

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 4210 of 2017****With****SPECIAL CIVIL APPLICATION NO. 4211 of 2017**

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IVRCL LIMITED

....Petitioner

Versus

GUJARAT STATE PETROLEUM

CORPORATION LIMITED & ORS.

...Respondents

Appearance:

MR MIHIR THAKORE, SR ADVOCATE with
 MR AS VAKIL, ADVOCATE for the Petitioner

MR ASPI M KAPADIA, ADVOCATE for the Respondent No.1

MR MANAN PANERI, ADVOCATE for BHARGAV KARIA & ASSO for
 Respondent No. 2

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CORAM: HONOURABLE MR.JUSTICE C.L. SONI**Date : 14/03/2017****ORAL ORDER**

1. The parties are common in both these petitions. The petitions are filed under Articles 226 and 227 of the Constitution of India seeking to quash the common order dated 18.02.2017 passed by the Arbitral Tribunal on impleadment applications preferred by the respondent no.1 to join the petitioner as respondent no.2 in two arbitration proceedings pertaining to the dispute in connection with Joint Operating Agreements ('JOA', for short). The copy of JOA is placed with

the petition. The JOA is entered into between the respondent No.1, respondent No.2 and another party being Geo Global Resources (Barbados) Inc. ('GGR', for short) to define their rights, interest and obligations in connection with concession agreement dated March 09, 2008 ('the Contract', for short) entered into by them with the Arab Republic of Egypt and Ganoub El - Wasi Holding Petroleum Company ('GANOPE', for short) for the development, exploration, extraction and production of hydrocarbon resources (referred as 'for oil exploration', in the petition) for South Diyur Block and North Hap'y Block, Egypt.

2. The Arbitral Tribunal has allowed the impleadment applications and ordered that petitioner be joined as respondent No.2 in the arbitration proceedings. Clause:18.2 of the JOA provides mechanism for dispute resolution which reads as under:

"It shall be the endeavour of all the parties to resolve differences through negotiation and conciliation with a period of sixty days from the date of identification of differences in writing by notice to the other party / parties and if no resolution is achieved, it shall be deemed that there is a dispute(s).

(A) **Arbitration:** All Disputes arising out of or in connection with this Agreement shall be referred to arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 and statutory modifications or re-enactment thereof. A Party who desires to submit a Dispute for resolution shall commence the dispute resolution process by providing the other parties to the Dispute written notice of the Dispute ("Notice of Dispute"). The Notice of

Dispute shall identify the parties to the Dispute and contain a statement of the nature of the Dispute and the relief requested.

(B) Number of Arbitrators: The arbitration shall be conducted by three arbitrators, unless all parties to the Dispute agree to a sole arbitrator within thirty (30) days after the submission of the Request for Arbitration. If a Sole Arbitrator is not agreed to, each party shall nominate one Arbitrator and both of them shall elect the third Arbitrator who shall be the Presiding Arbitrator of the arbitral tribunal."

3. The case of the petitioner is that it is the Holding Company of the Respondent No.2, however, is not signatory to JOA. It is also not the signatory to the Concession Agreement. It has no financial or contractual obligation to be discharged in connection with either Concession Agreement or the JOA. Since dispute arose between the respondent Nos. 1 and 2, the respondent No.1 preferred application under Section 11 of the Act which was allowed and the Arbitral Tribunal is constituted for arbitration in accordance with Arbitration and Conciliation Act, 1996 ('the Act', for short).

4. It is further case of the petitioner that respondent No.1 had neither raised any claim / dispute with the petitioner nor issued any notice to the petitioner for reference to the arbitration nor was made party in the application preferred by respondent No.1 under Section 11 of the Act and without complying with such pre-requisites, there would not be any arbitration against the petitioner. However in the statement of claim before the Arbitral Tribunal, with other prayers, the

prayer for impleadment of the petitioner is made and separate application was preferred for impleadment of the petitioner.

5. The Arbitral Tribunal has allowed the applications by observing that the petitioner has majority stake in the respondent No.2 company and it would not require much efforts to lift corporate veil to find that the petitioner is *alter ego* of respondent No.2 and to hold that the respondent No.2 is set up by the petitioner for executing work of oil exploration for which the JOA was executed.

