Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 2042 of 2022

Oil and Natural Gas Corporation Ltd. …Appellant

Versus

M/s Discovery Enterprises Pvt. Ltd. & Anr. …Respondents

With

T.C.(C) No. 48/2016

With

T.C.(C) No. 47/2016

With

T.C.(C) No. 49/2016

And With

T.C.(C) No. 50/2016

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J.

This judgment has been divided into sections to facilitate analysis. These are:

A Facts

1 The appeal arises from a judgment dated 27 June 2012 of the High Court of Judicature at Bombay by which an appeal under Section 37 of the Arbitration and Conciliation Act, 1996[1] has been dismissed. Oil & Natural Gas Corporation Limited[2] instituted an appeal against an interim award dated 27 October 2010[3] of the Arbitral Tribunal holding that the second respondent – Jindal Drilling and Industries Limited[4] was not a party to the arbitration agreement and must be deleted from the array of parties. The interim award was challenged in an appeal which was dismissed by the impugned judgment.

2 On 22 March 2006, ONGC awarded a contract to Discovery Enterprises Private Limited[5], the first respondent, which is a company belonging to the D P Jindal Group, for operating a floating, production, storage and offloading vessel[6]. Pursuant to the stipulation contained in clause 25.7.11 of the contract, a vessel called Crystal Sea was imported on 11 May 2006. ONGC paid the customs duty in the amount of Rs. 55.78 crores on the understanding that the vessel would be re-exported after work was complete under duty drawback whose formalities would be completed by DEPL. The vessel left Indian territorial waters and did not return. According to ONGC, DEPL failed to complete the formalities for duty drawback and

[1] "**Act of 1996**"
[2] "**ONGC**"
[3] "**interim award**"
[4] "**JDIL**" or the "**second respondent**"
[5] "**DEPL**"
[6] "**vessel**"

did not compensate ONGC for customs duty and other expenses incurred in the amount of Rs. 63.88 crores.

3 Clause 37 of the contract between ONGC and DEPL provides for the settlement of disputes of the parties through arbitration. On 25 April 2008, ONGC invoked arbitration against DEPL and JDIL and claimed an amount of Rs. 63.88 crores. An Arbitral Tribunal consisting of Mr Justice S P Kurdukar (Retd.), Mr Justice M S Rane (Retd.) and Mr S Venkateswaran (Senior Advocate) was constituted. In its statement of claim filed before the Arbitral Tribunal, ONGC set up the case that DEPL and JDIL belonged to the DP Jindal Group of Companies and since they constitute a single economic entity, the corporate veil should be lifted to compel the non-signatory, JDIL, to arbitrate. According to ONGC, DEPL is an alter ego and agent of JDIL. The statement of claim read thus:

> "17. It is submitted the Respondent no.1 was awarded the contract by relying on the fact that it is Group Company of D P Jindal group of companies and that the Respondent No.2, M/s Jindal Drilling & Industries Ltd has a vital business interest in the Respondent No.1, which can be said to be the alter ego of Respondent No.2. In fact, the Respondent No. 2 is the ultimate beneficiary of the business of Respondent No. 1. […] Presently, they are having three valid existing contracts with ONGC. DEPL has close corporate unity with Jindal Group and in fact the shareholders are almost common. Respondent No. 1 has throughout represented that they are group company of Jindal apart from their representation in the bid they have been representing that through the letter heads which clearly indicated that they belong to a single group of companies, namely DP Jindal Group of companies. M/s Jindal Drilling has also acknowledged that the contractor M/s DEPL is a group company of Jindal Group in their website in an article titled "Key due diligence observations". A copy of the said article is annexed herewith and marked as Annexure 8. Since Respondent No. 1 is liable to compensate ONGC for

the losses suffered by it, ONGC has adjusted the said amount from the monies payable to Jindal Drilling and Industries Limited as a security to satisfy the award to be passed in this case.

18. As stated above, Respondent No. 2 was supplying vessels and rigs to ONGC under various contracts, for last many years. It is a fact that the Respondent No.1 was formed as a group company with the charter of introducing cutting-edge technology and solutions to the oil and gas market in India. Respondent No.1 has represented itself as a part of the DP Jindal group of companies as seen from the company's website (www.discoveryepl.com). A copy of the relevant extract from the website is attached herewith and marked as Annexure A-9. The same web-based representation was made in categorical and unequivocal manner by Respondent No.1 in the bid submitted by them in connection with the subject contract. The copy of the same is annexed herewith and marked as Annexure-10. The Directors of the Respondent No.1 are Mr. Manav Kumar and Mrs. Shilpa Agarwal, son and daughter in law of Shri Naresh Kumar who is the Managing Director of the Respondent No. 2 i.e, the Jindal Drilling and Industries Ltd. The two companies operate out of the same premises, same floor, same building i.e. Keshav Building, Bandra Kurla Complex. Copies of the Letter Head of both the companies addressed to the claimant is enclosed herewith and marked as Annexure A-11 (colly). More significantly a prominent Jindal Drilling Executive has taken an active interest in the negotiations concerning the subject contract […]. It makes it abundantly clear that the activities of DEPL i.e. Respondent No. 1 contractor are an extension of the activities of Respondent No. 2 who has set up the Respondent No. 1 company as an agency to carry out its activities. Therefore, it is submitted that the doctrine of group company can be applied in this case - an arbitration agreement signed by one company in a group of companies entitles (or obligates) other group non-signatory companies, if the circumstances surrounding the negotiation, execution of the agreement show that the mutual intention of all the parties was to bind non-signatories. This group companies constitute the same "economic reality". This is evident when veil-piercing is done. Copies of documents evidencing close relationship between both the companies are annexed herewith as indicated above.

> 19. In any case, Respondent No. 1 can be considered as an agent/ alter ego of Respondent No. 2 because of its deep and pervasive family links, apart from the fact that Respondent No. 2 is the intended third-party beneficiary of this contract. The Arbitral Tribunal has to determine these questions in accordance with evidence and law. Further, there is corporate unity and cross shareholdings in both the companies by shareholders, common to both the companies.
>
> […]
>
> 21. It is submitted that this is a fit case where this Hon'ble Tribunal has to pierce the corporate veil in order to see the acknowledged the realities of Respondent No.1 being a group company of DP Jindal Group. As submitted above, there is a clause 'corporate unity' and applying the doctrine of group companies/alter ego/ultimate beneficiary. This Tribunal has to hold Respondent No. 2 also liable to compensate ONGC for the dues of respondent No.1. The issue preferred to Tribunal is within the arbitration agreement and under law and this Hon'ble Tribunal has jurisdiction to entertain and decide the dispute."

4 An application under Section 16 of the Act of 1996 was filed by JDIL seeking its deletion from the arbitral proceedings on the ground that it is not a party to the arbitration agreement. ONGC responded to the application. During the course of the proceedings, ONGC filed an application on 5 January 2009 for discovery and inspection to support its case that DEPL is an alter ego of the Jindal Group of companies. In support of the application for discovery and inspection, ONGC pleaded that:

(i) DEPL and JDIL are group companies and that the former is an agent or alter ego of the latter;

(ii) There exists corporate and functional unity between them;

(iii) DEPL is a corporate facade which has been created to promote and extend the business of JDIL;

(iv) JDIL is responsible for the acts of omission and commission of DEPL on the basis of the group of companies doctrine;

(v) DEPL has been created by the Jindal Group to render services in the oil and gas sector and each entity of the group is strategically formed to render certain services; and

(vi) DEPL is working under the "fraternal hood" of the group based on the admission on the corporate website of JDIL.

5 ONGC stated that the documentary evidence demonstrates that there is a "close corporate unity and functional unity existing between these two companies" and hence it was necessary to discover the documents set out in the schedule to the application. The documents of which discovery was sought are tabulated below:

> "SCHEDULE OF DOCUMENTS
>
> 1. Memorandum of Association of Respondent No.2.
>
> 2. Articles of Association of Respondent No.2.
>
> 3. Ledger account of Respondent No.2 for the financial years 2003-04, 2004-05, 2005-06 and 2006-07.
>
> 4. Employees salary register of Respondent No.2 for the financial years 2003-04, 2004-05, 2005-06 and 2006-07.
>
> 5. Titled document showing Respondent No.1's rights/ownership over the registered office premises at Suite 110, Tower-I, 70 Najafgarh Road, B-39, New Delhi-110 015.
>
> 6. Titled document showing Respondent No.2's rights/ownership over the office premises at 3rd Floor,

> Keshav Building, Banda-Kurla Complex, Banda (East), Mumbai-400 051.
>
> 7. Documents showing grant of telephone connection of the following telephone and fax numbers at the Delhi office of Respondent No. 1 and the payment of the bills of the said telephone and fax numbers by Respondent No. 1 from the calendar years 2003 to 2007. (i) Telephone No. 52531100, (ii) Fax No.52531191.
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> 8. Documents showing grant of telephone connection of the following telephone and fax numbers at the Mumbai office of Respondent No. 2 and the payment of the bills of the said telephone and fax numbers by Respondents from the calendar years 2003 to 2007. (i) Telephone Nos.26592889 & 55020047, (ii) Fax No.26592630.
>
> 9. List of the contract bagged from ONGC so far the inception of Respondent No.2.
>
> 10. List of crew members in the Drilling Unit "Noble Ed-Holt awarded on 17.8.06 and Noble Charlie Yester on 2.12.06."

