*

42. MOU II further provided that "[GMR Energy] shall remain liable for the payment of overdue amount not exceeding 437.5 crores" and if GMR Energy failed to make payment, Doosan India was entitled to 30% of GCEL's profits in the preceding quarter.

43. .....

44. .....

51. On 19 April, 2016, when Doosan India sought clarification on the sum of USD 4,462,293.62 for RT #1 invoice which has not been paid, GCEL represented that GCEL's liability of USD 4,462,293.62 has been "transferred" to GMR Energy.

52. By June 2016, GCEL's overdue payments for the Outstanding Debt had grown once again- to a sum including USD 41,910,590 and INR 674,024,462. The late interest accruing from the delayed payment stood at USD 5,219,643 plus INR 962,153,023.

53. On 9 June 2016, GCEL informed Doosan India that INR 12 Crores has been paid "out of 430 Crores transferred to GMR Energy and Payment [was] also released directly from GMR Energy".

H. GMR Infra refuses to honor the GMR Infra Guarantee

61. .....

62. .....

63. Specifically, on 18 July, 2016, GMR Infra responded that it believed "only" INR 450 Crores (USD 65.8 million) of payment was outstanding, and falsely claimed that it should not have to honor its unconditional first demand guarantee as said outstanding amount was "only a small portion of the original contracted amount".

J. Respondents are jointly and severally liable to Doosan India

69. GMR Infra is liable to Doosan India pursuant to the terms of the GMR Infra Guarantee. Further and in the alternative, GMR Infra, GMR Energy and GCEL were at all relevant times one and the same. Upon information and belief, they freely co-mingle corporate funds, run by the members of one family under the guise of the "Family Governance." They share directors and officers and use the same corporate letterhead and corporate signage. They often interchangeably use each other's address and phone numbers.

70. Indeed, not only did GMR Energy step in to bear GCEL's payment obligations under the EPC Agreements, GMR Energy in fact made payments to Doosan India on behalf of GCEL for GCEL's debts on several occasions.

71. No corporate formality is observed among GMR Infra, GMR Energy and GCEL. GCEL was 100% held by GMR Energy, but recently claimed to have gotten "transferred"

under the helm of GMR Infra. As of November 2016, GMR Infra directly and indirectly owns a 100% stake in GCEL.

72. In addition, as noted above, GCEL, GMR Energy and GMR Infra are all part of a family-owned business controlled by one of India's richest men, Mr. GM Rao. All the companies bear his name. Mr. G.M. Rao's elder son, Mr. G.B.S. Raju, is the chairman of GMR's Energy division and is responsible for the group's energy business. Mr. G.M's Rao's second son, Mr. Kiran Kumar Grandhi is the Corporate Chairman of GMR Group overseeing the group's finance and corporate strategy.

*IV. **ARBITRATION AGREEMENT***

74. Doosan India, GCEL and GMR Infra have a valid arbitration agreement by which they have agreed to arbitrate the present dispute, as evidenced by the GMR Infra Guarantee, at Clause 17:

"17.1 All disputes arising between the parties relating to this Guarantee or the interpretation of performance of this Guarantee (each a "Dispute") or any question regarding its existence, validity or termination shall be finally settled by arbitration before an arbitral tribunal consisting of three arbitrators. The arbitration shall be conducted in accordance with the arbitration rules of the Singapore International Arbitration Centre ("SIAC Rules"). as in force at the time. The guarantor and EPC Contractor shall each nominate one arbitrator for confirmation by the Chairman of the Singapore International Arbitration Centre. Both arbitrators shall agree on the third arbitrator within 30 Days after their appointment. Should the two arbitrators fail to reach agreement on the third arbitrator within such 30 days period, the third arbitrator shall be selected and appointed by Chairman of the Singapore International Arbitration Centre. The Parties agree that the arbitral tribunal shall have jurisdiction to adjudicate disputes on whether amounts have become payable by GCEL and/or whether GCEL has failed to make payment due under the EPC Contract.

17.2 The place of arbitration shall be Singapore and the language of the arbitral proceedings shall be English.

17.3 The award rendered shall be in writing and shall set out in reasonable detail the facts of the Dispute and the reasons for the arbitrators' decision. The award rendered shall apportion the costs of the arbitration. The award rendered in any arbitration commenced under this Agreement shall be final and binding upon the Parties. "(Emphases added.)

75. In addition, Doosan India and GCEL have a valid arbitration agreement by which the parties have agreed to arbitrate the present dispute, as evidenced by the CWETC Agreement, the onshore Agreement, and the Offshore Supply Agreement.

76. The CWETC Agreement contains an arbitration agreement in the following terms:

"21.3.3 Unless the Parties agree otherwise and subject to Section 21.4, such Dispute may be referred to arbitration in accordance with Section 21.4, on or after the sixtieth (60th) day after the day on which written notice of Dispute was given, even if no attempt at negotiation or senior level discussion has been made.

21.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to Section 21.3 shall, following notice by either Party, be exclusively and finally decided by arbitration in Singapore by a panel of three (3) arbitrators in accordance with the provisions of the Singapore International Arbitration Centre or any re-enactment or modification thereof. Save as specified in this Section 21.4.1, no arbitration provisions contained in any other law, shall apply to arbitration of any Dispute.
21.4.2 Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any party.
.....

21.4.5 The arbitral proceedings shall be conducted in the English language

21.4.6 The Parties agree that, where a Dispute arises and a dispute arises under one or more of the Other Contracts relating to the Project, which are so closely connected in the reasonable opinion of the Parties and the Parties deem it expedient for any Disputes and any such disputes, arising under one or more of the other contracts relating to the Project, to be resolved in the same proceedings, then the Parties may, at their option and by mutual agreement, consolidate and submit all such disputes for adjudication by the panel of arbitrators appointed hereunder and require such panel of arbitrators to adjudicate upon the same. Upon the aforesaid requirement by the Parties the panel of arbitrators shall determine the Dispute and all other disputes which have been consolidated, in accordance with provisions of this Section 21.4.

21.4.7 The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction."(Emphases added.)

77. The Onshore Agreement contains an arbitration agreement in the following terms:

"19.3.3 Unless the Parties agree otherwise and subject to Section 19.4, such Dispute may be referred to arbitration in accordance with Section 19.4 on or after the sixtieth (60^{th}) day after the day on which written notice of Dispute was given, even if no attempt at negotiation or senior level discussion has been made.

19.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to Section 19.3 shall, following notice

by either Party, be exclusively and finally decided by arbitration in Singapore by a panel of three (3) arbitrators in accordance with the provisions of the Singapore International Arbitration Centre(SIAC) or any re-enactment or modification thereof. Save as specified in this Section 19.4.1, no arbitration provisions contained in any other law, shall apply to arbitration of any Dispute.

19.4.2 Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any party.

.....

19.4.5 The arbitral proceedings shall be conducted in the English language.

.....

19.4.7 The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction. "(Emphases added.)

78. The offshore Supply Agreement contains an arbitration agreement in the following terms:

"19.3.3 Unless the Parties agree otherwise and subject to Section 19.4, such Dispute may be referred to arbitration in accordance with Section 19.4 on or after the sixtieth (60^{th}) day after the day on which written notice of Dispute was given, even if no attempt at negotiation or senior level discussion has been made.

19.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to Section 19.3 shall, following notice by either Party, be exclusively and finally decided by arbitration in Singapore by a panel of three (3) arbitrators in accordance with the provisions of the Singapore International Arbitration Centre(SIAC) or any re-enactment or modification thereof. Save as specified in this Section 19.4.1, no arbitration

provisions contained in any other law, shall apply to arbitration of any Dispute.

19.4.2 Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any party.
.....

19.4.5 The arbitral proceedings shall be conducted in the English language.
.....
19.4.7 The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction. "(Emphases added.)

V. PLACE OF ARBITRATION

82. As noted, the four arbitration agreements in the EPC Agreements and GMR Infra Guarantee provide that the arbitration is to be submitted to the SIAC in Singapore, which is reasonably construed to mean that the Parties intended for the place of arbitration to be Singapore.

VI. NUMBER AND CHOICE OF ARBITRATORS

83. The arbitration agreements in the EPC Agreements and GMR Infra Guarantee provide for three arbitrators.
84. So as to settle the disputes, Doosan India requests that the procedures set out in SIAC Rule 12.2 for the appointment for arbitrators be applied. Doosan India will nominate one arbitrator and GCEL, GMR Energy and GMR Infra will collectively nominate one arbitrator. As not all parties have agreed upon another procedure for appointing the third arbitrator, the third arbitrator shall be selected and appointed

by the President of the Singapore International Arbitration Centre in accordance with SIAC Rule 11.3.

22. Issue No. 1: Whether the arbitration that commenced at Singapore pursuant to Arb.316/16/ACU would fall under Part-I or Part-II of the Arbitration Act?

22.1. The four fold submission on behalf of GMR Energy on this issue is that firstly, on the plain reading of the arbitration clause, Singapore is not the seat of arbitration but only the venue; secondly, the parties to the arbitration being Indian entities, the arbitration cannot be construed to be an international commercial arbitration under Section 2 (1) (f) of the Arbitration Act, thirdly, the parties being Indian, choice if at all of a foreign seat for arbitration is in contravention of Section 28 of the Contract Act and fourthly, in case the arbitration is seated in Singapore the same would amount to derogation of the Indian substantive law, hence not permissible.

