IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:16.05.2017

\+ **O.M.P. (COMM) 22/2016**

SUDHIR GOPI ..... Petitioner

Versus

INDIRA GANDHI NATIONAL OPEN UNIVERSITY AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ashish Dholakia with Mr D. Kishore, Mr Gautam Bajaj, Ms Raji Joseph and Mr N. P. Rakesh.

For the Respondents : Mr Aly Mirza for Respondent No.1.
Mr Jaimon Andrews for Respondent No.2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

I.A. No. 1239/2016

1. For the reasons stated in the application, the delay in re-filing the present petition is condoned.

2. The application stands disposed of.

O.M.P. (COMM) 22/2016

3. Shri Sudhir Gopi, Chairman and Managing Director of Universal Empire Institute of Technology (UEIT) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the

Act') for setting aside the arbitral award dated 20.07.2015 (hereafter 'the impugned award') delivered by the sole arbitrator.

4. By the impugned award, a sum of USD 664,070 along with pre award and future interest at the rate of 12% per annum has been awarded in favour of respondent no.1 (hereafter 'IGNOU') and against Shri Sudhir Gopi (the petitioner) and UEIT (respondent No.2), jointly and severally.

5. The impugned award was rendered in the context of the disputes that had arisen in relation to an agreement dated 16.11.2005 as renewed by an agreement dated 01.05.2009 entered into between IGNOU and UEIT.

6. UEIT had also made an application under Section 34 of the Act challenging the impugned award (O.M.P. (COMM) 25/2016), which was rejected by this Court by an order dated 14.09.2016. The limited controversy involved in the present petition is whether the impugned award to the extent that it makes Mr Sudhir Gopi jointly and severally liable along with UEIT for the amount awarded in favour of IGNOU, is sustainable considering that Mr Sudhir Gopi was not a signatory to the agreement in question. UEIT is a limited liability company and it is Mr Gopi's case that although he is the principal shareholder as well as the Chairman and Managing Director of UEIT, he is not personally liable for the contractual liability of UEIT. Further, that he is not a party to the arbitration agreement and, therefore, the impugned award inasmuch as it holds him liable, is without jurisdiction.

7. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

7.1 IGNOU is a statutory university established under the Indira Gandhi National Open University Act, 1985. It is stated that IGNOU has developed educational programmes for distant learning, which are offered in over 35 countries across the globe.

7.2 UEIT is company incorporated under the applicable laws in Dubai, United Arab Emirates (UAE). UEIT and IGNOU agreed to collaborate for a distant educational project in Dubai, UAE. For the aforesaid purpose, IGNOU and UEIT entered into an agreement dated 16.11.2005 whereby UEIT agreed to act as a Partner Institute (PI) of IGNOU on the terms and conditions as indicated in the said agreement. Essentially, UEIT was to run a centre in Dubai for implementing IGNOU's distant learning programme and enrol students in different programmes offered by IGNOU. UEIT was to advertise the programmes at its own cost and admit students conforming to the eligibility criteria as prescribed by IGNOU. In terms of the agreement, the parties thereto - that is, UEIT and IGNOU - agreed to share the fees collected from the students enrolled under the various programmes run by IGNOU. The initial term of the said agreement was for three years. However, IGNOU and UEIT entered into another agreement dated 01.05.2009 on similar terms, thus, effectively renewing the earlier agreement for a further period (The contract between the parties is hereafter referred to as 'the Agreement').

7.3 Disputes arose between the parties in connection with the Agreement. It is IGNOU's case that it was entitled to receive its share of fee within a period of four weeks of the same being collected, which UEIT failed and neglected to remit. The invoices raised by IGNOU for the initial years were paid but invoices raised for admissions, re-admission and re-

registration of students after July 2008 remained outstanding and only certain *ad hoc* payments were made.

7.4 UEIT has its own tale of woe. UEIT, *inter alia*, claimed that IGNOU had enrolled students from other institutes that were operating illegally outside the trade free zone. It was contended that the expenditure incurred to run a centre in a trade free zone was higher than that required to operate such institutes outside the trade free zones. Thus, UEIT was adversely affected by IGNOU enrolling students from such illegal institutes. It was also claimed that IGNOU withheld the certificates and mark sheets and informed the students that the operations at centre had been temporarily suspended. This caused severe harm to UEIT and other institutions run by the same management.

7.5 IGNOU terminated the Agreement with UEIT and encouraged the enrolled students to migrate to other PIs.

7.6 IGNOU also invoked the arbitration clause. Before the arbitral tribunal, IGNOU filed its statement of claims *inter alia* claiming an aggregate sum of USD 14,48,046, which included a sum of USD 6,63,653 on account of unpaid invoices; a sum of USD 417 on account of demand drafts which were not encashed; an amount of USD 1,60,000 on account of loss of earning; and USD 5,00,001 on account of loss of goodwill.