6 ONGC led evidence in support of the statement of claim. During the course of the examination, ONGC's witness, Anindya Bhattacharya who was working as Chief Manager (MM) of ONGC, produced documents in support of claim. The production of documents was objected to by JDIL on the ground of relevance and admissibility. During the arbitral meeting on 7 July 2009, the Tribunal recorded the following minutes:

> **"Per Tribunal** :
> The documents produced by the witness Anindya Bhattacharya (CW-1) along with his affidavit dated June 26th 2009 and annexures 1 to 10 are taken on record. Mr. Rahul Narichania, Ld. Advocate for Respondent No. 2 objects to these documents being taken on record on the ground that the same are not relevant and admissible as far as the Respondent No. 2 is concerned. He further stated that he will cross examine the witness on the documents without

> prejudice to his rights that the said documents were neither relevant nor admissible in evidence and ought not to be marked as exhibits.
>
> The rival contentions will be decided while disposing of the application made under Section 16 of the Arbitration & Conciliation Act, 1996. It is also made clear that merely because the witness has been cross examined on behalf of the Respondent No. 2 on the documents, the documents do not automatically stand exhibited.
>
> Mr. Rajiv Kumar objects to the procedure recorded above. The Claimants do not waive any rights in this behalf."

7 By its interim award dated 27 October 2010, the Arbitral Tribunal held that it lacked the jurisdiction to arbitrate on the claim against JDIL, which was not a party to the arbitration agreement. The tribunal relied on the judgment of this Court in **Indowind Energy Ltd.** v. **Wescare (I) Ltd. & Anr.**[7]. The conclusion of the Tribunal was that JDIL is not a signatory of the arbitration agreement and hence could not be impleaded as a party to the proceedings. The Arbitral Tribunal held:

> "20. After considering rival contentions, the arbitral tribunal is of the opinion that it may not be permissible for it to go beyond the ambit of section 7 of the act. The word 'party' is defined under section 2(1)(h) means a party to an Arbitration Agreement and the arbitration agreement has been defined under section 7 of the Act. […] **To put it differently, this arbitral tribunal lacks the jurisdiction to investigate, enquire into and record any finding on the basis of claim petition paragraphs 17 to 21 against M/s Jindal Ltd/ Respondent No.2. The arbitral tribunal is therefore of the opinion that the claim petition of ONGC vis a vis M/s Jindal Ltd./ Respondent No.2 is untenable for want of jurisdiction under the Act. The arbitral tribunal makes it clear that the position of M/s Jindal Ltd/ respondent no.2 considered only on the basis of the provisions contained in section 2(1)(h) and section 7 of the Act."**
>
> (**emphasis supplied**)

[7] (2010) 5 SCC 306 ["**Indowind**"]

8 JDIL was accordingly struck off the array of parties. ONGC filed an appeal under Section 37 before the Bombay High Court which was dismissed on 27 June 2012 with the following observations:

> "16. As observed hereinabove, there is no evidence tendered before Arbitral Tribunal that DEPL and JDIL had common shareholders and common board of directors. Even if that had been the case, the Hon'ble Supreme Court of India in Indowind Versus Wescare case (supra) has held in terms that merely because two companies have common shareholders and directors, they do not become a single entity. In the instant case also, the Arbitral Tribunal has correctly held that merely because the two companies may at one point of time have had a common address and telephone number, it does not make them one economic unit. The mere fact that the son and daughter-in-law of the managing director of JDIL are directors in DEPL also does not and cannot establish that these companies are one and the same. There is also no credible evidence to show that because of the alleged nexus between the two companies, ONGC awarded the said contract to DEPL. Even assuming this to be correct, it does not take the case of ONGC any further. JDIL is admittedly not a party to the contract and cannot be liable under the said contract which is only between ONGC and DEPL. If ONGC wanted to bind JDIL to the said contract, it should have asked JDIL to be a party to the said contract. In fact, this court inquired from learned Advocate appearing for ONGC as to why ONGC did not insist on JDIL signing the said contract when admittedly there are other contracts which are entered into between ONGC and JDIL. However, the learned advocate appearing for ONGC had no answer to the same. In response, he only submitted that ONGC has also filed suit being 2947 of 2011 in this court in which DEPL and JDIL have been arrayed as the defendants."

9 The judgment of the High Court was challenged by ONGC under Article 136 of the Constitution. The Arbitral Tribunal delivered its final award dated 6 June 2013[8] and, while allowing the claim of ONGC, held that it is entitled to recover an amount

[8] "**Arbitral Award in the first proceeding**"

of Rs.63.87 crores and USD 1,756,197.50 together with interest at 9% per annum and legal costs. The counter claim filed by DEPL was dismissed.

10 At this stage, it would also be necessary to note that in the course of its interim award, the Arbitral Tribunal dealt with the applications filed by ONGC on 5 January 2009 for discovery of documents and inspection. The Arbitral Tribunal noted ONGC's contention that its application for discovery and inspection should be heard and disposed of first on merits and that the application filed by JDIL under Section 16 should be heard thereafter so that all relevant documents would emerge before the Arbitral Tribunal. The Arbitral Tribunal, however, directed that the application for discovery and inspection filed by ONGC be "deferred until the issue of the jurisdiction is decided".

A.1. Transferred cases arising out of the arbitration

11 During the pendency of the arbitration between ONGC and DEPL, ONGC withheld a sum of US$14,772,408.54 towards recovery of its claim of Rs.64.88 crores against four contracts with JDIL. By a letter dated 24 October 2007, JDIL sought the release of the sum withheld together with interest failing which it stated that it would exercise its right to take legal recourse. ONGC replied to the letter on 5 May 2008 stating that they are withholding the dues as an adjustment against the dues owed to ONGC by DEPL. Aggrieved by the deductions made by ONGC under its four contracts for drilling services, JDIL invoked arbitration on 4 February 2010. An Arbitral Tribunal consisting of Ms Justice Sujata Manohar (Retd.), Mr Justice B N

Srikrishna (Retd.), and Mr Justice M S Rane (Retd.) was constituted. In the meanwhile, ONGC instituted a declaratory suit against JDIL and DEPL before the Bombay High Court which is presently pending. The Arbitral Tribunal, by a common award dated 9 October 2013,[9] directed ONGC to pay JDIL an amount of US$14,772,495.55/- together with interest at 4% per annum calculated from the due date of each invoice till the date of payment or realisation. The Arbitral Tribunal dealt with the submission of ONGC that DEPL and JDIL belong to the same group thus entitling ONGC to make the deductions. Rejecting the contention of ONGC, the Arbitral Tribunal held:

> "25. There is hardly any evidence to support the plea of the Respondent that DEPL and the Claimant are one and the same company. Both DEPL and the Claimant are group companies of D.P. Jindal group of companies. Although the directors of DEPL are the son and daughter-in-law of the managing director of the Claimant, and the two companies, for some time, shared a common office and telephone numbers, that does not make the two companies one. Both are subsidiaries of the main company and both have independent legal existence. DEPL was incorporated in the year 2003. The Claimant is a public limited company listed on the stock exchange and was incorporated in the year 1983.
>
> 26. […] The facts of the present case are totally different and do not warrant lifting of corporate veil, assuming there is one. The evidence in the present case does not justify the application of "lifting the corporate veil". In respect of the contract which was entered into by the Respondent with DEPL, the tender was floated by ONGC in 2005 and the contract was entered into in 2006. There is no material to show that the Respondent awarded the contract to DEPL because it was in fact the claimant and/ or was supported by the claimant. The minutes of the meeting held by the Respondents for short-listing of bidders in respect of the contract have not been produced. The only witness produced

[9] "**Arbitral Award in the second proceeding**"

> by ONGC was not present at the meetings held by the executive purchase committee when the deliberations on the award of the contract recommended bidder took place. […] There is no evidence to show that in order to secure the said contract, DEPL represented that it was a part of the Claimant group. […]
>
> 27. There is no guarantee or letter of "comfort" from the Claimant to the Respondent in respect of the liabilities, if any, of DEPL under its contract with ONGC. […]
>
> […]
>
> 30. In the present case the Claimant and DEPL have throughout maintained their separate legal character. There is no evidence to indicate that they ever represented to the Respondent that they are one company or that the Claimant will be liable under the contract of the Respondent with DEPL.
>
> 31. In the present case the Respondent ONGC had earlier initiated arbitration proceedings against both DEPL and the Claimant before an Arbitral Tribunal […]. By its 'interim final award' dated 27-10-2010, the Arbitral Tribunal held that in the dispute between the Respondent and DEPL, the Claimant could not be impleaded. […] The findings of the earlier arbitral tribunal and the High Court in its order of 27 June 2012 support our present conclusions, and we respectfully agree with the same."

12 DEPL was not a party to the above arbitral proceedings which were initiated by JDIL. ONGC instituted petitions[10] under Section 34 of the Act of 1996 for challenging the Arbitral Award in the second proceeding in respect of the four contracts of JDIL. The petitions were dismissed by a Single Judge of the Bombay High Court on 28 April 2015. ONGC filed an appeal[11] under Section 37 of the Act of 1996 during the pendency of the special leave petition arising from the interim award of the Arbitral Tribunal dated 27 October 2010, consisting of Mr Justice S P

[10] Arbitration Petition No. 587, 767, 768 and 1045 of 2014
[11] Arbitration Appeal Nos. 446 to 449 of 2015

Kurdukar (Retd.), Mr Justice M S Rane (Retd.) and Mr S Venkateswaran. ONGC sought a transfer of the appeals lodged before the Bombay High Court against the judgment of the Single Judge dismissing the petitions under Section 34 for challenging the Arbitral Award in the second proceeding. The transferred cases[12] have come up before this Court together with the special leave petition arising out of the interim award dated 27 October 2010.