22.2. Contention of learned counsel for the GMR Energy that on the plain reading of the arbitration clause, Singapore is not the seat of Arbitration but venue deserves to be rejected in view of the decision of the Supreme Court reported as (2011) 9 SCC 735 *Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Co. Ltd.* wherein while interpreting a similar clause for arbitration in the agreement, it was held where the arbitration clause provides that the arbitration proceedings shall be in accordance with the Singapore International Arbitration Centre (SIAC) Rules, it means that Singapore shall be the seat of arbitration and the arbitration dispute will be governed by the Singapore International Arbitration Act. The report notes:

47. Clause 27 of the agreement provides for the arbitration and reads as follows:

"27.Arbitration

27.1. All disputes, differences arising out of or in connection with the agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this agreement. The arbitration shall be final and binding.

27.2. The arbitration shall take place in Singapore and be conducted in English language.

27.3. None of the party shall be entitled to suspend the performance of the agreement merely by reason of a dispute and/or a dispute referred to arbitration."

48. Clause 28 of the agreement describes the governing law and provides as follows:

"This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in accordance with its terms and provisions."

49. As will be seen from Clause 27.1, the arbitration proceedings are to be conducted in Singapore in accordance with the SIAC Rules as in force at the time of signing of the agreement. There is, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings, is the SIAC Rules. Clause 27.2 makes it clear that the seat of arbitration would be Singapore.

50. What we are, therefore, left with to consider is the question as to what would be the law on the basis whereof the arbitral proceedings were to be decided?

51. In our view, Clause 28 of the agreement provides the answer. As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India i.e. the Arbitration and Conciliation Act, 1996. The learned counsel for the parties have quite correctly spelt out the distinction between the "proper law" of the contract and the

> *"curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well settled that it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 makes it quite clear that the curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules.*

22.3. Supreme Court later in the decision reported as (2012) 12 SCC 359 *Yograj Infrastructure Ltd. v. Ssangyong Engg. & Construction Co. Ltd.* clarified paras 50 to 56 of above report as under:

> *3. Mr Rautray then submitted that through inadvertence, in paras 50 to 52 of the judgment in Yograj Infrastructure [Yograj Infrastructure Ltd. v. Ssang Yong Engg. & Construction Co. Ltd., (2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864] , it has been indicated that there was no ambiguity that the SIAC Rules would be the curial law of the arbitration proceedings and that the same had been subsequently clarified in para 54, wherein while indicating that the arbitration proceedings would be governed by the SIAC Rules as the curial law, which included Rule 32, which made it clear that where the seat of arbitration is Singapore, the law of the arbitration under the SIAC Rules would be the International Arbitration Act, 2002 (Chap. 143-A, 2002 Edn., Statutes of the Republic of Singapore). Mr Rautray submitted that it was a clear case of inadvertence in paras 50 to 52 that needs to be clarified by indicating that the curial law is the International Arbitration law of Singapore and not the SIAC Rules.*

8. Having regard to the submissions made on behalf of the respective parties, we are inclined to agree with Mr Rautray that the corrections and clarifications sought for have to be allowed. In particular, the observations made in paras 50-52 and 54 in Yograj Infrastructure case [Yograj Infrastructure Ltd. v. Ssang Yong Engg. & Construction Co. Ltd., (2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864] , if read together, indicate that, although, when the seat of arbitration was in Singapore, the SIAC Rules would apply, the same included Rule 32 which provides that it is the Singapore International Arbitration Act, 2002, which would be the law of the arbitration. Accordingly, it is clarified that while mention had been made in paras 50 to 52 that the curial law of the arbitration would be the SIAC Rules, what has been subsequently indicated in para 54 of the judgment is that the Singapore International Arbitration Act, 2002 would be the law of the arbitration.

22.4. Learned counsel for GMR Energy emphasizing on omission of the word "company" in Section 2 (1) (f) (iii) of the Arbitration Act states that pursuant to the amendment w.e.f. 23rd October, 2015 since all the four entities, that is, GMR Energy, GCEL, GIL and Doosan India are Indian companies incorporated in India, the arbitration instituted is a domestic arbitration and not an international commercial arbitration.

22.5. Section 2 (1) (f) of the Arbitration Act reads as under:

"2. (1)

f. "International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in for in India and where at least one of the parties is-

i. an individual who is a national of, or habitually resident in, any country other than India; or

ii. a body corporate which is incorporated in any country other than India; or

iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or"

22.6. In <u>*Chloro Controls*</u> (supra) the three Judge Bench of Supreme Court overruled the decision in <u>*Sumitomo Heavy Industries*</u> (supra) and held that the language of Section 45 of the Arbitration Act, 1996 cannot be narrowly construed using the definition of the word 'party' in Section 2 (1) (h) of the Arbitration Act. It was held:

> *116. As far as Sumitomo Corpn. [(2008) 4 SCC 91] is concerned, it was a case dealing with the matter where the proceedings under Sections 397 and 398 of the Companies Act had been initiated and the Company Law Board had passed an order. Whether the appeal against such an order would lie to the High Court was the principal question involved in that case. The denial of arbitration reference, as already noticed, was based upon the reasoning that disputes related to the joint venture agreement to which the parties were not signatory and the said agreement did not even contain the arbitration clause. On the other hand, it was the other agreement entered into by different parties which contained the arbitration clause. As already noticed, in para 20 of Sumitomo [(2008) 4 SCC 91] , the Court had observed that a party to an arbitration agreement has to be a party to the judicial proceedings and then alone it will fall within the ambit of Section 2(h) of the 1996 Act. As far as the first issue is concerned, we shall shortly proceed to discuss it when we discuss the merits of this case, in light of the principles stated in this judgment. However, the observations made by the learned Bench in Sumitomo Corpn. [(2008) 4 SCC 91] do not appear to be correct. Section 2(h) only says that "party" means a party to an arbitration agreement. This expression falls in the chapter dealing with definitions and would have to be construed along with the other relevant provisions of the Act. When we read Section 45 in light of Section 2(h), the interpretation given by the Court in Sumitomo Corpn. [(2008) 4 SCC 91] does not*

stand the test of reasoning. Section 45 in explicit language permits the parties who are claiming through or under a main party to the arbitration agreement to seek reference to arbitration. This is so, by fiction of law, contemplated in the provision of Section 45 of the 1996 Act.

117. We have already discussed above that the language of Section 45 is incapable of being construed narrowly and must be given expanded meaning to achieve the twin objects of arbitration i.e. firstly, the parties should be held to their bargain of arbitration and secondly, the legislative intent behind incorporating the New York Convention as part of Section 44 of the Act must be protected. Moreover, para 20 of the judgment in Sumitomo Corpn. [(2008) 4 SCC 91] does not state any principle of law and in any event it records no reasons for arriving at such a conclusion. In fact, that was not even directly the issue before the Court so as to operate as a binding precedent. For these reasons, respectfully but without hesitation, we are constrained to hold that the conclusion or the statement made in para 20 of this judgment does not enunciate the correct law.

22.7. Whether an arbitration between two Indian parties can be an international commercial arbitration and whether two Indian parties can choose a foreign seat was considered by the Madhya Pradesh High Court in Sasan Power (supra) and it was held that two Indian parties were free to arbitrate in a place outside India and an award rendered pursuant thereto would be a foreign award falling under Part-II of the Arbitration Act. The report notes:

57. On going through the scheme of the Arbitration and Conciliation Act, 1996, we find that based on the seat of arbitration so also the nationality of parties, an arbitration is classified to be an 'International Arbitration', and the governing law is also determined on the basis of the seat of arbitration. Therefore, it is clear that based on the seat of

arbitration, the question of permitting two Indian companies/ parties to arbitrate out of India is permissible. In the case of Atlas Exports (supra) itself, the principle has been settled that two Indians can agree to have a seat of arbitration outside India. Now, if two Indian Companies agree to have their seat of arbitration in a foreign country, the question would be as to whether the provisions of Part I or Part II would apply. Section 44, of the Act of 1996, contemplates a foreign award to be one pertaining to difference between persons arising out of legal relationship, whether contractual or not, which is in pursuance to an agreement in writing for arbitration, to which the convention set forth in the first schedule applies.

22.8. The decision of Madhya Pradesh High Court in <u>*Sasan Power*</u> (supra) was taken up in appeal before the Hon'ble Supreme Court where this issue was given up however, the Supreme Court in 2016 (10) SCC 813 <u>*Sasan Power Ltd. vs. North American Coal Corpn (India)*</u> dealt with and rejected the last contention raised by the plaintiff that the choice of foreign seat if any by Indian parties is in derogation of Indian law and it was held as under that this was not the scope of enquiry under Section 45 of the Arbitration Act:

48. It is settled law that an arbitration agreement is an independent or "self-contained" agreement. In a given case, a written agreement for arbitration could form part of another agreement, described by Lord Diplock as the "substantive contract" [Aughton Ltd. v. MF Kent Services Ltd., (1991) 57 BLR 1 (CA) "the status of a so-called "arbitration clause" included in a contract of any nature is different from other types of clauses because it constitutes a "self-contained contract collateral or ancillary to" "the substantive contract". These are the words of Lord Diplock in Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corpn. Ltd., 1981 AC 909: (1981) 2 WLR 141 (HL). It is a self-contained contract, even though it is, by common usage,

described as an "arbitration clause". It can, for example, have a different proper law from the proper law of the contract to which it is collateral. This status of "self-contained contract" exists irrespective of the type of substantive contract to which it is collateral."] by which parties create contractual rights and obligations. Notwithstanding the fact that all such rights and obligations arising out of a substantive contract and the agreement to have the disputes (if any, arising out of such substantive contract) settled through the process of arbitration are contained in the same document, the arbitration agreement is an independent agreement. Arbitration agreement/clause is not that governs rights and obligations arising out of the substantive contract: It only governs the way of settling disputes between the parties. [See T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., 1912 AC 1 (HL)]

49. In our opinion, the scope of enquiry (even) under Section 45 is confined only to the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed" but not the legality and validity of the substantive contract.