7.7 Mr Gopi and UEIT filed a reply to the statement of claims before the arbitral tribunal on 30.04.2012. Simultaneously, they also filed counter claims claiming a sum of USD 66,15,498 which included compensation for business loss quantified at USD 44,91,671 and compensation for loss of reputation quantified at USD 20,00,000.

7.8 The arbitral tribunal passed an order on 30.04.2012 directing UEIT to file a statement *inter alia* clarifying the nature and character of UEIT and whether the signatory of the reply (Mr Gopi) was authorised to represent UEIT.

7.9 In compliance with the aforesaid order, UEIT filed an additional statement on 15.05.2012 *inter alia* stating that UEIT was a Limited Liability Company (LLC) and was incorporated on 20.05.2003 under United Arab Emirates Law (Private Companies Regulation). It was also disclosed that its shareholders were Universal Empire Institute of Medical Sciences Pvt. Ltd. and Mr Nader Mohammed Abdulla Fikri. It was further disclosed that Universal Empire Institute of Medical Sciences Pvt. Ltd. transferred its shareholding in UEIT - 99 shares out of a total of 100 shares issued as on 19.03.2007 - to Mr Sudhir Gopi and the balance single share was retained by Mr Fikri. The resolution of UEIT approving the share transfer was also produced before the arbitral tribunal. It was further asserted that the change in the constitution of UEIT was recognised and approved by the Registration and Licensing Department, Dubai Technology and Media Free Zone Authority and a certificate dated 13.05.2007 issued by the said authority, which reflected Mr Sudhir Gopi and Mr Nader Mohammed Abdulla Fikri as a shareholder of UEIT, was also produced. It was further disclosed that Mr Sudhir Gopi was the Manager (Managing Director) of UEIT and his wife, Mrs Rashmi Sudhir Gopi was also a director of UEIT. It was confirmed by UEIT that Mr Gopi was representing the said company as its Managing Director and in terms of resolution passed by UEIT authorising him to do so. It was also clarified that the reply to the statement of claims and the counter claims was filed by

Mr Sudhir Gopi on behalf of UEIT in his capacity as a Managing Director and not in his personal capacity.

7.10 UEIT claimed that the statement of claims filed by IGNOU was bad for mis-joinder of parties as Mr Sudhir Gopi was not a party to the Agreement/or the arbitration agreement (clause). UEIT also prayed that the issue of mis-joinder of parties be considered as a preliminary issue.

7.11 Mr Gopi also filed a separate application confirming the above and *inter alia* contending that the claim petition filed by IGNOU was not maintainable against him and the issue of mis-joinder of parties be considered as a preliminary issue.

7.12 During the course of proceedings, the parties agreed that without prejudice to their respective contentions, the issue to mis-joinder of Mr Sudhir Gopi be considered alongwith other issues framed by the arbitral tribunal. Accordingly, an additional issue, "whether the arbitration proceedings are bad for mis-joinder of respondent no.2 [Sudhir Gopi]?" was framed.

7.13 The arbitral tribunal awarded a sum of USD 664,070 (comprising of claims for unpaid invoices and demand drafts) in favour of IGNOU against Mr Gopi and UEIT, jointly and severally. In addition, the arbitral tribunal also awarded interest at the rate of 12% per annum on the awarded amount from 03.01.2012 to the date of the award and from the date of the award till full realisation of the amount. The arbitral tribunal also awarded the cost of proceedings quantified at ₹1,00,000/-.

Submissions

8. Mr Ashish Dholakia, learned counsel appearing for Mr Gopi contended that the impugned award was without jurisdiction to the extent that Mr Gopi was also made liable for the awarded amounts. He contended that an arbitral tribunal does not have the power to proceed against any person who was not a signatory/party to the arbitration agreement (non-signatories). He relied upon the decisions of this Court in ***Prakash Industries Ltd. v. Space Capital Services Ltd.***: ***2016 SCC OnLine Del 6140*** and ***Balmer Lawrie & Company Ltd. v. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.***: ***EA(OS) No. 340/2013 in Ex.P.280/2012, decided on 17.03.2017*** as well as the decision of the Bombay High Court in ***Oil and Natural Gas Corporation Ltd. v. Jindal Drilling and Industries Ltd.***: ***(2015) SCC OnLine Bom 1707*** and ***Great Pacific Navigation (Holdings) Corporation Limited v. M V Tongli Yantai***: ***2011 LawSuit (Bom) 2095*** in support of his contention.