6. Learned senior advocate Mr.Mihir Thakore appearing with learned advocate Mr.A.S.Vakil for the petitioner submitted that the reference to the arbitration is in connection with the JOA to which the petitioner is not a party. Mr.Thakore submitted that the petitioner was not even a party to Concession Agreement. Mr.Thakore submitted that the petitioner being non-signatory to the arbitration agreement, no arbitration agreement exists against the petitioner and therefore the petitioner could not be made party to the arbitration proceedings for the dispute arising out of or in connection with the JOA. Mr.Thakore submitted that for reference to the arbitration under the Act, prior claim or dispute is required to be raised and notice under Section 21 of the Act is also required to be issued to a party for arbitration against him. However, no such pre-requisites are satisfied in the case of the petitioner. Mr.Thakore submitted that the petitioner, who is otherwise not a signatory to the JOA, could not have been ordered to be joined as respondent No.2 in arbitration proceedings. Mr.Thakore submitted that the petitioner, though is a holding company, but it is separate and distinct entity in law than the respondent No.2 and therefore

the Arbitral Tribunal is not justified in ordering to join the petitioner in the arbitration proceedings on the principles of lifting corporate veil. Mr.Thakore submitted that in absence of any allegations of fraudulent design against the petitioner in acquiring the majority stake in the respondent No.2, the petitioner could not be considered to be *alter ego* of respondent No.2. Mr.Thakore submitted that even otherwise since the petitioner was not joined as party in the application under Section 11 of the Act, it could not be subjected to arbitration proceedings. Mr.Thakore submitted that if the petitioner was joined as party in the application under Section 11 of the Act, the petitioner would have well contested the application on merits on different grounds and would have also an opportunity to challenge the order if made against the petitioner under Section 11 before the higher forum but such opportunity is taken away and the petitioner is now straightway ordered to be joined in the arbitration proceedings which is not permissible. Mr.Thakore submitted that even as per the statement of claim, the impleadment of the petitioner is prayed to recover the amount claimed against the respondent No.2 by respondent No.1 in case the Arbitral Tribunal is to make award in favour of the respondent No.1. Mr.Thakore submitted that for such nature of the prayer, the petitioner is compelled to be a party to the arbitration proceedings. Mr.Thakore submitted that though law would not permit the petitioner to be joined as party respondent in the arbitration proceedings, however, by virtue of the impugned order the petitioner is required to face and suffer the arbitration proceedings till the award is made and such would result into gross injustice to the petitioner and therefore the Court should exercise its extra ordinary powers under Article

226 of the Constitution of India.

7. Learned advocate Mr.Kapadia appearing for respondent No.1 submitted that the petition under Article 226 and 227 of the Constitution against the impugned order made by the Arbitral Tribunal pending arbitration proceedings is not maintainable. Mr.Kapadia submitted that even if the petition is held to be maintainable, considering the object and scheme of the Act, the Court may not permit the petitioner to invoke the jurisdiction by this Court under Article 226 and 227 of the Constitution of India against the impugned order. Mr.Kapadia submitted that Arbitral Tribunal has rightly considered the stake holding of the petitioner in respondent No.2 which is 100% and also rightly considered that the petitioner is an *alter ego* of respondent No.2 which would be apparent by lifting corporate veil and has committed no error in holding that non-signatory to the agreement could be subjected to the arbitration proceedings. Mr.Kapadia submitted that non-joining of the petitioner in application under Section 11 of the Act would not debar the Arbitral Tribunal from considering the question as regards joining of the petitioner as party in the arbitration proceedings. Mr.Kapadia submitted that on preliminary fact, the Arbitral Tribunal, *prima facie*, found that the respondent No.2 is second face of the petitioner and is setup by the petitioner to enter into agreement with the respondent No.1 and other party for and in connection with exploration of oil. Mr.Kapadia submitted that from the very beginning the petitioner had ill-designed to set up the respondent No.2 and to remain behind the respondent No.2 to defy all claims of respondent No.1 in connection with the agreement entered into between respondent Nos.1 and 2 and