50. The case of the appellant as disclosed from the plaint is that Article X Section 10.2 is inconsistent with some provisions of the Indian Contract Act, 1872, and hit by Section 23 of the Indian Contract Act (as being contrary to public policy). It is a submission regarding the legality of the substantive contract. Even if the said submission is to be accepted, it does not invalidate the arbitration agreement because the arbitration agreement is independent and apart from the substantive contract. All that we hold is that the scope of enquiry under Section 45 does not extend to the examination of the legality of the substantive contract. The language of the section is plain and does not admit of any other construction. For the purpose of deciding whether the suit filed by the appellant herein is maintainable or impliedly barred by Section 45 of the 1996 Act, the Court is required to examine only the validity of the arbitration agreement within the parameters set out in Section

45, but not the substantive contract of which the arbitration agreement is a part.

[Emphasis supplied]

22.9. It is thus evident that an arbitration agreement is an independent self-contained agreement not dependant on the substantive agreement, therefore irrespective of the contractual rights and obligations parties can opt for an international arbitration. Undoubtedly the decision of Madhya Pradesh High Court in *Sasan Power* (Supra) and the Supreme Court in *Sasan Power Ltd.* (supra) was rendered pre amendment to Section 2(1)(f) of the Arbitration Act however, needless to note that even in the present case, the agreements between the parties are prior to 23rd October, 2015 i.e. pre-amendment to Section 2 (1) (f) of the Arbitration Act.

22.10. Learned counsel for GMR Energy has relied upon the decision in *TDM Infrastructure* (supra) wherein Supreme Court noted as under:

14. Whereas Part I of the 1996 Act deals with domestic arbitration, Part II thereof deals with the foreign award. The term "international commercial arbitration" has a definite connotation. It, inter alia, means a body corporate which is incorporated in any country other than India. However, according to the petitioner, it is a Company whose central management and control is exercised in any country other than India and, thus, despite the fact that the Company is incorporated and registered in India, its central management and control being exercised in Malaysia, it will come within the purview of sub-clause (iii) of Section 2(1)(f) of the 1996 Act.

15. Whenever in an interpretation clause, the word "means" is used the same must be given a restrictive meaning. "International commercial arbitration" and "domestic arbitration" connote two different things. The 1996 Act excludes domestic arbitration from the purview of

international commercial arbitration. The company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although sub-clause (iii) of Section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company.

16. ....

17. ....

18. ....

19. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

20. The learned counsel contends that the word "or" being disjunctive, sub-clause (iii) of Section 2(1)(f) of the 1996 Act shall apply in a case where sub-clause (ii) shall not apply. We do not agree. The question of taking recourse to sub-clause (iii) would come into play only in a case where sub-clause (ii) otherwise does not apply in its entirety and not where by reason of an exclusion clause, consideration for construing an agreement to be an international commercial arbitration agreement goes outside the purview of its definition. Once it is held that both the companies are incorporated in India, and, thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement and, thus, the question of applicability of sub-clause (iii) of Section 2(1)(f) would not arise.

21. The Chief Justice of India or his designate, furthermore, having regard to sub-section (9) of Section 11 of the 1996 Act must bear in mind the nationality of an arbitrator. The nationality of the arbitrator may have to be kept in mind having regard to the nationality of the respective parties. Only in a case where, however, a body corporate which need not necessarily be a company registered and incorporated under the Companies Act, as for example, an association or a body of individuals, the exercise of central management and control in any country other than India may have to be taken into consideration.

22. Chapter VI of the 1996 Act dealing with making of an arbitral award and termination of proceedings in this behalf plays an important role. In respect of "international commercial arbitration", clause (b) of sub-section (1) of Section 28 of the 1996 Act would apply, whereas in respect of any other dispute where the place of arbitration is situated in India, clause (a) of sub-section (1) thereof shall apply. When, thus, both the companies are incorporated in India, in my opinion, sub-clause (ii) of Section 2(1)(f) will apply and not sub-clause (iii) thereof.

23. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

24. Russell on Arbitration, 23rd Edn., p. 357, in his commentary on the English Arbitration Act, 1996, shows that although a distinction has been made between a domestic and non-domestic arbitration but the provisions relating to domestic arbitration had not been brought into force.

22.11. However, in para-36 of *TDM Infrastructure* (supra) Supreme Court clarified that any findings/observations made hereinabove were only for the

purpose of determining the jurisdiction of the Court as envisaged under Section 11 of the 1996 Act and not for any other purpose and is also evident from the conclusions noted in para 20 and 22 of the report. Thus GMR Energy cannot rely upon the decision in *TDM Infrastructure* (supra) to contend that in the present case Part-I of the Arbitration Act would apply and not Part-II.

22.12. It is trite law that three sets of law may govern arbitration, that is, substantive law, curial law and appropriate law of contract which was duly recognized by the Supreme Court in *Sumitomo Heavy Industries* (supra) as under:

> *10. In the Law and Practice of Commercial Arbitration in England, 2nd Edn. by Mustill and Boyd, there is a chapter on "The Applicable Law and the Jurisdiction of the Court". Under the sub-title "Laws Governing the Arbitration", it is said,*
>
> > *"An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.*

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law, i.e., the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the first law in order to give effect to the resulting award.

***

It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws—

1. The proper law of the contract, i.e., the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement, i.e., the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.

3. The curial law, i.e., the law governing the conduct of the individual reference.

***

1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award;

the question whether the parties have been discharged from any obligation to arbitrate future disputes.
2. The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.
3. The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.

***

In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate."

11. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.

[Emphasis supplied]

22.13. Relying upon the decision in *Shin-Etsu Chemical* (Supra) learned counsel for GMR Energy also contended that as per the three EPC agreements and Corporate Guarantee, the law governing the contract between the parties is Indian law and in the absence of a specific choice of

the law governing arbitration agreement, the law governing arbitration agreement would also be Indian law. In *Shin-Etsu Chemical* (supra) Supreme Court was dealing with an arbitration clause wherein the parties agreed to be governed by and construed and interpreted under the laws of Japan. It was agreed that all disputes arising out or in relation to the said agreement which could not be settled by mutual accord shall be settled by arbitration in Tokyo, Japan in accordance with the Rules of Conciliation and Arbitration of International Chamber of Commerce. It is on this term of the agreement discussing the issue of final finding under Section 45 of the Arbitration Act, Supreme Court referring to its earlier decision reported as (1992) 3 SCC 551 *National Thermal Power Corporation v. Singer Co.,* held that the proper law of arbitration agreement is normally the same as proper law of contract and only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties. However, where there is no express provision in the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement but that is only a rebuttable presumption. Supreme Court held:

> *80. There is yet another strange result which may come about by holding that Section 45 requires a final finding. This can be illustrated by reference to the facts of the present case. The parties here have subjected their agreement to the laws of Japan. The question that will arise is: When a court has to make a final determinative ruling on the validity of the arbitration agreement, under which law is this issue to be tested? This question of choice of law has been conclusively decided by the judgment of this Court in National Thermal Power Corpn. v. Singer Co. [(1992) 3 SCC 551] where it was observed:*

> *"23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption." [Ibid., at SCC p. 563, para 23, per Thommen, J.]*
>
> [Emphasis supplied]

22.14. Expounding the territoriality principle of each part of the Act, the Supreme Court in Bharat Aluminum Company (supra) held:

> *89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. The definitions contained in Sections 2(1)(a) to (h) are limited to Part I. The opening line which provides "In this Part, unless the context otherwise requires….", makes this perfectly clear. Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter II (Geneva Convention Awards). From the aforesaid, the intention of Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other. To accept the submissions made by the learned counsel for the appellants would be to convert the "foreign award" which falls within Section 44, into a domestic award by virtue of the provisions contained under Section 2(7) even if the arbitration takes place outside India or is a foreign seated arbitration, if the law governing the arbitration agreement is by choice of the parties stated to be the Arbitration Act, 1996. This, in our*

opinion, was not the intention of Parliament. The territoriality principle of the Arbitration Act, 1996, precludes Part I from being applicable to a foreign seated arbitration, even if the agreement purports to provide that the arbitration proceedings will be governed by the Arbitration Act, 1996.

22.15. Further in *Reliance Industries Ltd.* (supra) it was held:

45. In our opinion, it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause. This view of ours will find support from numerous judgments of this Court. Once the parties had consciously agreed that the juridical seat of the arbitration would be London and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement. This Court in Videocon Industries Ltd. [(2011) 6 SCC 161:(2011) 3 SCC (Civ) 257] has clearly held as follows: (SCC p. 178, para 33)

> *"33. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents."*

22.16. In *IMAX Corporation* (supra) Supreme Court further held:

35. The relationship between the seat of arbitration and the law governing arbitration is an integral one. The seat of arbitration is defined as the juridical seat of arbitration designated by the parties, or by the arbitral institution or by the arbitrators themselves, as the case may be. It is pertinent

to refer to the following passage from Redfern and Hunter on International Arbitration [Redfern and Hunter on International Arbitration, 5th Edn. (Oxford University Press, 2009)] :

> *"This introduction tries to make clear, the place or seat of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated:*
> *When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.*
> *The seat of arbitration is thus intended to be its centre of gravity."*

22.17. The decision in *Reliance Industries* (supra) and *Imax Corporation* (supra) have been reiterated by Supreme Court in *Indus Mobile Distribution* (supra). In the present case the parties have agreed to be governed by SIAC Rules for arbitration and thus Singapore would not be a venue alone but also the seat of arbitration.