B Submissions of Counsel

13 Mr K M Nataraj, Additional Solicitor General[13], appearing on behalf of ONGC submitted that:

(i) The case of ONGC is that DEPL and JDIL constitute one single commercial entity and that ONGC is hence entitled by law to compel JDIL to participate in the arbitration proceedings so as to enforce the award against it;

(ii) Though evidence was available with ONGC to buttress the above claim, it filed an application for discovery and inspection to secure material which was within the possession, control and custody of JDIL. However, with the deletion of JDIL from the array of parties, the application for discovery and inspection has been rendered otiose;

(iii) The Arbitral Tribunal has not enquired into the facts at all, despite the contention of ONGC that JDIL is a necessary party;

[12] Transferred Case (Civil) Nos. 47, 48, 49 and 50 of 2016
[13] "**ASG**"

(iv) The Arbitral Tribunal has merely held, on the basis of the legal principle underlying Section 7 of the Act of 1996 and privity of contract, that JDIL which is not a signatory to the arbitration agreement cannot be impleaded in the arbitral proceedings;

(v) After the application for discovery and inspection was opposed by JDIL, the Arbitral Tribunal deferred its decision until the issue of jurisdiction was resolved on the application filed by JDIL under Section 16 of the Act of 1996;

(vi) The interim award did not consider or hear the application for discovery and inspection under Section 16. The decision has been rendered purely on the premise that a non-signatory to the arbitration agreement cannot be impleaded as a party;

(vii) ONGC has been precluded from tendering evidence that JDIL could be brought within the fold of arbitration on the basis of the group of companies doctrine;

(viii) While the Arbitral Tribunal has relied on the decision of this Court in **Indowind** (supra), the subsequent decisions of this Court have accepted and applied the group of companies doctrine. These decisions are:

a. **Chloro Controls India Pvt. Ltd.** v. **Severn Trent Water Purification Inc. & Ors;** [14]

b. **Cheran Properties Ltd.** v. **Kasturi & Sons Ltd. & Ors**;[15] and

c. **MTNL** v. **Canara Bank & Ors.** [16]. and

[14] (2013) 1 SCC 641 [“**Chloro Controls**”]
[15] (2018) 16 SCC 413 [“**Cheran Properties**”]

(ix) The decision in **Indowind** (supra) is not good law in view of the subsequent judgments of this Court. The Arbitral Tribunal ought to have decided the jurisdictional issue after parties were permitted to lead evidence, since the application of the group of companies doctrine and the lifting of the corporate veil involves mixed questions of law and fact. The issue of jurisdiction and merits are inextricably intertwined and a ruling premised exclusively on the application of Section 7 of the Act of 1996 was improper.

14 Controverting the above submissions, Mr Shyam Divan, Senior Counsel appearing on behalf of the JDIL has indicated in the following tabulation:

(i) ONGC's contentions;

(ii) JDIL's response;

(iii) Findings in the interim award of the Arbitral Tribunal; and

(iv) The order of the High Court.

The tabulated statement is reproduced below for convenience of reference:

<table>
<tr><th>"ONGC CONTENTION</th><th>JDIL RESPONSE</th><th>INTERIM AWARD</th><th>HIGH COURT ORDER</th></tr>
<tr><td>JDIL has substantial business interest in DEPL.</td><td rowspan="4">None of these assertions are based on fact and no evidence led by ONGC points to towards this.

Further JDIL is a publicly listed company at BSE and its annual reports, etc. are in public domain. It can be</td><td rowspan="4">Para 16, Page 178 of SLP
• Not a tickle of evidence to show that JDIL ever played any role to find itself in the contract between</td><td rowspan="4">Para 16 Page 14 of SLP

• There is no evidence tendered before Arbitral Tribunal that DEPL and JDIL had common shareholders and common Board of Directors. Even if that had been the case, the Hon'ble Supreme</td></tr>
<tr><td>DEPL is an alter ego of JDIL.</td></tr>
<tr><td>JDIL is the ultimate beneficiary in the business with DEPL.</td></tr>
<tr><td>DEPL has close corporate unity with JDIL.</td></tr>
</table>

[16] (2020) 12 SCC 767 ["**MTNL**"]

Shareholders of JDIL and DEPL are almost common.	seen that there is no benefit being derived by JDIL from DEPL. Further, it was incorporated in 1983 and DEPL was incorporated way later in 2003. No Letter of Guarantee or Letter of Comfort was issued by JDIL on behalf of DEPL in favour of ONGC. JDIL is not a party to the arbitration agreement and there is nothing on record to show that there was intention on part of any party to include JDIL and this was not a part of a composite transaction wherein JDIL had even a minute part to play. ONGC has not shared any document such as Minutes of Meeting, etc. to show that it indeed awarded the contract to DEPL because of JDIL. Further, if ONGC did award the tender to DEPL because of JDIL as alleged, this clearly shows impropriety on the part of ONGC and such action is against equity and natural justice.	DEPL and ONGC. • The executives of JDIL participated in the negotiations, etc. on behalf of DEPL as their signatures duly signify. • The personal relationship between the directors of DEPL and MD of JDIL is of no consequence. • Clearly JDIL is not party to the arbitration agreement. **Para 20 Page 180 of SLP** • None of the documents on the record would satisfy the requirement of clauses a, b & c of sub-section 7.	Court of India in Indowind Versus Wescare case (supra) has held that merely because two companies have common shareholders and Directors, they do not become a single entity. • Merely because the two companies may, at one point of time, have had a common address and telephone number or that the son and daughter-in-law of the Managing Director of the JDIL are Directors in DEPL, it does not make them one economic unit. • There is also no credible evidence to show that because of the alleged nexus between the two companies, ONGC awarded the said contract to DEPL. • JDIL is admittedly not a party to the contract. Further the Hon'ble Court specifically asked the counsel of ONGC whether they wanted to bind JDIL and did they not insist on JDIL signing the said Contract, the counsel for ONGC had no answer.
Through letterheads, articles on the website of DEPL, bid documents submitted by DEPL to ONGC, has represented that it is a part of the DP Jindal Group of DEPL	DEPL is a part of DP Jindal Group of Companies which is an admitted fact. But JDIL and DEPL are two separate corporate entities. There is no relation between the		

Companies.	two. There are other companies of DP Jindal Group of Companies as well including MSL, Jindal Pipes, etc.		
The directors of DEPL are related to the MD of JDIL (Son and daughter-in-law).	There is no bar on the directorship of any person and this is not an evidence on the basis of which doctrine of group companies can be invoked. This is just an allegation unfounded in law and fact. It was a separate venture started by Mr. Manav Kumar on his own.		
An Arbitration agreement signed by one company in a group of companies binds other non-signatory companies, when the underlying contract is intended to benefit the non-signatory as in the instant case.	There are no underlying contracts wherein JDIL has any interest. JDIL was never a party or had any benefits arising from the contract between DEPL and ONGC. ONGC and JDIL have four separate contracts which are a part of TC 47-50 of 2016 proceedings.		
JDIL and DEPL have offices in the same building/same premises.	A lot of businesses have common business address (Eg. Tata Companies). Just on the basis of the same, it certainly cannot be said that they are one and the same. Especially todays' time of co-working spaces, a lot of companies operate out of the same premises."		

15 The following submissions have been urged by Mr Shyam Divan, Senior Counsel behalf of the respondent:

(i) There is no disputing the factual position that DEPL is a part of the D P Jindal Group, yet JDIL has no shareholding in DEPL. There is neither any cross shareholding nor any common directors;

(ii) In 2010, DEPL ceased to be a part of the D P Jindal Group. However, JDIL continues to be a part of the D P Jindal Group of companies together with other group entities such as Maharashtra Seamless Ltd. and Jindal Pipes Ltd.;

(iii) JDIL is not a party to the arbitration agreement as required under Section 7 of the Act of 1996 and cannot be held liable for claims against DEPL since there is no evidence that JDIL was a beneficiary of the contract between ONGC and DEPL. No letter of guarantee or of comfort was issued by JDIL on behalf of DEPL in favour of ONGC;

(iv) The Bombay High Court has correctly held that no evidence was tendered before the Arbitral Tribunal that DEPL and JDIL had common shareholders or common directors;

(v) The arbitral award has discussed ONGC's claim that DEPL and JDIL belong to the same group of companies and came to the conclusion that there is not "a tickle of evidence" that JDIL played any role in the negotiations leading up to the contract or that thereafter JDIL participated in the execution of the

contract on behalf of the DEPL. Hence, the group of companies doctrine cannot be invoked to indict JDIL for the alleged acts and omissions of DEPL;

(vi) Under Section 7 of the Act of 1996, there must be an agreement between the parties to submit to arbitration. The expression 'party' is defined in Section 2(1)(h). The key words in both the provisions are "party to an arbitration agreement" and an agreement by the party to submit to arbitration. JDIL and DEPL are separate entities. DEPL was incorporated in 2003. JDIL was incorporated in 1983. Its shares are listed on the Bombay Stock Exchange. Though DEPL belonged to the DP Jindal Group of Companies, it ceased to remain a part of the group in 2010. The fact that DEPL and JDIL shared a common office is of no relevance. ONGC's witness asserted that he came to know that Mr G D Sharma (who signed on behalf of DEPL) is an employee of JDIL only after the signing of the contract. Hence there was no representation that JDIL was bidding for the contract. The association of the executive of JDIL was to render assistance to DEPL and nothing more; and

(vii) ONGC's witness has no knowledge of the facts since he was not:

a. Involved in the shortlisting of bidders;

b. A part of the decision-making process for the award of the contract;

c. A party to the deliberations by the tender committee for the award of the contract;

d. Present at the time when the approval was given for the award of the contract; and

e. Party to the deliberations within ONGC.

The witness stated that he has accessed the website of DEPL for the first time in June 2008, after the award of the contract on 22 March 2006. Hence it is not open to ONGC to claim that DEPL or JDIL represented to ONGC that DEPL was a group company of JDIL or that ONGC awarded the contract because of any representation by JDIL on its website.

C Analysis

C.1. Group of Companies Doctrine

16 Section 7[17] provides for an arbitration agreement. For the purpose of Part-I of the Act of 1996, an arbitration agreement is defined to mean an agreement by the parties to submit disputes between them in respect of a defined legal relationship, to arbitration. An arbitration agreement may either be in the form of an arbitration clause in a contract or take the form of a separate agreement. An arbitration agreement has to be in writing but it may be contained in:

(i) A document signed by the parties;

(ii) An exchange of communication; and

[17] "7. Arbitration agreement.—
(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in—
(a) a document signed by the parties;
(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

(iii) An exchange of a statement of claim and defence in which an allegation that there exists an arbitration agreement is not denied by the other party.