therefore in the nature of the claim made by respondent No.1 in the statement of claim, the Arbitral Tribunal committed no error in ordering the petitioner to be joined as respondent to arbitration proceedings. Mr.Kapadia submitted that simply because the petitioner is to face arbitration proceedings is no ground to uphold the objections of the petitioner against its impleadment in the arbitration proceedings as more prejudice would be caused to respondent No.1 than the petitioner by refusing the prayer for its impleadment in the arbitration proceedings. Mr.Kapadia submitted that whether Arbitral Tribunal has assumed jurisdiction not vested with it by ordering the petitioner to be joined as respondent in the arbitration proceedings though it is non-signatory to the agreement and though there were no dispute or claim against it or there was no notice to it, could well be examined when a challenge is made under Section 34 of the Act to the final award. Mr.Kapadia submitted that for the reasons assigned by the Arbitral Tribunal while allowing impleadment applications and in view of inbuilt mechanism under the Act for challenging the award of the Arbitral Tribunal on different grounds including those taken in the petition and argued by learned advocate for the petitioner, the Court may not permit the petitioner to invoke jurisdiction under Article 226 and 227 of the Constitution of India.

8. The Court, having heard learned advocates for the parties, finds that as regards the maintainability of the petition under Article 226 and 227 of the Constitution of India, Mr.Kapadia has mainly relied upon the decision in the case of **SBP & Co. vs. Patel Engineering Ltd.** reported in **(2005) 8 SCC 618**. In the said decision, Honourable the Apex Court has

held and observed in paras: 44 to 46 as under:

"44. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under [Section 11\(6\)](#) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under [Article 136](#) of the Constitution of India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under [Section 11](#) of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.

45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under [Article 226](#) or 227 of the Constitution of India. We see no warrant for such an approach. [Section 37](#) makes certain orders of the arbitral tribunal appealable. Under [Section 34](#), the aggrieved party has an avenue for ventilating his

grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under [Section 16](#) of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under [Section 37](#) of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under [Article 226](#) or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under [Article 227](#) of the Constitution of India or under [Article 226](#) of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under [Section 37](#) of the Act even at an earlier stage."

In this decision, while summoning up, the majority view expressed in para:47 reads as under:

"47. We, therefore, sum up our conclusions as follows:

i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under [Section 11\(6\)](#) of the Act is not an administrative power. It is a judicial power.

ii) The power under [Section 11\(6\)](#) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.

(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of [Section 11\(8\)](#) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v) Designation of a district judge as the authority under [Section 11\(6\)](#) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of [Section 37](#) of the Act or in terms of [Section 34](#) of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under [Article 136](#) of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under [Section 11\(6\)](#) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to [Section 11\(6\)](#) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by [Section 16](#) of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Railway Corpn. Ltd. & anr. Vs. Rani Construction Pvt. Ltd.* [(2000) 8 SCC 159] and orders under [Section 11\(6\)](#) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under [Section 16](#) of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under [Section 11\(6\)](#) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under [Section 11\(6\)](#) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.

(xii) The decision in *Konkan Railway Corpn. Ltd. & anr. Vs. Rani Construction Pvt. Ltd.* [(2000) 8 SCC 159] is overruled."

However, while expressing dissenting view that the function under Section 11 of the Act is administrative, what is observed in clause - (viii) of concluding para-142 reads as under.

“(viii). While exercising extraordinary jurisdiction under Article 226 of the Constitution, however, the High Court will be conscious and mindful of the relevant provisions of the Act, including Sections 5, 16, 34 to 37 as also the object of the legislation and exercise its power with utmost care, caution and circumspection.”

9. From the decision in the case of SBP & Co. (**supra**), it does not appear that the petition under Article 226 of the Constitution is held not to be maintainable in connection with the arbitration proceedings. But considering the object to have minimal judicial intervention in the arbitration proceedings, a note of caution is put not to permit any party to invoke jurisdiction of this Court under Article 226 and 227 of the Constitution of India against every order made by the Arbitral Tribunal. Learned Single Judge of this Court has, after considering the decision in the case of SBP & Co. (**supra**), taken a view in Special Civil Application No.12993 of 2016 with Special Civil Application No.12834 of 2016 that the jurisdiction of the High Court under Article 227 of the Constitution in connection with the arbitration proceedings is not taken away. However, in the facts of the case, the Court might refuse to entertain the petition under Article 226 and 227 of the Constitution of India. Before above view was taken by learned Single Judge, another learned Single Judge of this Court had already taken a view in Special Civil Application No.16075 of 2003 and allied matters that the petition under Article 226 of

the Constitution of India against the order of Arbitral Tribunal was maintainable.

10. Having considered the decision in the case of SBP & Co. (**supra**) and the view taken by two learned Single Judges of this Court, the Court does not propose to take a different view than the view taken in above referred petitions on aspect of maintainability of petition under Article 226 and 227 of the Constitution of India.