22.18. Responding to the contention of learned counsel for Doosan India, learned counsel for GMR Energy has also relied upon the decision of *National Highway Authority* (supra). In *National Highway Authority* (supra) the Full Bench of this Court was dealing with the issue of setting aside an arbitral award and held that there was a restriction under the Arbitration Act

to issue notice limited to some or one of the grounds and if so done a reasoned order is required to be passed. For this reason, it was held that proceedings under Section 34 of the Arbitration Act do not necessarily take the shape of execution proceedings and while dealing with the issue whether the Court can pass an interim order even before arbitral proceedings commences or arbitrator is appointed, it was held that the provisions of 1996 Act were very different from the provisions of 1940 Act and that the 1996 Act is a self contained code and displaces all such aspects of substantive and procedural law in respect of which there is an explicit or implicit reference in the said Act. However, the Court indicated that by implication it cannot be held that every aspect of Code of Civil Procedure is excluded.

22.19. The plea of learned counsel for GMR Energy that two Indian parties cannot choose a foreign seat as the same would contravene to Section 23 read with Section 28 of the Contract Act was turned down by the Supreme Court in *Atlas Exports* (supra) wherein it was held:

> *10. It was however contended by the learned counsel for the appellant that the award should have been held to be unenforceable inasmuch as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act. It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. Under Section 23 of the Indian Contract Act the consideration or object of an agreement is unlawful if it is opposed to public policy. Section 28 and Exception 1 to it, (which only is relevant for the purpose of this case) are extracted and reproduced hereunder:*

> *"28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.*
>
> *Exception 1.— This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."*
>
> *11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willingly initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time.*

22.20. The two decisions relied upon by learned counsel for GMR Energy i.e. *Seven Islands Shipping* and *M/s Aadhar Mercantile* (supra) are *per*

incuriam as have not considered the law laid by the Supreme Court in *Atlas* (supra).

22.21. Contention of learned counsel for GMR Energy that the judgment in *Atlas* (supra) was given prior to Arbitration and Conciliation Act, 1996, and therefore not applicable to the present case, also deserves to be rejected in view of the decision of the Supreme Court reported as 2011 (8) SCC 333 *Fuerst Day Lawson vs. Jindal Exports Ltd* wherein comparing the pre amendment and post amendment Arbitration Act it was observed that the new Act is more favourable to international arbitration than its previous incarnation. The report comparing the provisions of the two Acts noted:

> *64. The provisions of Chapter I of Part II of the 1996 Act along with the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, insofar as relevant for the present are placed below in a tabular form:*

Foreign Awards (Recognition and Enforcement) Act, 1961	*Arbitration and Conciliation Act, 1996* *Pt II : Enforcement of Certain Foreign Awards* *Chapter I : New York Convention Awards*
***2. Definition**.—In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—* *(a) in pursuance of an agreement in writing for arbitration to which the*	***44. Definition**.—In this Chapter, unless the context otherwise requires, 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—* *(a) in pursuance of an agreement in writing for arbitration to which*

Convention set forth in the Schedule applies, and	*the Convention set forth in the First Schedule applies, and*
(b) in one of such territories as the Central Government being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.	*(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.*
***3. Stay of proceedings in respect of matters to be referred to arbitration**.—Notwithstanding anything contained in the Arbitration Act, 1940 (10 of 1940), or in the Code of Civil Procedure, 1908 (5 of 1908), if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall*	***45. Power of judicial authority to refer parties to arbitration**.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

make an order staying the proceedings.	
***4. Effect of foreign awards**.—(1) A foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India.* *(2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.*	***46. When foreign award binding**.—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.*
***5. Filing of foreign awards in court**.—(1) Any person interested in a foreign award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court.* *(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.* *(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified why the award should not be filed.*	
***6. Enforcement of foreign award**.—*	***49. Enforcement of foreign***

(1) Where the court is satisfied that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award. *(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except insofar as the decree is in excess of or not in accordance with the award.*	***awards**.—Where the court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court.* ***Appealable orders**.—(1) An appeal shall lie from the order refusing to—* *refer the parties to arbitration under Section 45;* *enforce a foreign award under Section 48,* *to the court authorised by law to hear appeals from such order.* *(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.*
***7. Conditions for enforcement of foreign awards**.—(1) A foreign award may not be enforced under this Act—* *if the party against whom it is sought to enforce the award proves to the court dealing with the case that—* *the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where*	***48. Conditions for enforcement of foreign awards**.—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—* *the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

the award was made; or *the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceed-ings or was otherwise unable to present his case; or* *(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:* *Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or* *(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or* *(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or* *(b) if the court dealing with the case is satisfied that—* *(i) the subject-matter of the*	*the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or* *(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:* *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or* *(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or* *(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.* *(2) Enforcement of an arbitral award may also be refused if the court finds that—* *(a) the subject-matter of the*

difference is not capable of settlement by arbitration under the law of India; or *(ii) the enforcement of the award will be contrary to public policy.*	*difference is not capable of settlement by arbitration under the law of India; or* *(b) the enforcement of the award would be contrary to the public policy of India.*
(2) If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security.	*Explanation.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.* *(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.*
***8. Evidence**.—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce—* *the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;* *the original agreement for arbitration or a duly certified copy thereof; and* *such evidence as may be necessary to*	***47. Evidence**.—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—* *the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;* *the original agreement for arbitration or a duly certified copy thereof; and*

prove that the award is a foreign award. *(2) If the award or agreement requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.*	*such evidence as may be necessary to prove that the award is a foreign award.* *(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.* *Explanation.—In this section and all the following sections of this Chapter, 'court' means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes.*
***9. Saving**.—Nothing in this Act shall—* *prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or* *(b) apply to any award made on an*	***51. Saving**.—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.*

arbitration agreement governed by the law of India.	
***10. Repeal**.—The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), shall cease to have effect in relation to foreign awards to which this Act applies.*	***52. Chapter II not to apply**.—Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.*
***11. Rule-making power of the High Court**.—The High Court may make rules consistent with this Act as to—* *the filing of foreign awards and all proceedings consequent thereon or incidental thereto;* *the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and* *(c) generally, all proceedings in court under this Act.*	

65. A comparison of the two sets of provisions would show that Section 44, the definition clause in the 1996 Act is a verbatim reproduction of Section 2 of the previous Act (but for the words "chapter" in place of "Act", "First Schedule" in place of "Schedule" and the addition of the word "arbitral" before the word "award" in Section 44). Section 45 corresponds to Section 3 of the previous Act.

66. Section 46 is a verbatim reproduction of Section 4(2) except for the substitution of the word "chapter" for "Act". Section 47 is almost a reproduction of Section 8 except for the addition of the words "before the court" in sub-section (1) and an Explanation as to what is meant by "court" in that section.

67. Section 48 corresponds to Section 7; Section 49 to Section 6(1) and Section 50 to Section 6(2).

68. Apart from the fact that the provisions are arranged in a far more orderly manner, it is to be noticed that the provisions of the 1996 Act are clearly aimed at facilitating and expediting the enforcement of the New York Convention Awards.

> *69. Section 3 of the 1961 Act dealing with a stay of proceedings in respect of matters to be referred to arbitration was confined in its application to "legal proceedings in any court" and the court had a wider discretion not to stay the proceedings before it. The corresponding provision in Section 45 of the present Act has a wider application and it covers an action before any judicial authority. Further, under Section 45 the judicial authority has a narrower discretion to refuse to refer the parties to arbitration.*

22.22. Yet another alternative argument raised by learned counsel for Doosan India which deserves to be accepted is that in case the contention of learned counsel for GMR Energy that the present arbitration is covered by Part-I is to be accepted then this Court will have no territorial jurisdiction to entertain the present suit for the reason in the jurisdictional para mentioned in the plaint GMR Energy submits that the closest connect of the parties to the present case is Chhattisgarh in India, thus the Court at Delhi is ousted of the territorial jurisdiction to try the suit and pass orders.

22.23. In view of the discussion aforesaid the contentions raised by learned counsel for GMR Energy are rejected and it is held that the arbitration that commenced at Singapore pursuant to Arb.316/16/ACU would fall under Part-II of the Arbitration Act and not Part-I.

23. Issue No.2: Whether on the basis of pleas in the notice of arbitration issued by Doosan India a case is made out by Doosan India to subject GMR Energy to arbitration with GCEL and GIL?

23.1. Learned counsel for GMR Energy further contends that assuming it is held that the International Arbitration law of Singapore is applicable to the arbitration amongst the three defendants, that is, Doosan India, GCEL and GIL, GMR Energy not being the signatory to any of the three agreements, or

the corporate guarantee, it cannot be roped into an international arbitration by applying the principle of alter ego or it being a guarantor without there being a written guarantee. Further admittedly the MOU-I dated 1st July, 2015 and MOU-II dated 30th October, 2015 have been terminated by Doosan India and liability of GMR Energy, if any was discharged by virtue of letter dated 3rd November, 2016 which Doosan India deliberately suppressed in the notice of arbitration. Thus GMR Energy cannot be made a party to the arbitration agreement either by virtue of the three EPC agreements and the Corporate Guarantee or the two MOUs as noted above by applying the principle of alter ego.

23.2. Relying upon the decision reported as *Indowind Energy Ltd* (supra) learned counsel for GMR Energy contends that each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Director will not make the two companies a single entity. Thus Doosan India cannot use the principle of alter ego to invoke the arbitration clause against GMR Energy on the basis of common shareholding and common Board of Directors of the two companies, that is, GMR Energy and GCEL. By invoking arbitration against GMR Energy, arbitration has proceeded in disregard of the corporate personality of GMR Energy. Even in *Chloro Controls* (supra) Supreme Court laid a word of caution that only in exceptional cases can a non-party to the arbitration agreement be subjected to arbitration without its prior consent. Reliance is also placed on the decisions reported as 2011 (1) SCC 320 *S.N. Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Ltd.*, *Deutsche Post Bank* (supra) and *Ameet Lalchand Shah* (supra).