9. Mr Aly Mirza, learned counsel appearing for IGNOU countered the aforesaid submissions. He submitted that Mr Gopi held 99 shares out of the 100 shares issued by UEIT and was the sole in-charge of running its affairs. He contended that it was plainly evident from the conduct of Mr Gopi that he had made no distinction between himself and UEIT. He pointed out that certain cheques issued to IGNOU (which were subsequently dishonoured) in discharge of the obligations under the Agreement were issued by Mr Sudhir Gopi. He contended that Mr Gopi was running the business under the façade of UEIT and essentially there was no difference between Mr Sudhir Gopi and UEIT. For all intents and purposes, they were one and the same. He submitted that in the given facts,

the decision of the arbitral tribunal to hold Mr Sudhir Gopi an alter ego of UEIT, could not be faulted.

10. He next contended that prior to commencement of arbitral proceedings IGNOU had issued a notice dated 19.10.2011 to UEIT and Mr Sudhir Gopi and the same was responded to by Mr Gopi without taking any objection as to the notice being addressed to him. Similarly, Mr Gopi and UEIT had filed a common reply to the statement of claims and had also jointly filed counter claims. He submitted that the counter claims were largely based on loss of goodwill allegedly suffered by Mr Gopi and other institutions run by him. Thus, Mr Gopi could not now contend that he was not a party to the arbitration agreement. He submitted that even in the present petition, Mr Gopi has prayed that the counter claims made be allowed. He relied on the decision of the Supreme Court in ***Union of India (UOI) v. M/s. Pam Development Pvt. Ltd.*: *(2014) 1 SCR 1069*** in support of his contention that Mr Gopi having participated in the arbitration proceedings, was precluded from challenging the jurisdiction of the arbitral tribunal at a subsequent stage. He also relied upon the decision of the Supreme Court in ***Purple Medical Solutions Pvt. Ltd. v. MIV Therapeutics Inc. and Ors.*: *2015 (2) SCALE 127*** wherein the court had allowed an application under Section 11(6) of the Act and appointed the arbitrator by lifting the corporate veil. He also referred to the decision of a Coordinate Bench of this Court in ***Ram Kishan and Sons v. Freeway Marketing (India) (P) Ltd. and Anr.*: *2004 (2) ArbLR 508 (Delhi)*** whereby this Court had found fault with the arbitral tribunal in not lifting the corporate veil and had, therefore, allowed the application for setting aside the arbitral award as being opposed to public policy.

Reasons and Conclusion

11. "*Like consummated romance, arbitration rests on consent*"[1]. The agreement between parties to resolve their disputes by arbitration is the cornerstone of arbitration. The arbitral tribunal derives its jurisdiction from the consent of parties (other than statutory arbitrations). In absence of such consent, the arbitral tribunal would have no jurisdiction to make an award and the award so rendered would, plainly, be of no value. Thus, the first and foremost question to be addressed is whether there existed any arbitration agreement between Mr Sudhir Gopi and IGNOU.

12. In terms of Section 7(3) of the Act, an arbitration agreement must be in writing. By virtue of Section 7(4) of the Act, an arbitration agreement is in writing if it is contained in "*(a) a document signed by parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electric means which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which existence of an agreement is alleged by one party and not denied by the other*". The term "party" is defined under Section 2(1)(h) of the Act to mean *a party to an arbitration agreement*.

13. In the present case, admittedly, the Agreement is not signed by Mr Sudhir Gopi in his personal capacity. None of the communications produced provides a record of an agreement between Mr Sudhir Gopi and IGNOU to arbitrate. The arbitral tribunal has also not proceeded on the basis of any such agreement.

1. "*NON-SIGNATORIES AND INTERNATIONAL CONTRACTS: AN ARBITRATOR'S DILEMMA*" By Prof. William W. Park.

14. It was contended on behalf of IGNOU that since Mr Sudhir Gopi had filed counter claims jointly with UEIT, his consent to arbitrate must be inferred. However, that is not the basis on which the arbitral tribunal has proceeded against Mr Sudhir Gopi. The contention that Mr Gopi's consent to arbitrate must be inferred from his preferring counter claims, is also unmerited. This is so because, in compliance with the directions of the arbitral tribunal issued on 30.04.2015, both UEIT and Mr Gopi had clarified that Mr Gopi had preferred the counter claims on behalf of UEIT and not in his personal capacity. Further, both UEIT and Mr Gopi had resisted the claims on the ground that there was mis-joinder of parties to the extent that Mr Gopi had been arrayed as a respondent in the arbitral proceedings.

15. The jurisdiction of the arbitrator is circumscribed by the agreement between the parties and it is obvious that such limited jurisdiction cannot be used to bring within its ambit, persons that are outside the circle of consent. The arbitral tribunal, being a creature of limited jurisdiction, has no power to extend the scope of the arbitral proceedings to include persons who have not consented to arbitrate. Thus, an arbitrator would not have the power to pierce the corporate veil so as to bind other parties who have not agreed to arbitrate.