11. However, even if the petitions are maintainable, the question is whether the impugned order made by the Arbitral Tribunal is required to be interfered with. The Arbitral Tribunal was called upon to decide the question about impleadment of petitioner in the arbitration proceedings. Once the arbitration proceedings commence, it is for the Arbitral Tribunal to decide all questions raised in connection with arbitration proceedings. From the reasoning assigned by the Arbitral Tribunal in the impugned order, it appears that the Arbitral Tribunal, on *prima facie* finding that by lifting the corporate veil the petitioner may be found to be an *alter ego* of respondent no.2 and that the respondent No.2 is set up to enter into agreement with the respondent No.1 and the other party for oil exploration, came to the conclusion that objections raised by the petitioner were not required to be accepted.

12. Mr.Kapadia submitted that as held by Honourable the Supreme Court in the case of **State of Gujarat vs. Renusagar Power Co.** reported in **(1988) 4 SCC 59**, in expanding horizon of modern jurisprudence the lifting of corporate veil is permissible.

13. In case of **Vodafone International Holdings BV vs. Union of India** reported in **(2012) 6 SCC 613**, Honourable the Supreme Court has observed in paras:259 and 277 as under:

"259. The US Supreme Court in *United States v. Bestfoods* [141 L Ed 2d 43 : 524 US 51 (1998)] explained that it is a general principle of corporate law and legal systems that a parent corporation is not liable for the acts of its subsidiary, but the Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, if the corporate form is misused to accomplish certain wrongful purposes, when the parent company is directly a participant in the wrong complained of. Mere ownership, parental control, management, etc. of a subsidiary is not sufficient to pierce the status of their relationship and, to hold parent company liable. In *Adams v. Cape Industries Plc.* [(1990) 2 WLR 657], the Court of Appeal emphasised that it is appropriate to pierce the corporate veil where special circumstances exist indicating that it is mere facade concealing true facts.

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A. Lifting the veil – Tax Laws

277. Lifting the corporate veil doctrine is readily applied in the cases coming within the company law, law of contract, law of taxation. Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction."

14. The Arbitral Tribunal, while passing the impugned order, has considered judgment of Division Bench of this Court dated 8-13/10-2015 in First Appeal Nos.1714 and 1715 of 2015. The First Appeals were preferred by the petitioner against the order

made by the Court below on application preferred by the respondent No.1 under Section 9 of the Act. The Division Bench, after considering the different judgments, including the judgment in the case of ***Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc.*** reported in **(2013) 1 SCC 641**, has observed that in a given set of circumstances, even a non-signatory to an arbitral agreement can be subjected to arbitration proceedings and it would be futile to argue that in no case, a non-signatory to arbitral agreement can be compelled to submit to the jurisdiction of the Arbitral Tribunal so validly constituted.

15. Considering the above observations of the Division Bench with other judgments including the judgment in the case of ***Chloro Controls (supra)*** and on *prima facie* view that on lifting corporate veil it would not require much efforts for holding that respondent No.2 is setup by the petitioner for executing the work of oil exploration for which the JOA was entered into, the Tribunal found that there was enough strength and substance in the say of respondent No.1 and therefore the impleadment applications should not be rejected merely on the ground that the petitioner is not signatory to JOA.

16. Learned senior advocate Mr.Thakore, however, relied on the judgment in the case of ***S.N.Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Limited*** reported in **(2011) 1 SCC 320**. In this decision, Honourable the Supreme Court has held and observed in paras:6 to 25 as under:

“6. The following contentions are urged by the appellant :

(i) The appellant was not a party to the

tripartite loan agreements executed among respondents 1, 2 and 3 (that is the lender, the borrower and borrower's Managing Director-cum-Guarantor) containing the arbitration clause. He had merely given a short letter dated 27.10.1995 standing guarantee for a loan of Rs.75 lakhs sanctioned by the first respondent. As there was no arbitration agreement between the first respondent and appellant, the claim against the appellant could not be referred to arbitration, nor could any award be made against him. The awards against the appellant were therefore liable to be set aside under section 34(2)(a)(ii) of the Act.

(ii) The appellant had merely given a letter dated 27.10.1995 indicating his willingness to stand guarantee, but he did not execute the loan agreement or any deed of guarantee, as it was decided that the third respondent would be the guarantor instead of appellant. Consequently, the third respondent executed the loan agreement as guarantor as also a deed of Guarantee. Therefore, the appellant was not a guarantor and is not liable.