23.3. Rebutting the contention of learned counsel for Doosan India that by virtue of MOU-1 and MOU-II, GMR Energy guaranteed the liability of GCEL it is contended that the MOU-I and MOU-II stood terminated by the letter of Doosan India dated 3rd November, 2016 and that since Doosan India is trying to approbate and reprobate at the same time, no arbitral dispute can be said to be subsisting as per the decision in *M/s P.K. Ramaiah* (supra). Further, in terms of the decision reported as *X vs. Y & Z*, 4A_128/2008 dated 19th August, 2008 even a guarantor cannot be pulled into an arbitration in case there is no arbitration agreement with the guarantor. Distinguishing the decisions relied upon by learned counsel for Doosan India, it is contended that they were on their peculiar facts and not applicable to the present case.

23.4. Learned counsel for Doosan India countering the submissions of learned counsel for GMR Energy contends that in *Chloro Controls* (supra) Supreme Court recognized the legal basis to bind a non-signatory to an arbitration agreement which inter alia are implied consent, third party beneficiary, guarantors, assignment or other transfer mechanism of control/ rights, apparent authority, piercing of veil, agent principle relationship, agent vendor relations etc. In *Jiang Haiying* (supra) the High Court of Singapore referring to excerpts from Halsbury's Laws of Singapore held that privity rule, while strict, is not absolute and there are several situations where non-signatories may be considered as party to the arbitration agreement, one such being the corporate veil piercing on the basis of alter ego. It is further submitted that the principle of invoking arbitration against the non-signatory is consistent with Sections 44 and 45 of the Arbitration Act which recognizes situations where there can be arbitration even between the non-

signatories to a contract, as Section 44 recognizes the legal relationship "whether contractual or not".

23.5. Further relying upon the decision of this Court in *M/s Sai Soft Securities* (supra) it is contended that the Division Bench of this Court recognized the award wherein the corporate veil was lifted and arbitration proceeded against a non-party. It is further contended that fraud is not the only concept in which corporate veil can be pierced. Supreme Court in the *Renusagar Power Co.* (supra) reiterated the expanding horizon of modern jurisprudence enumerating certain circumstances besides fraud wherein lifting of the corporate veil was permissible. The House of Lords in *DHN Food Distributors* (supra) recognized the concept of single economic entity and by lifting the corporate veil held that three companies should be for the purpose treated as one. Contending that the decision in *Sudhir Gopi* (supra) was per incuriam for the reason it failed to consider the issue of arbitrability of alter ego and was passed without taking into consideration the decision of the Supreme Court in *A. Ayyasamy* (supra) wherein the Supreme Court carved out cases which cannot be sent for arbitration, fraud being one such category. Hence the decisions relating to lifting the corporate veil on the ground of fraud cannot be used to determine the present case where arbitration is being invoked on the principle of alter ego and not on the principle of fraud. Referring to the book tiled as International Commercial Arbitration (2nd Edition) by Gary B. Born it is contended that concept of domestic arbitrability differs from international arbitrability. Hence, the decisions rendered on domestic arbitration cannot be applied ipso facto to international commercial arbitrations.

23.6. The seven grounds on which Doosan India invokes the principle of alter ego against GMR Energy as also noted in the notice of arbitration above are:

> *"(1) GMR Energy, GCEL and GMR Infra freely co-mingle corporate funds and are run by the members of one family.*
> *(2) The entitles have common directors and use the same corporate signage and letterhead.*
> *(3) There is no corporate formality maintained between the GMR Infra, GCEL and GMR Energy.*
> *(4) At the time of execution of the EPC Agreements, GMR Energy was the 100% holding company of GCEL, which thereafter stands divested in favour of another sister entity, GMR Generation Assets Limited.*
> *(5) GMR Infra at the relevant time held 93.5% stake in the plaintiff and thus has a controlling stake in GCEL indirectly.*
> *(6) GMR Energy, GCEL and GMR Infra are all part of a family owned business controlled by Mr. G.M. Rao.*
> *(7) GMR Energy acknowledged the debt due by its subsidiary, GCEL towards Doosan and also made payments towards the release of such debt."*

23.7. Supreme Court in the decision reported in Chloro Controls (Supra) held:

> *"70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming*

"through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England(2nd Edn.) by Sir Michael J. Mustill:

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

71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope

of arbitration can be said to include the signatory as well as the non-signatory parties.

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

74. In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to

refer all the disputes between all the parties to the Arbitral Tribunal is one of the determinative factors.

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102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:

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.

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.

xxx xxx xxx

xxx xxx xxx

109. The New York Convention clearly postulates that there should be a defined legal relationship between the parties, whether contractual or not, in relation to the differences that may have arisen concerning the subject-matter capable of

settlement by arbitration. We have referred to a number of judgments of the various courts to emphasise that in given circumstances, if the ingredients above-noted exist, reference to arbitration of a signatory and even a third party is possible. Though heavy onus lies on the person seeking such reference, multiple and multi-party agreements between the parties to the arbitration agreement or persons claiming through or under such parties is neither impracticable nor impermissible.

[Emphasis supplied]

23.8. In *Renusagar Power Co.* (supra) Supreme Court noting that the concept of lifting the corporate veil is a changing concept and is of expanding horizons held:

64. We are, however, of the opinion that these tests are not conclusive tests by themselves. Our attention was also drawn to the decision of the Madras High Court in Spencer & Co. Ltd. Madras v. CWT [AIR 1969 Mad 359 : 72 ITR 33 : 39 Com Cas 212 : ILR (1969) 2 Mad 450] where Veeraswami, J. held that merely because a company purchases almost the entirety of the shares in another company, there was no extinction of corporate character for each company was a separate juristic entity for the tax purposes. Almost on similar facts, are the observations of P.B. Mukharji, J. in Turner Morrison & Co. Ltd. v. Hungerford Investment Trust Ltd. [AIR 1969 Cal 238] where he held that holding company and subsidiaries are incorporated companies and in this context each has a separate legal entity. Each has a separate corporate veil but that does not mean that holding company and the subsidiary company within it, all constitute one company.

65. Mr Justice O. Chinnappa Reddy speaking for this Court in LIC v. Escorts Ltd.[(1986) 1 SCC 264 : AIR 1986 SC 1370 : 1985 Supp (3) SCR 909 : (1986) 59 Com Cas 548] had emphasised that the corporate veil should be lifted where the associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the

veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected. After referring to several English and Indian cases, this Court observed that ever since A. Salomon & Co. Ltd. case [1897 AC 22] a company has a legal independent existence distinct from individual members. It has since been held that the corporate veil may be lifted and corporate personality may be looked in. Reference was made to Pennington and Palmer's Company Laws.

66. It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order the profits of Renusagar have been treated as the profits of Hindalco.

67. In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(c) of the Act. The learned Additional Advocate-General for the State relied on several decisions, some of which have been noted.

68. The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The ghost of Salomon case [1897 AC 22] still visits frequently the hounds of Company Law but the veil has been pierced in many cases. Some of these have been noted by Justice P.B. Mukharji in the New Jurisprudence [Tagore Law Lectures, p. 183] .

69. It appears to us, however, that as mentioned the concept of lifting the corporate veil is a changing concept and is of expanding horizons. We think that the appellant was in error in not treating Renusagar's power plant as the power plant of Hindalco and not treating it as the own source of energy. The respondent is liable to duty on the same and on that footing alone; this is evident in view of the principles enunciated and the doctrine now established by way of decision of this Court in Life Insurance Corpn. of India [(1986) 1 SCC 264 : AIR 1986 SC 1370 : 1985 Supp (3) SCR 909 : (1986) 59 Com Cas 548] that in the facts of this case Sections 3(1)(c) and 4(1)(c) of the Act are to be interpreted accordingly. The persons generating and consuming energy were the same and the corporate veil should be lifted. In the facts of this case Hindalco and Renusagar were inextricably linked up together. Renusagar had in reality no separate and independent existence apart from and independent of Hindalco.

[Emphasis supplied]

23.9. Noting with approval observations of Lord Denning in the decision of the Court of Appeal in *DHN Food Distributors* (supra), Supreme Court in *Renusagar Power Co.* (supra) also noted:

> *55. In Kodak Ltd. v. Clark [(1903) 1 KB 505] the Court of appeal in England while dealing with an English company carrying on business in the U.K. owned 98 per cent of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors etc. of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholders. It was held that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax. Renusagar was not the alter ego of Hindalco, it was submitted. On the other hand these English cases have often pierced the veil to serve the real aim of the parties and for public purposes. See in this connection the observations of the Court of appeal in DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [(1976) 3 All ER 462] . It is not necessary to take into account the facts of that case. We may, however, note that in that case the corporate veil was lifted to confer benefit upon a group of companies under the provisions of the Land Compensation Act, 1961 of England. Lord Denning at p. 467 of the report has made certain interesting observations which are worth repeating in the context of the instant case. The Master of the Rolls said at p. 467 as follows:*
>
> > *"Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law [Principles of*

Modern Company Law, 3rd Edn., p. 216 (1969)] says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [(1955) 1 All ER 725]. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

I realise that the President of the Lands Tribunal, in view of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this Court, we must decide differently from him. These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly."