Sub-section (5) of Section 7 stipulates that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if:

(i) The contract is written; and

(ii) The reference is such as to make the arbitration clause a part of the contract.

17 The expression "party" is defined in Section 2(h) to mean a party to an arbitration agreement. The interpretation of the term "parties" vis-à-vis an arbitration agreement under Section 7 has been dealt with by this Court in **Indowind** (supra) in the context of an application for the appointment of an arbitrator under Section 11(6). In that case, the second respondent company was the promoter of Indowind. The first and second respondent had entered into an agreement of sale. In the agreement, the seller was described to include the first respondent and its subsidiaries. The second respondent was described as the buyer and as the promoter of Indowind. Under the agreement, the seller agreed to transfer business assets for a consideration which was partly payable in money and partly by the issuance of shares. The sale agreement also incorporated a clause to arbitrate any dispute. The Board of Directors of the first and second respondent approved of the agreement, but there was no approval by the Board of Indowind. After a dispute arose, the first respondent instituted a petition under Section 11(6) against both the second respondent and Indowind for the appointment of an arbitrator. Indowind

resisted the petition on the ground that it was not a party to the agreement between the first and second respondent. The application was allowed by the Chief Justice of the Madras High Court by observing that *prima facie* Indowind was a party after lifting the corporate veil and noticing Indowind's intention to be bound by the sale agreement. Two issues were framed by this Court for consideration:

> "
> (i) Whether an arbitration clause found in a document (agreement) between two parties, could be considered as a binding arbitration agreement on a person who is not a signatory to the agreement;
>
> (ii) Whether a company could be said to be a party to a contract containing an arbitration agreement, even though it did not sign the agreement containing an arbitration clause, with reference to its subsequent conduct"

Justice R V Raveendran, speaking for the two-judge Bench in **Indowind** (supra) held that if Indowind had acknowledged or confirmed in any correspondence, agreement or document that it was a party to the arbitration agreement between the first and second respondent or that it was bound by the arbitration agreement contained in that contract, it could have been possible to say that Indowind is a party to the arbitration agreement. That however was not the position. The decision in **Indowind** (supra) was in the context of an application under Section 11(6). A party which was not a signatory to the arbitration agreement had raised an objection on the ground that the agreement to arbitration did not operate in relation to it. The Court refused to pierce the corporate veil and relied on a strict interpretation of Section 7 to hold thus :

"17. It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. **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. Nor will the existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other.** If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind.

18. The very fact that the parties carefully avoided making Indowind a party and the fact that the Director of Subuthi though a Director of Indowind, was careful not to sign the agreement as on behalf of Indowind, shows that the parties did not intend that Indowind should be a party to the agreement. Therefore the mere fact that Subuthi described Indowind as its nominee or as a company promoted by it or that the agreement was purportedly entered by Subuthi on behalf of Indowind, will not make Indowind a party in the absence of a ratification, approval, adoption or confirmation of the agreement dated 24-2-2006 by Indowind.

[….]

20. Wescare referred to several acts and transactions as also the conduct of Indowind to contend that an inference should be drawn that Indowind was a party to the agreement or that it had affirmed and approved the agreement or acted in terms of the agreement. An examination of the transactions between the parties to decide whether there is a valid contract or whether a particular party owed any obligation towards another party or whether any person had committed a breach of contract, will be possible in a suit or arbitration proceeding claiming damages or performance. But the issue in a proceeding under Section 11 is not whether there was any contract between the parties or any breach thereof. A contract can be entered into even orally. A contract can be spelt out from correspondence or conduct. But an arbitration agreement is different from a contract. **An arbitration agreement can come into existence only in the manner**

> **contemplated under Section 7. If Section 7 says that an arbitration agreement should be in writing, it will not be sufficient for the petitioner in an application under Section 11 to show that there existed an oral contract between the parties, or that Indowind had transacted with Wescare, or Wescare had performed certain acts with reference to Indowind, as proof of arbitration agreement.**
>
> […]
> 24. **It is no doubt true that if Indowind had acknowledged or confirmed in any correspondence or other agreement or document, that it is a party to the arbitration agreement dated 24-2-2006 or that it is bound by the arbitration agreement contained therein, it could have been possible to say that Indowind is a party to the arbitration agreement. But that would not be under Section 7(4)(a) but under Section 7(4)(b) or Section 7(5). Be that as it may. That is not the case of Wescare.** In fact, the delivery notes/invoices issued by Wescare do not refer to the agreement dated 24-2-2006. Nor does any letter or correspondence sent by Indowind refer to the agreement dated 24-2-2006, either as an agreement executed by it or as an agreement binding on it….."
>
> (**emphasis supplied**)

18 Subsequently, in **Chloro Controls** (supra), a three-judge Bench of this Court dealt with the provisions of Section 45, which falls in Part II of the Act of 1996 dealing with the enforcement of foreign arbitral awards. Section 45 postulates that notwithstanding anything contained in Part I, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement in writing for arbitration 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 agreement is void, inoperative or incapable of being performed. Interpreting the expressions "through or under" in Section 45, this Court held that though an arbitration normally would take place between parties to the arbitration agreement, it

could take place between a signatory to an arbitration agreement and a third party as well. This Court held that though the scope of the arbitration agreement is limited to parties who have entered into it and those who claim under or through them, courts under the English law have developed the group of companies doctrine. In substance, the doctrine postulates that an arbitration agreement which has been entered into by a company within a group of companies, can bind its non-signatory affiliates or sister concerns if the circumstances demonstrate a mutual intention of the parties to bind both the signatory and affiliated, non-signatory parties. Elaborating on the concept, the Court held:

> "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."

Noting that this would only be in exceptional cases, the Court in **Chloro Controls** (supra) held that these exceptions would be examined on the touchstone of:

(i) A direct relationship to the party signatory to the arbitration agreement;

(ii) Direct commonality of the subject matter; and

(iii) Whether the agreement is of a composite transaction where the performance of a mother agreement may not be feasible without the execution or performance of a subsidiary or ancillary agreement.

19 The principle for binding non-signatories as laid down in **Chloro Controls** (supra) was applied in the context of a domestic arbitration in **Ameet Lalchand Shah & Ors.** v. **Rishabh Enterprises & Anr**.[18]. A two-judge Bench of this Court, in the context of the application of the then amended[19] provisions of Section 8 of the Act of 1996, observed that the 2015 amendment to Section 8 had brought it in line with Section 45 of the Act of 1996. Prior to the amendment, Section 8(1) of the Act of 1996 provided that a party to an arbitration agreement can make an application to seek a reference to arbitration. The amended Section 8 (1) clarified that a person claiming through or under a party to the arbitration can also seek reference to arbitration notwithstanding any judicial precedent. In **Ameet Lalchand** (supra), the Court did not explicitly invoke the group of companies doctrine to bind a non-signatory, rather it relied on **Chloro Controls** (supra) to hold that a non-signatory would be bound by the arbitration clause in the mother agreement, since it is a party to an inter-connected agreement, executed to achieve a common commercial goal.

[18] (2018) 15 SCC 678
[19] Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 amendment**")

20 In **Cheran Properties** (supra), a three-judge Bench of this Court interpreted and applied the group of companies doctrine in the context of the enforcement of a domestic arbitration award against a non-signatory to the arbitration agreement. The Court observed that the decision by a two-judge Bench in **Indowind** (supra) was rendered before the evolution and application of the group of companies doctrine by a three-judge Bench in **Chloro Controls** (supra):

> "23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory."

This Court in **Cheran Properties** (supra) also analysed academic literature that scrutinised adjudicatory trends across the world. It noted that the written intention to arbitrate between parties can extend to bind non-signatories with the aim to target the creditworthy member of the group of companies. However, the principle of separate legal personalities of companies also has to be balanced. The corporate

veil can be pierced to bind non-signatories upon a construction of the arbitration agreement, the intention at the time of entering the contract and the performance of the underlying contract:

> "25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:
>
> > "… The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways : first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession…. [*Id* at p. 99.] "
>
> The group of companies doctrine has been applied to pierce the corporate veil to locate the "true" party in interest, and more significantly, to target the creditworthy member of a group of companies [Op cit fn. 16, 2.40, p. 100.] . Though the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract. [*Id*, 2.41 at p. 100.]"

This Court in **Cheran Properties** (supra) also distinguished the principle laid down in **Chloro Controls** (supra) from its application in the context of Section 11(6) in **Duro Felguera** v. **Gangavaram Port Limited**[20]. In **Duro Felguera** (supra), a two-judge Bench of this Court refused to direct a joint arbitration in five different contracts between sister concerns of one of the parties of the original arbitration agreement, by respecting the conscious intention of the parties to subject themselves to separate arbitration agreements under their individual contracts. This Court in **Cheran Properties** (supra) distinguished the factual situation in **Duro Felguera** (supra) by discerning the mutual intention of the parties and performance of the contract:

> "34. [.....] The principle which underlies *Chloro Controls* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] is that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. In applying the doctrine, the law seeks to enforce the common intention of the parties, where circumstances indicate that both signatories and non-signatories were intended to be bound. In *Duro* [*Duro Felguera* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , the case was held to stand on a different footing since all the five different packages as well as the corporate guarantee did not depend on the terms and conditions of the original package nor on the memorandum of understanding executed between the parties. The judgment in *Duro*[*Duro Felguera* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] does not detract from the principle which was enunciated in *Chloro Controls*[*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689]."

[20] (2017) 9 SCC 729 ["**Duro Felguera**"]

21 The group of companies doctrine was subsequently applied by a two-judge Bench of this Court in **Reckitt Benckiser (India) P Ltd.** v. **Reynders Label Printing**[21] for determining if a non-signatory foreign company, within the same group of companies, could be impleaded in a domestic arbitration. This Court noted the principles formulated by this Court in **Chloro Controls** (supra) and **Cheran Properties** (supra) and noted its inapplicability after assessing the following:

(i) the alleged common employee between the two companies in the same group was factually established as having no connection with the foreign company; and

(ii) a mere existence of an indemnity by the foreign company, in the absence of any other factors, would not signify its intention to be bound by the arbitration agreement and/or of deriving benefits from the performance of the underlying contract.