(iii) Even assuming without conceding that there was an arbitration agreement between the appellant and first respondent, and that he was liable in respect of the loan amount, there could be no award for interest against him as he had not agreed to guarantee the payment of interest.

Re : Contention (I)

7. Section 2(b) defines "arbitration agreement" as an agreement referred to in section 7 of the Act. Section 2(h) defines "party" as party to an arbitration agreement. Section 7 of the Act defines an 'arbitration agreement'. Sub-section (1) of Section 7 defines an arbitration agreement as 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. Sub-section (2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) requires an arbitration agreement to be in writing. Sub-section (4) explains as to when an arbitration agreement could be said to be in writing, that is : (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the arbitration agreement; or (c) an exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other. Sub-section (5) provides that 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 a part of the contract.

8. Thus there can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an Arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.

9. There is no dispute that the loan agreements among the first respondent (lender), the second respondent (borrower) and the third respondent (guarantor) contained a provision for

arbitration. The said provision for arbitration is extracted below :

"In the event of any dispute, question or difference arising out of or in connection with this agreement and the respective rights and obligations of the parties hereunder, the same shall be referred to the arbitration in accordance with the provisions of the Arbitration Act, 1940."

But the appellant was not a party to the same. In fact appellant's letter of guarantee for Rs.75 lakhs was given on 27.10.1995, prior to the dates of the two loan agreements. It is also not in dispute that the letter dated 27.10.1995 given by appellant to the first respondent did not contain a provision for arbitration; and that except the said letter dated 27.10.1995, the appellant did not execute any document or issue any communication.

10. An arbitration agreement between the lender on the one hand and the borrower and one of the guarantors on the other, cannot be deemed or construed to be an arbitration agreement in respect of another guarantor who was not a party to the arbitration agreement. Therefore, there was no arbitration agreement as defined under section 7(4)(a) or (b) of the Act, in so far as appellant was concerned, though there was an arbitration agreement as defined under section 7(4)(a) of the Act in regard to the second and third respondents. As the letter dated 27.10.1995 does not refer to any document containing an arbitration clause, there is also no arbitration agreement between first respondent and appellant as contemplated under section 7(5) of the Act.

11. What therefore remains to be considered is whether there is an arbitration agreement as contemplated under section 7(4)(c) of the Act, which provides that an arbitration agreement in writing can be said to exist, if it is

contained in an exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other. The statement of claim filed by the first respondent before the arbitrator does not contain an allegation or assertion of an arbitration agreement between the first respondent and appellant. Nor has the appellant accepted the existence of any arbitration agreement by not denying such arbitration agreement in the defence filed before the arbitrator. On the other hand, the appellant specifically contended before the arbitrator that there was no arbitration agreement between them (first respondent and appellant) and therefore the arbitrator did not have jurisdiction.

12. But the words, 'statements of claim and defence' occurring in [section 7\(4\)\(c\)](#) of the Act, are not restricted to the statement of claim and defence filed before the arbitrator. If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of [section 7\(4\)\(c\)](#) of the Act. It follows that if in the application filed under [section 11](#) of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties.

13. The question therefore is whether in this case, the application under [section 11](#) of the Act had alleged the existence of an arbitration

agreement between first respondent and appellant and such allegation was accepted by non-denial thereof, by the appellant. The application filed by the first respondent under section 11 of the Act referred to the loan agreement containing the arbitration clause, which was executed by respondents 2 and 3 as borrower and guarantor in favour of the first respondent. The application specifically relied upon the provisions of clause 18 of the loan agreement as the arbitration agreement under which appointment of an arbitrator was sought. Significantly, the application under section 11 of the Act did not allege or refer to the existence of any arbitration agreement between the first respondent and the appellant.

14. The only averment found in the entire application with reference to the document executed by the appellant is extracted below:

"Respondent No.3 vide his letter dated 27.10.95 guaranteed the repayment of the total amount of loan i.e. Rs.75,00,000 (Rupees Seventy Five Lakhs) sanctioned by the Petitioner to Respondent No.1. Copy of the letter dated 27.10.95 from Respondent No.3 guaranteeing repayment of loans is annexed herewith and marked as "ANNEXURE-C".