[Emphasis supplied]

23.10. Learned counsel for GMR Energy relied on the decision reported as *Balwant Rai Saluja* (supra). In the said decision as noted below, Supreme Court held that mere ownership and control is not sufficient to pierce the corporate veil, however, in the present case not only the group companies

issue is involved, there were two MOUs between the parties, wherein GMR Energy accepted its liability to pay and also made part payment:

> *70. The doctrine of 'piercing the corporate veil' stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. A. Salomon and Co. Ltd. (1897) AC 22. Lord Halsbury LC (paragraphs 31-33), negating the applicability of this doctrine to the facts of the case, stated that:*
>
> > *...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself..., whatever may have been the ideas or schemes of those who brought it into existence.*
>
> *xxxx xxxx xxx*
>
> *xxxx xxxx xxxx*
>
> *82. The present facts would not be a fit case to pierce the veil, which as enumerated above, must be exercised sparingly by the Courts. Further, for piercing the veil of incorporation, mere ownership and control is not a sufficient ground. It should be established that the control and impropriety by the Air India resulted in depriving the Appellants-workmen herein of their legal rights. As regards the question of impropriety, the Division Bench of the High Court of Delhi in the impugned order dated 02.05.2011, noted that there has been no advertence on merit, in respect of the workmen's rights qua HCI, and the claim to the said right may still be open to the workmen as per law against the HCI. Thus, it cannot be concluded that the controller 'Air India' has avoided any obligation which the workmen may be legally entitled to. Further, on perusal of the Memorandum of Association and*

Articles of Association of the HCI, it cannot be said that the Air India intended to create HCI as a mere facade for the purpose of avoiding liability towards the Appellants-workmen herein.

23.11. The decision in *S.N. Prasad* (supra) relied by learned counsel for GMR Energy has no application to the facts of the case as even though GMR Energy was not a signatory to the three EPC agreements and the corporate guarantee by virtue of the two MOUs it undertook to discharge the liability of GCEL. Even in *Deutsche Post Bank* (supra), Supreme Court was dealing with an arbitration clause in a construction agreement to which the appellant was not a party but had only entered into a loan agreement. The Supreme Court was not dealing with the issue of 'alter ego' in the two decisions hence the decisions are not applicable to the facts of the present case.

23.12. As noted above the arbitration clause in the three EPC agreements provided that where a dispute arises and a dispute arises under one or more of the other contracts relating to the project which are so closely connected in the reasonable opinion of the parties and the parties deem it expedient for any dispute and any such disputes, arising under one or more of other contracts relating to the project may be resolved in the same proceedings, then the parties may at their option and by mutual agreement consult and all other disputes by the panel of arbitrators appointed and require such panel of arbitrators to adjudicate upon the same. As per clause 17.1 of the Corporate Guarantee all the disputes arising between the parties relating to the guarantee or the interpretation of the performance of the guarantee or any question regarding its existence, validity or termination had also to be settled

by arbitration. It was thus the intention of the parties to consolidate all the disputes relating to the project, refer the same by mutual agreement to the same panel of arbitrators and get resolved through arbitration.

23.13. In the two MOUs relied upon by Doosan India in the notice of arbitration, GMR Energy admitted its liability towards Doosan India and secondly during the pendency of the dealings between the parties, GMR Energy held 100% stakes in GCEL though the same were transferred again pending disputes between the parties.

23.14. Though the letter dated 3rd November, 2016 does not form the basis of the notice of arbitration however, since it has been heavily relied upon by learned counsel for GMR Energy it would be appropriate to note contents of the said letter:

> *"November 3, 2016*
> *Ref. No.: Raipur-DP-GH-L-0725*
>
> *GMR Chhattisgarh Energy Ltd.*
> *Raikheda- Village, Tilda-Block, Dist.*
> *RAIPUR (C.G.) Pin-493 225*
> *Attention: Mr. S.N. Barde/President*
> *C.C :Mr. Madhu Terdal/GMR Group CFO*
> *Mr. G.B.S. Raju/BCM*
> *Ref.1. [Raipur-DP-GH-L-0699]*
> *Ref.2. Standstill Agreement*
> *Subject: Corporate Guarantee Resolution Meeting with DPSI*
>
> *This letter is in continuation of the meeting held last week at Mumbai office of GMR Infrastructure Ltd.*
>
> *As we stressed during the meeting, the Contractor sincerely hopes that the prolonged overdue issues can be cleared in the next meeting to be held during the 4th week of November so that we can avoid having to initiate a legal action.*
>
> *In this regard, we would like to remind the Owner that the Tripartite Agreement among GCEL, GEL and Doosan became null and void as of 31st Dec., 2015 because the*

conditions precedent for effectiveness were not fulfilled by the agreed upon date. Further, the nullification was notified to GCEL via the Contractor's letter dated 4th Jan., 2016. Please be advised, therefore, that the payment obligation is not on GEL, but on GCEL and GIL, by the invocation of Corporate Guarantee.

Also, as was discussed during the last week's meeting, it is necessary to execute the Standstill Agreement between GCEL, GIL and the Contractor to continue negotiation without initiating a legal proceeding right away. Please review the attached Standstill Agreement and let us know of your readiness to sign as soon as possible, but no later than 15th Nov., 2016.

As you may well understand, the Contractor has been in serious financial trouble due to the overdue payment for a long time and is now strained to initiate a legal proceeding unless the Owner takes a tangible action immediately to clear the overdue payment. Therefore, the Contractor requests to the GCEL and GIL to provide a detailed payment plan including the security of payment, methods of delay interest payment and higher interest rates for the deferred payment as soon as possible, but not later than 15th Nov., 2016, so that the Contractor can make decisions internally before the next meeting in the 4th week of November.

Kindly let us remind the Owner that the situation is such that the Contractor will have to commence a legal action as mentioned in the "Legal Notice" dated 14th Oct 2016, unless the Owner provides the Contractor with a repayment schedule acceptable to us, reliable payment security and commitment of interest payment, as well as GCEL and CIL's confirmation of the Standstill Agreement until 15th Nov., 2016.

This letter is without prejudice to any of the rights and remedies available to the Contractor in respect of any breach of the Agreements, the MOU, the Corporate Guarantee and related documentation and agreements, whether now or in the future, under law or in equity.

Sincerely,

SD/-
Dong Jib Park
Raipur PM"

23.15. From the contents of the letter noted above it is evident that though Doosan India stated that the tripartite agreement between GCEL and GMR Energy and Doosan India became null and void on 31st December, 2015 and that the payment obligation was now on the GCEL and GIL by invocation of the corporate guarantee however, the said letter was without prejudice to the rights and remedies available to Doosan India in respect of any breach of agreements, MOUs, Corporate Guarantee and related documentation and agreements. Further whether a tripartite agreement resulting in the two MOUs between Doosan India, GCEL and GMR Energy could be novated by a unilateral letter is a question to be decided on merits during the arbitration and not in the present suit.

23.16. Learned counsel for GMR Energy heavily relied upon clause 23.12 of the agreement between the parties which provided as under:

> *"23.12 Parties Obligation Non-Recourse*
> *The Parties have entered into this Agreement entirely on their own behalf, and in no manner for or on behalf of any shareholder of either Party, or any partner, shareholder, officer, director, employee or agent of either Party and neither Party shall have any recourse against such persons for any act, omission, obligation or liability of the other Party or for any other matter pertaining in any way to this Agreement or the Other Contracts, whether based upon a piercing of the Party's corporate veil or any other legal theory based upon exercise of control over the party or otherwise." (emphasis supplied)*

23.17. A perusal of clause 23.12 bars recourse to applications qua any partner, shareholder, office, director, employee or agent of either party even on the principle of piercing the parties' corporate veil or any other legal theory. However, the agreement did not bar other corporate entity to be made subject to arbitration based on the principle of piercing of the corporate veil or any such legal theory.

23.18. Considering the fact that firstly, GCEL was a joint venture of GMR Group, secondly, the group companies did not observe separate corporate formalities and comingled corporate funds, thirdly, by the two MOUs entered into between Doosan India, GMR Energy and GCIL, GMR Energy undertook to discharge liability and made part payments in discharge of GCEL's liability also, fourthly, when the two MOUs were entered into, GMR Energy had acquired GCEL and fifthly, whether the two MOUs being the tripartite agreement between Doosan India, GCEL and GMR Energy could or could not be novated by letter dated 31st December, 2015 being an issue to be decided on merits, it is held that from the notice of arbitration Doosan India has made out a case for proceeding against GMR Energy to subject GMR Energy to arbitration with GCEL and GIL.

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

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

held that an arbitrator does not have the power to pierce the corporate veil which function is essentially of the Court.

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

24.3. In *Sudhir Gopi* (supra) this Court was dealing with the arbitration agreement which falls in Part-I of the Arbitration Act, and held that whether a court will compel any person to arbitrate would have to be examined in the context of the specific provisions of the applicable statute. Though it is universally accepted principle that dispute resolution by arbitration must be encouraged, however, the courts determine the question whether an individual or an entity can be compelled to arbitrate, guided by the domestic law and the judicial standards of their country. This Court further held that the courts would undoubtedly have the power to determine whether in a given case the corporate veil should be pierced or not, however, an arbitral tribunal has no jurisdiction to lift the corporate veil, its jurisdiction being confined by the arbitration agreement which included the parties to

arbitration and it would not be permissible for the arbitral tribunal to expand or extend the same to other persons. Continuing the discussion, this Court also noted that an arbitration agreement can be extended to a non-signatory in limited circumstances, firstly, where the Court comes to the conclusion that there is an implied consent and secondly, where there are reasons to disregard the corporate personality of a party, thus, making the shareholders answerable for the obligations of the company. Thus, this Court recognized that though limited, corporate veil could be lifted but it was for the court to do it and not the arbitral tribunal. To come to this conclusion this Court in *Sudhir Gopi* (supra) referred to the decision in *DDA vs. Skipper Construction* (supra) wherein the Court lifted the corporate veil for the reason the corporate character was being employed for the purpose of committing illegality or for defrauding others.