22 In **MTNL** (supra), a two-judge Bench of this Court was considering a situation in which MTNL had floated certain bonds to Can Bank Financial Services Ltd[22] through a memorandum of understanding. The bond amount was placed in an FD by MTNL with Canfina. Canfina paid back a part of the amount of the FD while the rest was not paid to MTNL. As a consequence, MTNL did not service the interest of the bonds. Canfina was a wholly-owned subsidiary of Canara Bank. Canfina had transferred the bonds to Canara Bank. Subsequently, all three parties had

[21] (2019) 7 SCC 62
[22] "**Canfina**"

participated in a meeting where the minutes indicated their view to take recourse to arbitration. A sole arbitrator was appointed to resolve the dispute and notice was issued in the arbitration to MTNL, Canara Bank and Canfina. A dispute was raised on whether Canfina could be joined as a party to the arbitral proceedings. In this backdrop, this Court while dealing with the joinder of Canfina in the arbitration proceedings held:

> "10.3. A non-signatory can be bound by an arbitration agreement on the basis of the "group of companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract."

While elucidating the circumstances in which the group of companies doctrine could be invoked to bind the non-signatory, the Court held:

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

> See also Gary B. Born : *International Commercial Arbitration*, Vol. I, 2009, pp. 1170-1171.]
>
> 10.6. The circumstances in which the "group of companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.
>
> 10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group. [ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.]."
>
> (**emphasis supplied**)

On the facts, the Court held that Canfina was set up as a wholly-owned subsidiary of Canara Bank. The dispute arose out of the subscription by Canfina of the bonds floated by MTNL which were subsequently transferred by Canfina to its holding company, Canara Bank. MTNL had contended that it was constrained to cancel the allotment due to the non-payment of the sale consideration by Canfina. Hence, this Court held that it would be futile to decide the dispute only between MTNL and Canara Bank in the absence of Canfina since indisputably, the original transaction emanated from the agreement between MTNL and Canfina and there was "a clear

and direct nexus" between the issuance of the bonds, their subsequent transfer by Canfina to Canara Bank and the cancellation of allotment by MTNL. Canfina was held to be a proper party to the proceedings.

23 Commentators have noted that a signed written agreement to submit a present or future dispute to arbitration does not exclude the possibility of an arbitration agreement binding a third party. A non-signatory may be bound by the operation of the group of companies doctrine as well as by the operation of the principles of assignment, agency and succession.[23] A party, which is not a signatory to a contract containing an arbitration clause, may be bound by the agreement to arbitrate if it is an alter ego of a party which executed the agreement. This constitutes a departure from the ordinary principle of contract law that every company in a group of companies is a distinct legal entity. A non-signatory may be bound by the arbitration agreement where:

(i) There exists a group of companies; and

(ii) Parties have engaged in conduct or made statements indicating an intention to bind a non-signatory.

24 Gary B. Born in his treatise on *International Commercial Arbitration* indicates that:

> "The principal legal basis for holding that a non-signatory is bound (and benefited) by an arbitration agreement … include both purely consensual theories

[23] Redfern and Hunter on International Arbitration, 5th Ed. – 2.13, pp. 89-90

> (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego).[24]"

Explaining the application of the alter ego principle in arbitration, Born also notes:

> "Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle … that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities[25].
>
> [……]
>
> "the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories[26]."

25 Recently, John Fellas elaborated on the principle of binding a non-signatory to an arbitration agreement from the lens of the doctrine of estoppel. He situated the rationale behind the application of the principle of direct estoppel against competing considerations of party autonomy and consent in interpreting arbitration agreements. Fellas observed that non-signatory parties can be bound by the principle of direct estoppel to prohibit such a party from deriving the benefits of a contract while disavowing the obligations to arbitrate under the same :

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[24] Gary Born, International Commercial Arbitration 2nd Edn., Vol. 1, at page 1418
[25] *Id.* at page 1432
[26] *Id.* at page 1450

> "**There are at least two distinct types of estoppel doctrine that apply in the non-signatory context: "the direct benefits" estoppel theory and the "intertwined" estoppel theory. The direct benefits theory bears the hallmark of any estoppel doctrine- prohibiting a party from taking inconsistent positions or seeking to "have it both ways" by "rely[ing] on the contract when it works to its advantage and ignor[ing] it when it works to its disadvantage."** *Tepper Realty Co. v. Mosaic Tile Co.,* 259 F.Supp. 688,692 (SDNY 1966). **The direct benefits doctrine reflects that core principle by preventing a party from claiming rights under a contract but, at the same time, disavowing the obligation to arbitrate in the same contract**.
>
> [….]
>
> By contrast, the intertwined estoppel theory looks not to whether any benefit was received by the non-signatory, but rather at the nature of the dispute between the signatory and the non-signatory, and, in particular whether "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estoppel [signatory party] has signed….the intertwined estoppel theory has as its central aim the perseveration of the efficacy of the arbitration process is clear when one looks at the typical fact pattern of an intertwined estoppel case."[27]
>
> (**emphasis supplied**)

26 In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:

(i) The mutual intent of the parties;

(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;

(iii) The commonality of the subject matter;

[27] John Fellas, *Compelling Signatories to Arbitrate with Non-Signatories*, New York Law Journal (March 28, 2022)

(iv) The composite nature of the transaction; and

(v) The performance of the contract.

Consent and party autonomy are undergirded in Section 7 of the Act of 1996. However, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego.[28] These principles would have to be understood in the context of the present case, where ONGC's attempt at the joinder of JDIL to the proceedings was rejected without adjudication of ONGC's application for discovery and inspection of documents to prove the necessity for such a joinder.

C.2. Standard for Review of the Interim Arbitral Award

27 The interim award of the Arbitral Tribunal is substantially premised on the fact that JDIL is not a party to the contract dated 22 March 2006. The Tribunal held that the agreement was only between ONGC and DEPL. Adverting to Section 7 of the Act of 1996, the Tribunal held that there must be a written agreement between the parties to submit to arbitration or in the specific manner envisaged under the provision. Before the Arbitral Tribunal, it was urged by ONGC that:

(i) There is a commonality of interest in the business between DEPL and JDIL;

(ii) DEPL is a corporate facade created by JDIL for their extended business;

(iii) The executives of JDIL were actively associated in the bidding process; and

(iv) The office of DEPL or JDIL were situated in the same building.

[28] Gary Born, *supra* note 24, at page 1418

The Arbitral Tribunal rejected the above submissions by holding that there was not a "tickle" of evidence on record to show that JDIL, which is a distinct corporate legal entity, "ever played any role to find itself in the contract between JDIL and ONGC". The participation of JDIL in the execution of the contract was held to be on behalf of DEPL and that the fact that the directors of DEPL are the son and daughter-in-law of the MD of JDIL was held not to be of relevance.

28 The fundamental basis of the interim award is that in view of the provisions of Section 7 and the definition of the expression "party" in Section 2(1)(h), the provisions of the Act of 1996 could not be invoked or applied to a non-signatory to an arbitration agreement. The Tribunal held that it has no jurisdiction to investigate, enquire into or record any findings on the basis of ONGC's claim against JDIL.

29 The Tribunal had, by its order dated 7 July 2009, specifically held that the objections of JDIL to the production of documents sought by ONGC would be decided when the application under Section 16 was resolved. Yet in the interim award, ultimately, the Tribunal has directed that ONGC's application dated 5 January 2009 would stand deferred until the issue of jurisdiction is decided. ONGC was justified in submitting that its application for discovery and inspection should be heard first and disposed of on merits after which appropriate orders as regards joinder of parties could be issued to DEPL and JDIL.

30 By failing to consider the application for discovery and inspection, the Tribunal has foreclosed itself from inquiring into whether there was sufficient material to

establish the application of the group of companies doctrine. The application for discovery and inspection was indeed relevant to the exercise which was being carried out by the Tribunal. ONGC's primary submissions for impleading JDIL were that:

(i) DEPL has been created by the DP Jindal Group with a definite purpose to render services to the oil and gas sector;

(ii) There is a close corporate and functional unity between DEPL and JDIL;

(iii) The executives of JDIL had been closely associated with the negotiation of the agreement;

(iv) The bid as well as the contract with DEPL were signed by G D Sharma who was an employee of JDIL;

(v) G D Sharma was signing letters on behalf of DEPL as their authorized signatory as well as on behalf of JDIL;

(vi) Mohan Ramanathan, who was the General Manager of JDIL, used to visit the witness who deposed on behalf of the ONGC in connection with the subject contract; and

(vii) Naresh Kumar, the Managing Director of JDIL, had negotiated with the owners of the vessel in connection with the same tender.

31 Moreover, it was stated in the course of the evidence by ONGC's witness that almost all the senior officers of JDIL, including its Managing Director, actively participated in matters relating to the hiring of the vessel, its deployment, performance and related issues. At a kick-off meeting held on 21 November 2005

between ONGC and DEPL, Mohan Ramanathan (General Manager, JDIL) was stated to have been in attendance on behalf of the DEPL. It was in this backdrop that ONGC sought to assert that there exists corporate, financial and functional unity between DEPL and JDIL. The Arbitral Tribunal has not considered whether the group of companies doctrine would stand attracted. The Arbitral Tribunal precluded itself from deciding as to whether the application for discovery and inspection should be allowed. The Arbitral Tribunal effectively shut out material evidence which ONGC sought to bring on the record.

32 In this backdrop, the failure of the Arbitral Tribunal to allow for discovery and inspection goes to the root of the process in as much as it disabled ONGC from pursuing its fundamental claim based on the application of the group of companies doctrine.