(Note: The term 'petitioner' refers to the lender, respondent No.1 refers to the borrower and respondent No.3 refers to the appellant).

15. Except the aforesaid averment, there is absolutely no reference to any agreement between the first respondent and the appellant or the existence of any arbitration agreement between them. Therefore the application filed by the first respondent under section 11 of the Act referring to the loan agreement with respondents 2 and 3 containing the arbitration agreement cannot be considered or construed to be an allegation of existence of an arbitration

agreement between first respondent and appellant. If there was no reference to the existence of any arbitration agreement with appellant, the question of the appellant accepting such arbitration agreement by 'non-denial' does not arise.

16. The first respondent contended that the application under [section 11](#) of the Act consisted of two parts, that is a preamble containing three columns - column (1) relating to the "provision under which the application was filed", column (2) relating to "Name of applicant with complete address" and column (3) relating to "Name of the other parties to the arbitration agreement with complete address"; and the second part contained the running averments. It is submitted that the name of first respondent is shown as the applicant in column (2); and against column (3) relating to "Names of the other parties to the arbitration agreement", the names of Hitek Industries (second respondent), Prem Prakash Verma (third respondent) and S.N. Prasad (appellant) was shown and that amounted to an allegation that the appellant was a party to the arbitration agreement.

17. To constitute an arbitration agreement under [section 7\(4\)\(c\)](#) of the Act, what is required is a statement of claim containing a specific allegation about the existence of an arbitration agreement by the applicant and 'non-denial' thereof by the other party. An 'allegation' is an assertion or declaration about a fact and also refers to the narration of a transaction. As noticed above, in the entire application under [section 11](#) of the Act, there was no allegation as to the existence of any arbitration agreement between first respondent and the appellant. Column (3) containing "Names of other parties to arbitration agreement with addresses" cannot be considered to be an assertion or declaration

about the existence of an arbitration agreement between the first respondent and appellant. Section 7(4)(c) of the Act cannot therefore be relied upon to prove the existence of an Arbitration agreement.

18. It is of some relevance to note that in the year 1998 when the applications under section 11 of the Act was filed and in the year 2000 when the applications were allowed, an application under section 11 of the Act was not considered to be a judicial proceeding and the order appointing an arbitrator was considered to be an administrative order. Therefore at the relevant time, the application under section 11 of the Act and the counter if any thereto were not in the nature of 'statements of claim and defence'. Be that as it may.

19. Before the Arbitrator, the appellant specifically contended that by relying upon the section 2(1)(h) and section 7 of the Act that he was not a party to the arbitration agreement and therefore there could be no arbitration in regard to the claim against him. The said contention was rejected by the arbitrator on the ground that the designate of the Chief Justice, in his order dated 23.5.2000 appointing the arbitrator, had observed that the existence of arbitration agreement was not denied and there was no dispute regarding the existence of the arbitration agreement. But what was not denied was the arbitration agreement between first respondent and respondents 2 and 3. The arbitrator held that in view of the positive finding of the designate of the Chief Justice about the existence of an arbitrator agreement notwithstanding the fact that the letter of guarantee does not refer to the loan agreement which was executed subsequently, it could not be said that there was no arbitration agreement between the parties. The arbitrator ought to have considered and decided the objections of

the appellant that he was not a party to the arbitration agreement on merits, instead of referring to the order of the designate of the Chief Justice appointing the arbitrator.

20. As noted above, when the said application under [section 11](#) of the Act was filed in 1998 and decided in 2000 (long prior to the decision in *SBP & Co. vs. Patel Engineering Ltd.* - (2005) 8 SCC 618,) the prevailing view was that the orders under [section 11](#) of the Act were administrative orders and that the Designate of the Chief Justice appointing an arbitrator was not adjudicating on any disputed question of fact, including the existence of any valid arbitration agreement; and that the Arbitrator was required to decide about the existence of arbitration agreement and the arbitrability.

21. The first respondent contended that the appellant having agreed to be a guarantor for the repayment of the loan, can not avoid arbitration by contending that he was not a signatory to the loan agreement containing the arbitration clause. It was submitted that the liability of the principal debtor and guarantors was joint and several and therefore there could be only one proceeding against all of them; and that if the contention of the appellant was accepted, it would necessitate two proceedings in regard to the same loan transaction and same cause of action, that is an arbitration proceedings against the borrower and one of its guarantors (respondents 2 and 3) and a separate suit against the other guarantor (appellant). It was further submitted that multiple proceedings may lead to divergent findings and results, leading to an anomalous situation.