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

24.5. Following the Constitution Bench decision in *SBP & Co.* (supra) Supreme Court in 2009 (1) SCC 267 *National Insurance Co.Ltd. Vs.*

Boghara Polyfab (P) Ltd. identified and segregated three categories for consideration in an application under Section 11 of the Arbitration Act, Category (1) being where the Chief Justice/his designate has to/must decide the issue; Category (2) where the Chief Justice/his designate may choose to decide the issues or leave them to the decision of the Arbitral Tribunal and Category (3) where the Chief Justice/his designate should leave the issues exclusively to the Arbitral Tribunal. Issues falling in the three categories were noted as under:-

> *22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.*
>
> *22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:*
>
> *(a) Whether the party making the application has approached the appropriate High Court.*
>
> *(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.*
>
> *22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:*
>
> *(a) Whether the claim is a dead (long-barred) claim or a live claim.*

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

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

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

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

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

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

circumstance which rendered the discharge voidable at the instance of the claimant. If the Arbitral Tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the Arbitral Tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits."

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

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

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

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

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

Tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the Arbitral Tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable b the Arbitral Tribunal.

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

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

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

131.3 Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in Anderson Wright Ltd. took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not.

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

24.9. Singapore High Court in the decision reported as 2006 SGHC 78 *Aloe Vera of America, Inc. vs. Asianic Food (S) Pte. Ltd. & Anr.* held:

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

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

Whether a person is the alter ego of a company is an issue which does not have a public interest element. It normally

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

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

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

24.11. In *Chloro Controls* (supra) Supreme Court reiterated the decision in *National Insurance Co.Ltd.* (supra) wherein a distinction was carved out between a court referred arbitration and an arbitration without the

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

25. Issue No.4: In the present suit whether this Court will form a prima facie opinion on the issue of alter ego or return a finding?

25.1. Learned counsel for GMR Energy contends that the present case deals with a non-party to the agreement, which issue is covered by the decision of the Supreme Court in *Chloro Controls* (supra) wherein discussing the earlier judgment in *Shin-Etsu Chemical* (supra), Supreme Court held that the Court must return a final finding in an application under Section 45 of the Arbitration Act.

25.2. Learned counsel for Doosan India however contends that in the present suit this Court will only apply the prima facie test and if from the

notice of arbitration a prima facie case is made out for proceeding against GMR Energy then ultimately whether GMR Energy is liable to be proceeded in the arbitration or an award passed against it would be in the sole domain of the arbitral tribunal and this Court will not return a finding of fact on the said issue. Reliance is placed on the decisions in *Shin-Etsu Chemical* (supra), *Malini Ventura* (supra) and *Mcdonald's India Private Limited* (supra) wherein the test of prima facie view was upheld. It is reiterated that the Arbitral Tribunal is the proper forum to adjudicate upon the issue of alter ego as held in *Integrated Sales* (supra).

25.3. Singapore High Court in the decision reported as *Malini Ventura* (supra) held:

> *"19. This is where the chicken and the egg question arises. Mr Nakul Dewan, counsel for the defendants, says that the international arbitration regime in place in Singapore gives primacy to the Tribunal and it is the Tribunal that has the first bite at deciding whether or not there is an arbitration agreement which confers jurisdiction on it. The defendants further say that under s 6 of the IAA I have no choice but to refer the question of the existence, validity or termination of an arbitration agreement to the Tribunal. The plaintiff's riposte is that s 6 would only apply to an "arbitration agreement" and that since she did not sign the Guarantee, neither she nor the defendants are parties to an "arbitration agreement" within s 6(1) and therefore the defendants are not allowed to apply to court for a stay of this action. It is for the court to decide whether there is an arbitration agreement or not.*
>
> *20. Essentially, my dilemma is how to apply s 6 of the IAA in the circumstances of this case. The first two subsections of that provision read:*
>
> *Enforcement of intentional arbitration agreement*
>
> *6.-(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party*

to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

[emphasis added]

36. Bearing in mind the differences in the regimes governing international arbitration in Singapore and in England, I do not think it will be correct for me to fully take on board the approach of the English courts as set out in Albon and Al-Naimi. The regime in force here gives primacy to the tribunal although, of course, the court still has an important role to play. If I were to hold that, in a situation where the conclusion of the arbitration agreement is in issue, the jurisdiction in s 6(2) to stay the court proceedings would not bite unless I could conclude, on the basis of the usual civil standard, that the arbitration agreement had been entered into, I would be imposing too high a burden on the party seeking the implementation of the arbitration agreement. I consider that it would satisfy the rights of both parties if the party applying for the stay was able to show on a prima facie basis that the arbitration agreement existed. The matter would then go to the tribunal to decide whether such existence could be established on the usual civil standard and then, if any party was dissatisfied with the tribunal's decision, such party could come back to the court for the last say on the issue. In another case regarding a tribunal's jurisdiction, albeit a different aspect not involving the formation of the arbitration agreement, the Court of Appeal observed that it was only in the clearest case that the court should decide that there was no jurisdiction instead of remitting the matter to the tribunal for an initial decision (see Tjong Very Sumito v Antig Investments Pte Ltd [2009] 4 SLR(R) 732 at [22]-[24]).

37. I note that "Commentary to the UNICTRAL Model Law" by Stavros L Brekoulakis and Laurence Shore in Concise International Arbitration, Loukas A Mistelis (ed) (Kluwer Law International, 2010) ("the Commentary") indicates at pp 601-602 that there have been other national courts which have given priority to the arbitral tribunal to decide the issue of existence of an arbitration agreement, holding that evidence that an arbitration agreement existed prima facie only would be enough for the courts to refer the issue to the tribunal for final determination. The Commentary also notes (at p 602) that other national courts have taken the contrary position. Whilst I recognise that there is some degree of logical discomfort in the notion that an arbitral tribunal can be given authority to decide on its jurisdiction when it may end up deciding that because one party did not sign it, no arbitration agreement ever existed and therefore in fact the tribunal had no authority to decide the question, I think that having accepted and given effect to the principle of "kompetenz-kompetenz" for so many years we must disregard that discomfort. Otherwise we may find ourselves drawing finer and finer distinctions between situations in which the principle applies and situations in which it does not.

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42 I have held, however, that at this stage it is only necessary for me to be satisfied on a prima facie basis that an arbitration agreement exists. Having reached that conclusion, the defendants are, prima facie, parties to an arbitration agreement and entitled to make an application for a stay under s 6. Further, I must grant that stay application unless I am satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. I am satisfied that none of those situations exist here. As Lightman J observed in Albon, the formulation "null and void" means "devoid of legal effect" which would be the result of the agreement being procured by duress, mistake, fraud or waiver. It does not apply to a situation in which no agreement was

concluded at all. Further, for an arbitration agreement to be "inoperative", it must have been concluded but for some reason ceased to have legal effect (see Albon at [18]).

25.4. Following *Malini Ventura* (Supra) in *Tomolugen Holding* (supra) it was held:

63 The prima facie approach was also the view urged upon us by the amicus curiae, Prof Boo. We agree that a Singapore court should adopt a prima facie standard of review when hearing a stay application under s 6 of the IAA. In our judgment, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a prima facie case that:
(a) there is a valid arbitration agreement between the parties to the court proceedings;
(b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
(c) the arbitration agreement is not null and void, inoperative or incapable of being performed.
64. ....
65. We part company with the English position and adopt the prima facie approach for the purposes of the threshold question essentially for four reasons. First, the prima facie approach coheres better with what we consider was envisaged by the drafters of the IAA. The earliest iteration of the IAA (viz, the International Arbitration Act 1994 (Act 23 of 1994) ("the original IAA")) was enacted in 1994, and it drew heavily from the recommendations made in the Report of the Sub-committee on Review of Arbitration Laws (1993) (Chairman: Giam Chin Toon) ("1993 Report on Review of Arbitration Laws"). That report included a draft Bill, which was considered and adopted with amendments by the Singapore Academy of Law's Law Reform Committee, and this subsequently resulted in the enactment of the original IAA in 1994 (see the remarks of Assoc Prof Ho Peng Kee, the then Parliamentary Secretary to the Minister for Law, at the second reading of the International Arbitration Bill 1994 (Bill 14 of

1994) ("the 1994 International Arbitration Bill"): Singapore Parliamentary Debates, Official Report (31 October 1994) vol 63 ("Singapore Parliamentary Debates vol 63") at cols 627-628).

67. Second, to require the court, on a stay application under s 6 of the IAA, to undertake a full determination of an arbitral tribunal's jurisdiction could significantly hollow the kompetenz-kompetenz principle of its practical effect. The full merits approach has the potential to reduce an arbitral tribunal's kompetenz-kompetenz to a contingency dependent on the strategic choices of the claimant in a putative arbitration. If the claimant decides to pursue its claim by arbitration, the arbitral tribunal will determine any challenge to its jurisdiction, and thus, its kompetenz-kompetenz will be given full vent. But, if the claimant decides to pursue its claim by bringing proceedings in court (instead of by recourse to arbitration), the court will be seized of jurisdiction, and will be able (and, indeed, on the full merits approach, obliged) to make a full determination on the existence and scope of the arbitration clause; this will deprive the putative arbitral tribunal of its kompetenz-kompetenz. In our view, the strength of the kompetenz-kompetenz principle cannot depend on the arbitrary choice of the claimant as to whether it will pursue its claim by way of court proceedings or by way of arbitration. That undermines the principles of judicial non-intervention and kompetenz-kompetenz which were at the forefront in the drafting of the Model Law and the enactment of the original IAA (see Assoc Prof Ho's remarks at the second reading of the 1994 International Arbitration Bill: Singapore Parliamentary Debates vol 63 at cols 625-626). We should point out that the strain which the English position puts on these principles of judicial non-intervention and kompetenz-kompetenz has not escaped criticism (see Arbitration Law (Robert Merkin gen ed) (informa, Looseleaf Ed, 15 August 2011 release) at para 8.21, as well as David Joseph QC, Jurisdiction and Arbitration Agreements and their Enforcement (Sweet & Maxwell, 2nd Ed, 2010) ("Jurisdiction and Arbitration Agreements") at pp 346-347). This difficulty is avoided if the prima facie approach is adopted.