33 During the course of his submissions, Mr Shyam Divan, senior counsel urged that:

(i) JDIL's application under Section 16 was decided by the Arbitral Tribunal after evidence was adduced;

(ii) The witness for ONGC deposed and the Tribunal has evaluated the evidence and documentary material on record;

(iii) The Tribunal has entered a finding of fact that there is nothing to indicate the existence of a single economic unit comprising JDIL and DEPL;

(iv) No directions could have been issued by the Tribunal on ONGC's application for discovery and inspection unless the Tribunal were to rule on the challenge to its jurisdiction which had to be decided first and hence the Tribunal was justified in concluding that the application filed by ONGC for discovery and inspection would be considered subsequently;

(v) The decision in **Indowind** (supra) continues to hold the field. The group of companies doctrine is only an exception to the principle that a party who is not a signatory of the agreement cannot be subjected to arbitration;

(vi) The broad approach of the court under Section 34 which is of non-interference with the arbitral award, must also govern an appeal under Section 37; and the same standard must apply to the latter as it applies to the former. The Arbitral Tribunal has ruled on its jurisdiction, pursuant to the application filed by JDIL under sub-section (1) of Section 16. Under sub-section (5), if the Arbitral Tribunal rejects such a plea, it must continue with the arbitral proceedings to make an arbitral award. Under sub-section (6), a party aggrieved by the arbitral award may make an application for setting aside the award under Section 34.

34 The arbitral tribunal has held that it does not have jurisdiction to entertain the claim against JDIL. The decision of the Arbitral Tribunal that it lacks jurisdiction is subject to an appeal under Section 37(2)(a). Under sub-section (1) of Section 37, an appeal lies to the court (as defined under Section 2(1)(e)) only from the following orders, namely:

(i) An order refusing to refer the parties to arbitration under Section 8;

(ii) An order granting or refusing to grant any measure under Section 9; and

(iii) An order setting aside or refusing to set aside an arbitral award under Section 34.

Sub-section 2 of Section 37 stipulates that an "appeal shall also lie" to the court from an order of the arbitral tribunal, *inter alia*, on the ground of the arbitral tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16. Hence, an appeal lies to the Court from the decision of the Arbitral Tribunal that it lacks jurisdiction.

35 Mr Shyam Divan, relied upon two recent decisions of this Court in **Ssangyong Engineering and Construction Company Limited** v. **National Highways Authority of India**[29], and in **M/s Dyna Technologies Pvt. Ltd.** v. **M/s Crompton Graves Ltd.**[30] Both these decisions define the standard of review under Section 34. These decisions indicate that a challenge to an arbitral award must be adjudicated within the confines of Section 34. Clause (b)(ii) of sub-section (2) of Section 34 stipulates that an arbitral award may be set aside only if the court finds that it conflicts with the public policy of India. Prior to its substitution by Act 3 of 2016, the explanation stipulated that without prejudice to the generality of sub-clause (ii), 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 or was in violation of Section 75 or Section 81. As a result of the substitution of the explanation by Act 3 of 2016,

[29] (2019) 15 SCC 131 ["**Ssangyong Engineering**"]
[30] (2019) 20 SCC 1

Parliament has stipulated that an award conflicts with the public policy of India only if one of three conditions is fulfilled, namely:

(i) The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81;

(ii) The award is in contravention with the fundamental policy of Indian law; or

(iii) The award conflicts with the most basic notions of morality or justice.

36 In **Ssangyong Engineering** (supra), this Court held that the expression "public policy of India" in Section 34 would mean "the fundamental policy of Indian law" as explained in **Associate Builders** v. **DDA**[31]. Sub-section (2A) to Section 34, which was introduced by the Amending Act of 2016, provides for an additional ground of challenge in the case of a domestic award, namely the existence of a patent illegality apparent on the face of the award. Justice R F Nariman, speaking for the two-judge Bench, observed that:

> "34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a

[31] (2015) 3 SCC 49

> judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. **However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(*a*)(*iii*) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders*** [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .
>
> […]
>
> 41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. **Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse**."
>
> (**emphasis supplied**)

37 In this backdrop, it has been held that:

(i) A mere contravention of substantive law is not a ground to set aside an award;

(ii) The court while exercising the power of judicial review should not reappreciate evidence;

(iii) The construction of a contract is essentially a matter for the arbitral tribunal to decide;

(iv) An award can be construed to be perverse only if it is based on no evidence or has ignored vital evidence;

(v) The illegality of an award must be of such a nature or character so as to go to the root of the award; and

(vi) Judicial intervention under Section 34 would not be warranted only because an alternative view on facts or the construction of the award is available.

38 Mr K M Nataraj, ASG, urged that when an appeal arises under Section 37(2)(a) against an order of the arbitral tribunal accepting the plea under Section 16 that it has no jurisdiction, the parameters for the exercise of the appellate jurisdiction of the court would not be constricted by the principles which apply to a challenge to an arbitral award under Section 34. The ASG submitted that this is for a valid reason, which is that upon the acceptance of a plea that there is a lack of jurisdiction, the matter goes out of the fold of arbitration. Such a determination cannot be subject to the governing principles which apply to a challenge to an arbitral award under Section 34.

39 Sub-section (1) of Section 37 provides for appeals to the court against orders of the arbitral tribunal meeting one of the descriptions specified in clauses (a), (b) and (c). Sub-section (2) provides that an appeal shall also lie to the court from an order of the arbitral tribunal accepting a plea under sub-sections (2) or (3) of Section 16 (of a want of jurisdiction) and for granting or refusing a measure under Section 17. It is true that Parliament has not specifically constricted the powers of the court while considering an appeal under clause (a) of sub-section (2) of Section 37 by the

grounds on which an award can be challenged under Section 34. The expression "arbitral award" is defined in Section 2(1)(c) to include an interim award. The grounds of challenge to an arbitral award under Section 34 are specified by the parameters which are spelt out in that provision. However, with regard to challenges to the jurisdiction of the tribunal, Section 16 stipulates that where the tribunal rejects a plea of a lack of jurisdiction, it must continue with the arbitral proceedings and make an award and the remedy of a challenge to the award would lie under Section 34. However, if the arbitral tribunal accepts a plea that it lacks jurisdiction, the order of the tribunal is amenable to a challenge in appeal under Section 37(2)(a). In the exercise of the appellate jurisdiction, the court must have due deference to the grounds which have weighed with the tribunal in holding that it lacks jurisdiction having regard to the object and spirit underlying the statute which entrusts the arbitral tribunal with the power to rule on its own jurisdiction. The decision of the tribunal that it lacks jurisdiction is not conclusive because it is subject to an appellate remedy under Section 37(2)(a). However, in the exercise of this appellate power, the court must be mindful of the fact that the statute has entrusted the arbitral tribunal with the power to rule on its own jurisdiction with the purpose of facilitating the efficacy of arbitration as an institutional mechanism for the resolution of disputes.

40 Now it is in this backdrop that the Court must approach the task at hand. In the present batch of cases, there are two parallel proceedings arising out of the constitution of two sets of arbitral tribunals. In the first proceeding, the Arbitral Tribunal consisted of Mr Justice S P Kurdukar, Mr Justice M S Rane and Mr S

Venkateswaran. Both DEPL and JDIL were made parties by ONGC, which is the claimant. The application filed by JDIL under Section 16 was allowed by the Arbitral Tribunal by its interim award dated 27 October 2010. The appeal filed by ONGC was dismissed by the Bombay High Court on 27 June 2012. In pursuance of the arbitration proceedings, the Arbitral Tribunal made a final award on 6 June 2013 in favour of ONGC against DEPL.

41 The second set of proceedings involved four agreements between ONGC and JDIL which are tabulated below: -

S. No.	Date of the Agreement	Particulars
1.	23 December 2003	Agreement for Charter Hire of Drilling Unit NCY
2.	9 December 2004	Agreement for hiring of 2 sets of steerable downhole mud motors Equipment, Drilling jars and directional drilling services
3.	2 December 2006	Agreement for Charter Hire of Drilling Unit NCY
4.	17 August 2006	Agreement for Charter Hire of Drilling Unit “Noble Ed-Holt”

JDIL invoked the arbitration on 4 February 2010 and an Arbitral Tribunal consisting of Ms Justice Sujata Manohar, Mr Justice B N Srikrishna and Mr Justice M S Rane was constituted. The Arbitral Tribunal rendered a final award on 9 October 2013 (the arbitral award in the second proceeding) in favour of JDIL and accepted its claim amounting to US$14,772,495.55 together with interest of 4% per annum from the date of the invoice until payment or realisation. ONGC instituted proceedings under Section 34 before the Bombay High Court. By a judgment dated 28 April 2015, a Single Judge of the Bombay High Court upheld the arbitral award. The appeals against the judgment of the Single Judge under Section 37 were pending when

ONGC applied for transfer of the appeals to this Court. By an order dated 1 September 2016, the appeals have been transferred to this Court on the ground that "there is some connection" between the special leave petition arising from the judgment of the Bombay High Court affirming the decision of the Arbitral Tribunal that it lacked jurisdiction on the claim against JDIL. Now at this stage, it would be material to note that the Single Judge of the Bombay High Court, while considering the challenge to the arbitral award dated 9 October 2013 in favour of JDIL held that :

> "In my view the arbitral tribunal has considered the evidence led by the parties in the impugned award independently and have rendered findings of facts that i) the petitioners had failed to prove that the said DEPL and the respondents herein were one and the same company; ii) both the companies had independent legal existence; iii) the petitioners had failed to produce any evidence to prove that the petitioners had awarded the said contract to DEPL because it was in fact the respondents herein and/or was supported by the respondents; iv) there was no evidence to show that in order to secure the said contract, DEPL had represented that it was a part of the respondents group; v) the witness examined by the petitioners was not present in the meeting held by the Executive Purchase Committee and did not produce Minutes of Meeting held by the said Committee for short listing of the bidders; vi) the respondents herein had not issued any guarantee or letter of comfort from the respondents to the petitioners in respect of the liabilities, if any, of DEPL under its contract with the petitioners and vii) the petitioners had failed to provide any particulars of the alleged fraud or that the said DEPL was incorporated in order to defraud the creditors. In my view, all the aforesaid findings rendered by the arbitral tribunal are based on the pleadings, documents and the evidence led by the parties and are not perverse and thus no interference with such findings of facts is permissible under Section 34 of the Arbitration Act."