22. It was also submitted that the letter dated 27.10.1995 guaranteeing the loan of Rs.75

lakhs was written by the appellant, as a Director of the borrower company; and that as the appellant had already given a guarantee letter dated 27.10.1995, he was not required to execute the tripartite loan agreements containing the arbitration clause; that the appellant was aware of the terms of the loan and was further aware that loan agreements with arbitration clause had to be executed; and that therefore it should be deemed that the appellant had agreed to abide by the terms contained in the loan agreements, including the arbitration clause. We find no merit in these contentions.

23. When the appellant gave the guarantee letter dated 27.10.1995, he could not be imputed with the knowledge that the loan agreements which were to be executed in future (on 28.10.1995 and 6.11.1995) would contain an arbitration clause. Further, the appellant did not state in his letter dated 27.10.1995 that he would be bound by the terms of loan agreement/s that may be executed by the borrower. Therefore the question of appellant impliedly agreeing to the arbitration clause does not arise.

24. The apprehension of the first respondent that an anomalous situation may arise if there are two proceedings (one arbitration proceedings against the borrower and one guarantor and a suit against another guarantor), is not a relevant consideration as any such anomalous situation, if it arises, would be the own-making of the first respondent, as that is the consequence of its failure to require the appellant to join in the execution of the loan agreements. Having made only one of the guarantors to execute the loan agreements and having failed to get the appellant to execute the loan agreements, the first respondent cannot contend that the appellant who did not sign the loan agreements

containing the arbitration clause should also be deemed to be a party to the arbitration and be bound by the awards. The issue is not one of convenience and expediency. The issue is whether there was an arbitration agreement with the appellant.

25. As there was no arbitration agreement between the parties (the first respondent and appellant), the impleading of appellant as a respondent in the arbitration proceedings and the award against the appellant in such arbitration cannot be sustained. As a consequence, both the arbitration awards, as against the appellant are liable to be set aside. If the first respondent wants to enforce the alleged guarantee of the appellant, it is open to the first respondent to do so in accordance with law."

17. Mr.Thakore also relied on the judgment in the case of **Deutsche Post Bank Home Finance Limited vs. Taduri Sridhar** reported in **(2011) 11 SCC 375** wherein Honourable the Supreme Court, in paras:14, 17 to 21, has held and observed as under:

"14. In *Jagdish Chander v. Ramesh Chander* [(2007) 5 SCC 719] this Court held: (SCC p.726, para11]

"11. The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator / Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement or mutual consent."

15. ... xxx

16. ... xxx

17. Therefore, if X enters into two

contracts, one with *M* and another with *D*, each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for arbitration by *X* against *M* in regard to the contract with *M*, *X* cannot implead *D* as a party on the ground that there is an arbitration clause in the agreement between *X* and *D*.

18. The existence of an arbitration agreement between the parties to the petition under Section 11 of the Act and existence of dispute(s) to be referred to arbitration are conditions precedent for appointing an arbitrator under Section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim / demand against the other party to the arbitration agreement and the other party refuses / denies such claim or demand. If a party to an arbitration agreement, files a petition under Section 11 of the Act impleading the the other party to the arbitration agreement as also a non-party to the arbitration agreement as the respondents, and the court merely appoints an arbitrator without deleting or excluding the non-party, the effect would be that all parties to the petition under Section 11 of the Act (including the non-party to arbitration agreement) will be parties to the arbitration. That will be contrary to the contract and the law. If a person who is not a party to the arbitration agreement is impleaded as a party to the petition under Section 11 of the Act, the court should either delete such party from the array of parties, or when appointing an arbitrator make it clear that the arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement.

19. The arbitration agreement relied upon by the first respondent to seek appointment of arbitrator, is Clause 7 of the construction agreement dated 21-2-2008 . The appellant was not a party to the said construction agreement dated 21-2-2008 containing the arbitration agreement. It is no doubt true that the loan

agreement dated 21-12-2006 between the first respondent as the borrower, and the appellant as the creditor, also contains an arbitration clause (vide Clause 11) providing for resolution of disputes in regard to the said loan agreement by arbitration. But the developer was not a party to the loan agreement. There is no arbitration agreement between the developer and the appellant. The disputes between the first respondent and the developer cannot be arbitrated under Clause 11 of the loan agreement. The first respondent invoked the arbitration agreement contained in Clause 7 of the construction agreement (between the first respondent and the developer) and not the arbitration agreement contained in Clause 11 of the loan agreement (between the appellant and the first respondent). The existence of an arbitration agreement in a contract between the appellant and the first respondent, will not enable the first respondent to implead the appellant as a party to an arbitration in regard to his disputes with the developer.