> *68 Third, we consider that the fear of resource duplication which, it is said, will arise from the prima facie approach is overstated. A robust recognition and enforcement of the kompetenz-kompetenz principle may, on the contrary, deter a plaintiff from commencing proceedings in court in the face of an arbitration agreement. The plaintiff will be well aware that the court will stay the proceedings in favour of arbitration except in cases where the arbitration clause is clearly invalid or inapplicable. The author of Jurisdiction and Arbitration Agreements also argues (at p 346), albeit anecdotally, that the parties to an arbitration are likely to accept a well-reasoned jurisdictional determination rendered by an arbitral tribunal without appealing against it, and this would avoid re-litigation of the same issue. Parties that attempt to protract proceedings by making unmeritorious appeals against an arbitral tribunal's jurisdictional determination also face the prospect of an adverse costs order under s 10(7) of the IAA.*

25.5. The issue as to whether the Court should form a prima facie opinion or return a finding was also dealt in Chloro Controls (supra) and distinguishing the decision in Shin-Etsu Chemical (supra) Supreme Court held that if the decision of jurisdiction is left open and not decided finally at the threshold itself, the same may result not only parties being compelled to pursue arbitration proceedings by spending time, money and effort but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties that may finally prove to be in vain and futile. It would be thus appropriate to determine the fundamental issues as contemplated under Section 45 of the Arbitration Act at the very first instance by the judicial forum as is the legislative intent. It was held:

> *"128. The judgment of this Court in Shin-Etsu Chemical Co. Ltd. [(2005) 7 SCC 234] preceded the judgment of this Court in SBP & Co. [(2005) 8 SCC 618] Though the Constitution Bench in the latter case referred to this judgment in para 89 of*

the judgment but did not discuss the merits or otherwise of the case presumably for absence of any conflict. However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Section 11 relatable to Section 8 are final and not open to be questioned by the Arbitral Tribunal. Sections 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act. We may refer to the exact terminology used by the larger Bench in SBP & Co. [(2005) 8 SCC 618] in relation to the finality of such matters, as reflected in para 12 of the judgment which reads as under: (SCC pp. 643-44)

> *"12. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions,*

namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that

provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him."

(Emphasis supplied)

We are conscious of the fact that the above dictum of the Court in SBP case [(2005) 8 SCC 618] is in relation to the scope and application of Section 11 of the 1996 Act. It has been held in various judgments of this Court but more particularly in SBP [(2005) 8 SCC 618] which is binding on us that before making a reference, the Court has to dispose of the objections as contemplated under Section 8 or Section 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Section 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This, of course, would be applicable at pre-award stage. Thus, there exists a direct legal link, limited to that extent.

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

only is the positive but also the negative effect of the arbitration agreement. (Refer Fouchard Gaillard Goldman on International Commercial Arbitration.)

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

22.3, the Court is expected to leave the determination of such dispute upon the Arbitral Tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable b the Arbitral Tribunal.

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

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

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

> *131.3. Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in Anderson Wright Ltd. [AIR 1955 SC 53 : (1955) 1 SCR 862] took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not.*
>
> *131.4. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration."*

25.6. However, in *Chloro Controls* (supra) the Supreme Court was dealing with a case of reference to the arbitration under Section 45 and not an arbitration which had already been initiated. Carving out the distinction between the two in para 22 of the decision in *National Insurance Co. Ltd.* (supra) Supreme Court held that the Arbitral Tribunal was also competent to decide the issue including the validity of the arbitration agreement. In a case where the arbitration is not a court referred arbitration it would be thus in the domain of the Arbitral Tribunal to decide the issue of alter ego and Court in a suit filed by the opposite party is competent to form an opinion based on the affidavits filed by the parties as held in the Constitution Bench decision in *SBP & Co.* (supra) as under:

> *39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is*

> *to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.*

25.7. The present arbitration not being a court referred arbitration and the application under Section 45 of the Arbitration Act filed by Doosan India without prejudice to its rights and contentions, for the reason this Court passed an interim injunction on the facts of this case it would be sufficient if this Court returns a finding based on the pleadings supported by affidavits by the parties without going into a full-fledged trial.

26. Issue No. 6: Whether the arbitration against GMR Energy is contrary to Rule 7 of SIAC Rules?

26.1. The last issue raised by GMR Energy is that assuming SIAC Rules, 2016 are applicable to the arbitration even then GMR Energy could not be impleaded as a party without compliance of Rule 7 of SIAC Rules and without entailing an opportunity of hearing to GMR Energy even prior to the constitution of Tribunal. Doosan India self impleaded GMR Energy and thus the objections to GMR Energy to SIAC went unheard. In this regard GMR Energy through its letters dated 21st December, 2016, 13th January, 2017, 15th March, 2017, 20th May, 2017 and 27th May, 2017 objected to the applicability of the arbitration agreement to GMR Energy and its inclusion in the arbitration proceedings which went undetermined by SIAC. Even after the impugned letter dated 8th June, 2017 issued by SIAC, GMR Energy on 13th June**,** 2017 requested SIAC to first determine its objections which were not determined and compelling GMR Energy to file the present suit.

26.2. Countering the contention of non-invocation of Rule 7 of SIAC Rules, learned counsel for Doosan India submits that the plea of GMR Energy is clearly an afterthought, after a period of five months from the date of notice of arbitration raised for the first time in the objections dated 20th May, and 27th May, 2017. Notwithstanding the objections, it is contended that Rule 7 of SIAC Rules has no application to the present arbitral proceedings as the concept of joinder of parties is different from invoking an arbitration agreement against an alter ego. Furthermore Rule -7 of SIAC Rules applies at the stage, after the commencement of arbitration under Rule 3 and GMR Energy not being named as a party to the arbitration in accordance with Rule

3, Rule 7 would have no application. Even otherwise Rule 7 of SIAC Rules is not mandatory as it uses the term "May".

26.3. Rule 7 of SIAC Rules provide as under:

> *7.1 Prior to the constitution of the Tribunal, a party or non-party to the arbitration may file an application with the Registrar for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or a Respondent, provided that any of the following criteria is satisfied.*
>
> *a. the additional party to be joined is prima facie bound by the arbitration agreement; or*
> *b. all parties, including the additional party to be joined, have consented to the joinder of the additional party.*

26.4. The concept of joinder and consolidation while invoking an arbitration agreement against an alter ego was considered in Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law', in Albert Jan Van den Berg (ed), International Arbitration 2006; Back to Basics', ICCA Congress Series, Volume 13 (Kluwer Law International 2007) pp. 341- 358 at pp 346 is as below:

> *7. Distinction of the Non-signatory Issue from Joinder and Consolidation*
> *The issue of "extension" of the arbitration clause to non-signatories should be clearly distinguished from the issues which are usually referred to as:*
> - *Joinder: that is, whether a non-party to the arbitration may intervene in the arbitration proceedings, once they have been initiated, or whether a party to the arbitration proceedings (Claimant on the one hand, Respondent on the other hand) may join a non-party during the arbitration;*
> - *Consolidation: that is, if multiple disputes that arise from, or in connection with, different contracts, must in the first*

place be the object of separate arbitration requests, can the arbitral proceedings subsequently be consolidated?...

26.5. Thus there being a distinction between invoking arbitration against a non-signatory and joinder of a non-party during arbitration, the contention of learned counsel for GMR Energy that the invocation of arbitration against GMR Energy is contrary to Rule 7 of the SIAC Rules is rejected. In any case GMR Energy would be at liberty to raise the plea before the arbitral tribunal.

27. This Court having held that the arbitration that has commenced at Singapore would fall under Part-II of the Arbitration Act and not Part-I; the arbitration pending in Singapore pursuant to Arb.316/16/ACU not on a reference by Court, the issue of piercing the corporate veil, in the facts the present case, can be decided both by the Court as well as the Arbitral Tribunal; and this Court having formed an opinion based on the pleadings on affidavit that from the notice of arbitration Doosan India has made out a case for proceeding against GMR Energy to arbitration with GCEL and GIL; I.A. No. 7248/2017 under Order XXXIX Rule 1 and 2 CPC is dismissed and I.A. No. 9068/2017 under Order XXXIX Rule 4 CPC is disposed of. Interim order dated 4th July, 2017 is vacated. There being an arbitration pending at Singapore pursuant to Arb.316/16/ACU no further reference to arbitration is necessary under Section 45 of the Arbitration Act. I.A. No. 9069/2017 under Section 45 of the Arbitration and Conciliation Act, 1996 is accordingly disposed of as infructuous holding that GMR Energy is required to submit to the arbitration pursuant to SIAC Arbitration No. 316/2016 (Arb.216/16/ACU).

28. It is clarified that the finding of this Court on the issue of alter ego is for subjecting GMR Energy to arbitration and not a final determination on merits to pass an award against GMR Energy which would be in the domain of the Arbitral Tribunal.

(MUKTA GUPTA)
JUDGE

NOVEMBER 14, 2017
'vn'

HIGH COURT OF DELHI
सत्यमेव जयते