42 The Single Judge noted that ONGC had not denied the claims which were made by JDIL (the original claimant). The only defence of ONGC was that it was entitled to adjust the amount which was claimed by JDIL under the four contracts against ONGC's claim qua DEPL. In the course of the Arbitral Award in the second proceeding, the Arbitral Tribunal has also observed that the claims of JDIL were not disputed by ONGC. The award of the Arbitral Tribunal noted that:

> "The above claims of the Claimant are not denied by the Respondent ONGC. The defence of ONGC to the claims made by the Claimant in these arbitration proceedings is essentially to the effect that the Respondent is entitled to appropriate the sums payable by it to the Claimant under these 4 contracts against the claim of the Respondent against DEPL under its contract with DEPL."

43 The basis on which ONGC claimed the above adjustment was that DEPL and JDIL constitute one economic entity and that DEPL is a group company of JDIL. The Arbitral Tribunal rejected the submission of ONGC, observing thus :

> "It is contended by Mr Rajiv Kumar, learned senior counsel for the Respondent that the corporate veil should be lifted in order to treat the two companies as one because throughout, it was the Claimant which acted on behalf of DEPL. The Respondent has placed strong reliance on the case of State of *UP v. Renusagar Power Co. and Another* [1988 4 SCC 59]. The Supreme Court has observed that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible if two associated companies are so inextricably mixed as to constitute one entity. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. It held on the facts of that case that at no point of time had the Respondent Renusagar showed any independent volition and had been controlled fully by Hindalco which controlled even day-to-day affairs of the Respondent. Even the profits of the Respondent had been treated as the profits of Hindalco. The court held that the Respondent and Hindalco can be treated as one concern. The facts of the present case are totally different and do not warrant lifting of corporate veil, assuming there is one. The evidence in the present case does not justify the application

> of "lifting the corporate veil". In respect of the contract which was entered into by the Respondent with DEPL, the tender was floated by ONGC in 2005 and the contract was entered into in 2006. There is no material to show that the Respondent awarded the contract to DEPL because it was in fact the Claimant and/or was supported by the Claimant. The minutes of the meeting held by the Respondents for short-listing of bidders in respect of that contract have not been produced. The only witness produced by ONGC was not present at the meetings held by the executive purchase committees when deliberations on the award of the contract to the recommended bidder took place [Of Answer to Question 39 in the cross-examination of the same witness in the first arbitration between ONGC and DEPL relied upon in this arbitration]. There is no evidence to show that in order to secure the said contract, DEPL represented that it was a part of the Claimant group. The Respondent contends that an employee of the Claimant namely Mr Mohan Ramanathan attended the pre-bid meeting and customs hearing in connection with their contract with DEPL. The Claimant in the evidence of its witness CW-2 Ms. Dalvi has stated that Mr Ramanathan had attended the pre-bid meeting and customs hearing at the request of DEPL and as a representative of DEPL on account of his expertise in these areas. She has also stated that she was asked by Mr. Ramanathan to attend the customs duty hearing on behalf of DEPL. The Claimant has also pointed out that Mr. G.D. Sharma, an employee of the Claimant attended certain meetings and signed letters etc. only on behalf of DEPL and has signed these expressly on behalf of DEPL."

44 The Tribunal also observed that JDIL had not furnished any guarantee or letter of comfort to ONGC in respect of the liabilities of DEPL. The emails addressed by the Managing Director of JDIL to the owners of the vessel were not from an official email address but from personal email addresses. The Arbitral Tribunal held that there was no basis for the allegation that DEPL was incorporated to defraud the creditors. Thus, the Tribunal observed that JDIL and DEPL maintained a separate legal character throughout.

45 In the earlier proceedings instituted by ONGC against both DEPL and JDIL, the Arbitral Tribunal had by its interim award dated 27 October 2010 upheld JDIL's plea of a lack of jurisdiction and held that JDIL could not be impleaded. In paragraph 31 of the Arbitral Award in the second proceeding, dated 9 October 2013 between ONGC and JDIL, the Arbitral Tribunal adverted to the interim award 27 October 2010 in the first proceeding and agreed with those findings. The relevant extract reads as follows:

> "31. In the present case the Respondent ONGC had earlier initiated arbitration proceedings against both DEPL and the Claimant before an Arbitral Tribunal consisting of Justice Kurudukar [presiding arbitrator], Justice Rane and Mr Venkateshwaran, Senior Advocate. By its 'interim final award' dated 27-10-2010 the Arbitral Tribunal held that in the dispute between the Respondent and DEPL, the Claimant could not be impleaded. It rejected the contention of ONGC that the Claimant was liable under the said contract between ONGC and DEPL. The arguments advanced before us were also advanced before it. In fact the evidence of Respondents witness Anindya Bhattarcharya is common in both the arbitrations. That Arbitral Tribunal rejected the contention of the Respondent and directed that the name of Claimant should be deleted from the said proceedings. The order has been upheld by the High Court in the petition filed by ONGC under Section 16 of the Arbitration and Conciliation Act 1996 by its order dated 27 June 2012. We are informed that an SLP is pending. There is now a final award dated 6 June 2013 given by the aforesaid Arbitral Tribunal in the arbitration proceedings between the Respondent and DEPL where the Respondents have been held entitled to recover from DEPL a sum of Rs 6387.37 lakhs as well as US dollars 1756197.50 with interest at 9% per annum as set out therein and have been granted other reliefs as set out therein. After the Claimant took out the present arbitration proceedings, ONGC has filed a suit in the High Court being Suit Number 2947/2011 against the Claimant and DEPL. **The findings of the earlier Arbitral Tribunal and the High Court in its order of 27 June 2012 support our present conclusions, and we respectfully agree with the same."**
>
> (**emphasis supplied**)

46 It is important to note that in the Arbitral Award in the second proceeding, no issue of jurisdiction arose since only JDIL and ONGC were parties and the claim of JDIL arose under four distinct contracts of JDIL with ONGC. DEPL was not a party to that proceeding. The examination-in-chief of ONGC's witness in the first arbitration proceeding was treated as an affidavit in the subsequent arbitration involving the claim by JDIL against ONGC. This Court has been informed that the cross-examination of the witness in the first arbitral proceeding leading up to the interim award dated 27 October 2010 was also treated as a cross-examination in the subsequent arbitration. JDIL also led evidence, *inter alia*, of its manager in support of its assertion that there were neither any common directors between JDIL and DEPL nor did JDIL hold any shares in DEPL.

47 The above narration indicates that the batch of cases which has been transferred to this Court arises from a claim in arbitration by JDIL against ONGC under four contracts. The Arbitral Tribunal by its award dated 9 October 2013 (the Arbitral Award in the second proceeding) allowed the claim. ONGC did not plead any defence to the claim on merits. However, ONGC asserted a right to adjust the amounts which were due to JDIL against the claims which ONGC had against DEPL under a distinct contract. ONGC asserted that JDIL and DEPL form one common economic entity and that the group of companies doctrine would apply. Thus essentially, the grounds on which ONGC opposed JDIL's application under Section 16 in the first arbitral proceeding overlap with the basis on which ONGC sought adjustment of the claims due to JDIL in the second arbitral proceeding. There is thus

a significant degree of overlap between the issues which arose before the first Arbitral Tribunal in its interim award dated 27 October 2010 and those on which the Arbitral Tribunal rendered its Arbitral Award dated 9 October 2013 in the second proceeding. As we have seen above, Arbitral Award in the second proceeding relied on the findings contained in the interim award of the first Arbitral Tribunal dated 27 October 2010. In opposing JDIL's application under Section 16 before the Arbitral Tribunal consisting of Mr Justice S P Kurdukar, Mr Justice M S Rane and Mr S Venkateswaran, ONGC invoked the group of companies doctrine. In the course of its statement of claim, ONGC pleaded that DEPL was awarded the contract by relying on the fact that it is a group company of the DP Jindal Group of Companies and that JDIL has a vital business interest in DEPL, which can be said to be an alter ego of JDIL.

48 ONGC pleaded that it had a continuing business relationship with JDIL for the past several years and this was a major factor which weighed with ONGC while deciding to award the contract in favour of the DEPL. On the date of the submission of the claim, ONGC had three subsisting contracts with JDIL. ONGC claimed that DEPL has a close corporate unity with the Jindal Group of Companies and that it has consistently represented that they are a group company within the DP Jindal Group of Companies. According to ONGC, besides the letterheads of DEPL which indicate that it belongs to the DP Jindal Group of Companies, JDIL has also acknowledged this position on its website. ONGC also indicated that since DEPL is liable to compensate ONGC for the loss suffered by it, ONGC has adjusted the

monies payable to JDIL as security to satisfy the award. ONGC led the evidence of its Chief Manager (MM), Anindya Bhattacharya. The witness for ONGC deposed that:

(i) At the pre-bid conference which was held on 7 October 2005, DEPL was represented by Mohan Ramanathan together with two other persons and he is an employee of JDIL;

(ii) In response to the second expression of interest dated 17 October 2005, DEPL submitted its offer which was signed by G D Sharma on behalf of DEPL;

(iii) G D Sharma holds the position of Manager (Commercial and Development) with JDIL;

(iv) In response to ONGC's invitation for sealed bids from shortlisted parties on 31 October 2005, DEPL submitted its bid under a cover letter dated 4 November 2005. The annexure to the letter contained a resume of DEPL declaring that it is a part of the DP Jindal Group of Companies which has a strong presence in the oil and gas sector and is engaged in off shore drilling for oil and gas;

(v) Both DEPL and JDIL shared a common addresses and telephone numbers;

(vi) DEPL was created by the Jindal Group with the definite purpose of rendering a particular service to the oil and gas sector and DEPL has indicated on the website that it works under the "fraternal hood of the said group";

(vii) DEPL is promoted and managed by the son and daughter in law of the Managing Director of JDIL;

(viii) The bid submitted by DEPL was signed by G D Sharma as an authorized signatory who is an employee of JDIL;

(ix) The Managing Director of JDIL, Mr Naresh Kumar, had negotiated with the owners of the vessel for hiring on behalf DEPL;

(x) DEPL was incorporated in 2003;

(xi) Mohan Ramanathan who attended the office of ONGC in connection with the subject contract was the General Manager of JDIL; and

(xii) Almost all senior officers of JDIL including its Managing Director actively took part in matters relating to the hiring of the vessel, its deployment, performance and related issues. Therefore, a corporate, financial and functional unity exists between DEPL and JDIL.