20. The first respondent obviously cannot involve the appellant as a party to an arbitration in regard to his disputes arising out of the claims made by him against the developer which are covered by Clause 7 of the construction agreement. The disputes referred to in the petition under Section 11 of the Act relate to the claims of the first respondent against the developer. It is however true that there is reference to the appellant in disputes (b), (e) and (f) and reference to collusion between the developer and the appellant in those "disputes". The first respondent has also alleged that the appellant by releasing the payments to the developer without verifying the ground realities about the progress and construction and without intimation to him, had committed breach of trust and is therefore liable to pay compensation for the financial and mental suffering of the first respondent as also the legal and other expenses. No such claim has ever been made against the appellant before filing the petition under Section 11 of

the Act, nor did the first respondent at any time seek arbitration in regard to such claims against the appellant. The said claims against the appellant cannot be arbitrated in an arbitration in pursuance of Clause 7 of the construction agreement between the first respondent and the developer.

21. The first respondent did not issue any notice or demand making any claim against the appellant nor did he issue any notice claiming that the appellant is liable for the consequences of non-performance by the developer, of its obligations. Nor did the first respondent issue any notice to the appellant seeking reference of any disputes to arbitration. Therefore, it could not be said that any dispute existed between the first respondent and the appellant, when the petition under Section 11 of the Act was filed. Even in the application under Section 11 of the Act, there is no reference to Clause 11 of the loan agreement which contains the arbitration agreement in regard to disputes that may arise between the appellant as lender and the first respondent as the borrower. There is no claim or dispute in regard to the loan agreement. The first respondent has not invoked Clause 11 of the loan agreement for deciding any dispute with the appellant. If there had been an arbitration clause in the tripartite agreement among the first respondent, developer and the appellant, and if the first respondent had made claims or raised disputes against both the developer and the appellant with reference to such tripartite agreement, the position would have been different. But that is not so. The petition under Section 11 of the Act against the appellant was therefore misconceived as the appellant was not a party to the construction agreement dated 21-2-2008."

18. Though elaborate arguments were made on behalf of the petitioner on merits by taking the stand that the petitioner being non-signatory to the JOA cannot be joined in arbitration

proceedings and such arguments were sought to be supported by above two decisions and other judgments, however, the Court is of the view that once the arbitration proceedings commence, it is for the Arbitral Tribunal to decide all questions arise in connection with arbitration proceedings. If the impact of any order made while deciding any question in the arbitration proceedings, is either on the jurisdiction of the Arbitral Tribunal or concerning the issue on which application under Section 34 of the Act for setting aside the arbitral award could be made, the aggrieved party will have his remedy under the Act i.e. under Section 34 or Section 37 of the Act, and the High Court would not interdict the arbitration proceedings by permitting such party to invoke powers under Article 226 and 227 of the Constitution of India. Simply because such party will be required to face and suffer the arbitration proceedings till the award is made would not be the guiding factor to permit the party to invoke the jurisdiction of this Court under Article 226 and 227 of the Constitution of India. By impleadment of petitioner in arbitration proceedings, the Arbitral Tribunal could be said to have assumed jurisdiction over the petitioner in arbitration proceedings. Having assumed such jurisdiction, the Arbitral Tribunal shall continue to exercise jurisdiction subjecting the petitioner to arbitration proceedings till the final award is made. Therefore all questions including the question that no arbitration agreement exists against the petitioner, that in absence of any claim / dispute raised against the petitioner or in absence of notice under Section 21 of the Act issued to the petitioner, no arbitration could take place against the petitioner etc., could well be raised by taking appropriate remedy by the petitioner under the Act.

19. For the reasons stated above, the Court finds that no interference is called for in the impugned order dated 18.02.2017 passed by the Arbitral Tribunal, on impleadment applications preferred by the respondent no.1 to join the petitioner as respondent No.2 in arbitration proceedings. The petitions are therefore rejected. Notice discharged.

(C.L.SONI, J.)

Amit