49 At the hearing before the first Arbitral Tribunal on 7 July 2009, the documents which were produced by ONGC's witness were taken on the record. Counsel for JDIL objected to these documents on the ground of relevance and admissibility but stated that he would cross-examine the witness without prejudice to those contentions. The first Arbitral Tribunal observed that the rival contentions would be decided while disposing of the application under Section 16. ONGC also filed an application for discovery and inspection before the first Arbitral Tribunal and the annexure to the application contained a schedule indicating the disclosures which were sought. The order of the first Arbitral Tribunal notes the submission of ONGC that the applications for discovery and inspection must be decided first and it is only on the completion of the process that JDIL's challenge to jurisdiction under Section

16 could be addressed. The first Arbitral Tribunal deferred a decision on the two applications until the issue of jurisdiction was decided. The net result is that the applications for discovery and inspection which were crucial to ONGC's claim that there existed functional, financial and economic unity between DEPL and JDIL remained to be decided before the application under Section 16 was taken up. There is merit in the submission which was been urged on behalf of the ONGC that the application for discovery and inspection had to be decided before the plea of jurisdiction was adjudicated upon. The application for discovery and inspection was intended to facilitate ONGC in its plea that there existed functional, financial and economic unity between the two companies. The failure of the first Arbitral Tribunal to hear the application for discovery and inspection goes to the root of its interim award dated 27 October 2010 holding an absence of jurisdiction *qua* JDIL. The interim award of the Arbitral Tribunal in the first proceeding, dated 27 July 2010 refers to the documents which were produced by ONGC and to the submission that neither DEPL nor JDIL had led any evidence to controvert the documentary and oral evidence adduced by ONGC. The first Arbitral Tribunal upheld the plea of jurisdiction that JDIL is neither a party to the contract nor had it submitted a bid to ONGC which resulted in the formation of the contract. The Tribunal held that the agreement was only between ONGC and DEPL and that in terms of Section 7, an agreement to arbitrate is between the parties to the agreement. While observing that the arbitration agreement was only between DEPL and ONGC, the Tribunal held that neither was there an arbitration agreement between ONGC and JDIL nor was JDIL a signatory to the agreement between ONGC and DEPL. After noting the

documents which were relied upon by ONGC, the Tribunal held that there was "no tickle of evidence to indicate that JDIL", a distinct incorporated legal entity, ever played any role to find itself in the contract between JDIL and ONGC. The executives of JDIL who participated in the contractual dealing were held to be representatives of DEPL. Reading the interim award dated 27 October 2010 of the first Arbitral Tribunal, the unmistakable impression which emerges from the record is that the primary basis for the determination of an absence of jurisdiction is that the arbitration agreement was between ONGC and DEPL. The legal foundation of the group of companies doctrine has not been evaluated, on facts or law. True enough, the judgment of this Court in **Cholo Controls** (supra) is of 2013, **Cheran Properties** (supra) is of 2018 and **MTNL** (supra) came in 2020. However, ONGC had clearly laid out the factual and legal foundation for setting up a case in opposition to the plea of JDIL. The first Arbitral Tribunal has made a fundamental error of law in not deciding the application by ONGC on discovery and inspection of documents before it ruled on jurisdiction. In doing so, the first Arbitral Tribunal's interim award dated 27 October 2010 goes against the principles of natural justice. The failure to consider the application for discovery and inspection of documents results in a situation where vital evidence that could have assisted the Tribunal in its determination of the challenge under Section 16 was shut out. As a matter of fact, it emerged from the record that no evidence was adduced by JDIL in support of its plea of the absence of jurisdiction under Section 16. JDIL having taken the plea of absence of jurisdiction was required to establish the grounds on which it set about to establish its plea.

50 Based on the above discussion, the interim award of the first Arbitral Tribunal stands vitiated because of:

(i) The failure of the arbitral tribunal to decide upon the application for discovery and inspection filed by ONGC;

(ii) The failure of the arbitral tribunal to determine the legal foundation for the application of the group of companies doctrine; and

(iii) The decision of the arbitral tribunal that it would decide upon the applications filed by ONGC only after the plea of jurisdiction was disposed of.

D Conclusion

51 For all the above reasons we have come to the conclusion that there was a fundamental failure of the first Arbitral Tribunal to address the plea raised by ONGC for attracting the group of companies doctrine. Moreover, by leaving the application filed by ONGC for discovery and inspection unresolved, the first Arbitral Tribunal failed to allow evidence which may have had a bearing on the issue of whether JDIL could be considered to have an economic unity with DEPL and could hence be made a party to the arbitral proceedings.

52 For the above reasons, we are of the view that:

(i) The interim award of the Arbitral Tribunal dated 27 July 2010 on the plea raised by JDIL under Section 16 has to be set aside;

(ii) The judgment of the Single Judge of the Bombay High Court dated 27 June 2012 dismissing ONGC's appeal under Section 37 would have to be set aside;

(iii) The plea by JDIL that the Arbitral Tribunal lacks jurisdiction would have to be decided afresh. In this regard, this Court was informed that one of the three arbitrators has died and that the Arbitral Tribunal cannot be reconstituted. We accordingly direct that ONGC and JDIL shall each nominate their arbitrators within a period of two weeks from the date of this judgment while the two arbitrators shall nominate and appoint the third arbitrator. The Arbitral Tribunal so reconstituted shall decide afresh upon the plea of JDIL in regard to the absence of jurisdiction after furnishing to the parties the opportunity of leading any further evidence or seeking the production of further documentary material on the record. The evidence and documentary evidence which has been already adduced before the earlier Arbitral Tribunal shall however form part of the record of the newly constituted Tribunal;

(iv) As regards the cases which have been transferred to this Court, we would order and direct that these cases be remitted back to the Bombay High Court. The decision on those appeals which arose from the dismissal by the Single Judge of the petition under Section 34 challenging the Arbitral Award dated 9

October 2013 in the second proceeding, in favour of JDIL, shall be held in abeyance and remain adjourned *sine die* until the Arbitral Tribunal which is reconstituted in terms of the above directions rules on its jurisdiction and in the event that it rejects the plea challenging its jurisdiction, until the arbitral award is delivered in relation to ONGC's claim against JDIL; and

(v) During the pendency of these proceedings, ONGC was directed to deposit the amount due under the Arbitral Award in the second proceeding dated 9 October 2013, which was permitted to be withdrawn by JDIL subject to furnishing a bank guarantee which shall be kept alive during the pendency of the proceedings before the Bombay High Court. The bank guarantee furnished by JDIL shall be kept alive to the satisfaction of the Prothonotary and Senior master of the Bombay High Court.

53 For the above reasons, we issue the following directions:

(i) The judgment of the Single Judge of the Bombay High Court dated 27 June 2012 in Arbitration Petition No 814 of 2011 is set aside;

(ii) The appeal filed by ONGC under Section 37 of the Act of 1996 against the interim award of the Arbitral Tribunal dated 27 October 2010 is allowed and the interim award of the Tribunal dated 27 October 2010 shall stand set aside;

(iii) A fresh Arbitral Tribunal shall be constituted by ONGC and JDIL each nominating their arbitrators within a period of two weeks from the date of this

judgment and the two arbitrators thereafter will jointly appoint the third arbitrator;

(iv) The present judgment will not have any bearing on the arbitral award dated 6 June 2013 passed in favour of ONGC against DEPL;

(v) The transferred cases shall stand remitted back to the Bomaby High Court. The hearing of the transferred cases is adjourned *sine die* so as to await the outcome of the arbitral proceedings between ONGC and JDIL in terms of (iii) above;

(vi) In pursuance of the interim orders of this Court, ONGC was directed to deposit the amount due to JDIL under the Arbitral Award in the second proceeding dated 9 October 2013 which was permitted to be withdrawn by JDIL subject to furnishing a bank guarantee. The bank guarantee furnished by JDIL shall be kept alive to the satisfaction of the Prothonotary and Senior master of the Bombay High Court pending the disposal of the arbitration appeals against the judgment of the Single Judge dated 28 April 2015 dismissing the petition under Section 34 challenging the arbitral award dated 9 October 2013; and

(vii) Upon the reconstitution of the Arbitral Tribunal, the plea of JDIL under Section 16 shall be decided afresh. All the rights and contentions in that regard are kept open to be decided by the arbitral tribunal. The oral and documentary evidence which was produced before the earlier arbitral tribunal shall form part of the proceedings before the fresh Arbitral Tribunal to be constituted in

pursuance of the above directions. ONGC would be at liberty to pursue its application for discovery and inspection and to seek further directions before the Arbitral Tribunal. Parties would be at liberty to apply for leading further evidence before the Arbitral Tribunal if they are so advised.

54 The appeal is allowed in the above terms. The transferred cases are remitted back to the Bombay High Court for disposal in the light of the above directions.

55 Pending application(s), if any, stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[Surya Kant]

…….....J.
[Vikram Nath]

New Delhi;
April 27, 2022