16. There may be cases where courts can compel non signatory(ies) to arbitrate. These may be on grounds of (a) implied consent and/or (b) disregard of corporate personality. In cases of implied consent, the consent of non signatory(ies) to arbitrate is inferred from the conduct and intention of the parties. Thus, in cases where it is apparent that the non-

signatory(ies) intended to be bound by the arbitration agreements, the courts have referred such non-signatories to arbitration.

17. The second class of cases, is where a corporate form is used to perpetuate a fraud, to circumvent a statute or for other misdeeds. In such cases, the courts have disregarded the corporate façade and held the shareholders/directors (the alter egos) accountable for the obligations of the corporate entity.

18. In ***Chloro Controls India Private Limited v. Severn Trent Water Purifications Inc. & Others*: *2013 (1) SCC 641***, the Supreme Court had explained the above principle in the following words:

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

19. It is also necessary to emphasize that whether a court will compel any person to arbitrate would have to be examined in the context of the specific provisions of the applicable statute. It is almost universally accepted that dispute resolution by arbitration must be encouraged; however, the courts determine the question whether an individual or an entity can be compelled to arbitrate, guided by the domestic law and the

judicial standards of their country. In this respect, the laws of most countries are not identical and the case law emanating from courts in other countries, cannot be readily followed.

20. The courts would, undoubtedly, have the power to determine whether in a given case the corporate veil should be pierced and the persons behind the corporate façade be held accountable for the obligations of the corporate entity. However as stated earlier, an arbitral tribunal, has no jurisdiction to lift the corporate veil; its jurisdiction is confined by the arbitration agreement - which includes the parties to arbitration - and it would not be permissible for the arbitral tribunal to expand or extend the same to other persons.

21. A similar view was also expressed by the Bombay High Court in ***Oil and Natural Gas Corporation Ltd. v. Jindal Drilling and Industries Limited*: *2015 SCC OnLine Bom 1707*** in the following words:

> "47. The petitioners had canvassed before the arbitral tribunal that the arbitral tribunal shall lift the corporate veil to find out that the said DEPL and the respondents herein were forming part of the said Jindal Group and were one and the same entity and thus the respondents were liable for the liabilities of the said DEPL. In my view, the arbitral tribunal has no power to lift the corporate veil. Only a Court can lift the corporate veil of a company if the strongest case is made out. In my view, the prayer of the petitioners for lifting the corporate veil of the said DEPL was itself not maintainable in the arbitration proceedings."

22. In ***MV Tongli Yantai*** (*supra*), Vazifdar J sitting as a single judge of the Bombay High Court had observed that:

> " ..In whatever other circumstances the corporate veil may be lifted, it ought not to be in arbitration proceedings even in principle. To permit such course would be contrary to the 1996 Act….The mere fact that a party is an alter ego of another would not predicate an agreement to refer disputes to arbitration by the one which is not a party to the arbitration agreement. Courts have lifted the corporate veil to confer benefit or to foist liability upon a party. An arbitration reference stands upon a different footing. It is a mode of adjudication of disputes dependent upon an agreement between parties".

This decision in ***MV Tongli Yantai*** *(supra)* was overturned by the division bench of the Bombay High Court, *albeit*, on another point. And the Supreme Court, by consent of parties, set aside both the decision of the Single Judge as well as the Division Bench. Thus, this decision does not have any precedent value, but this court respectfully concurs with the view expressed therein.

23. This court has also held that an arbitral tribunal cannot lift the corporate veil in the case of ***Balmer Laurie*** (*supra*).

24. It is also relevant to refer to the decision of the Supreme in ***Indowind Energy Limited v. Wescare (India) Limited*: *2010 (5) SCC 306***.

25. In that case Subuthi Finance Ltd. (Subuthi) the promoter of appellant company (Indowind) entered into an agreement with Wescare (India) Ltd. (Wescare) for sale and purchase of certain equipments. Wescare and its subsidiary (RCI Power Ltd.) were described as "seller/wescare" and Subuthi and its nominee were described as "buyer". The agreement also disclosed Subuthi to be the promoter of Indowind. The agreement between Subuthi and Wescare included an arbitration clause.

26. Wescare sold certain Wind Electric Generators (WEGs) to Indowind, which was paid by Indowind partly in cash and partly by allotment of shares. Certain disputes arose between Wescare on one hand and Subuthi and Indowind on the other. Wescare filed petitions under Section 9 of the Act for interim measures before Madras High Court, which were dismissed on the ground that Indowind had neither signed nor ratified the agreement between Subuthi and Wescare. Thereafter, Wescare filed a petition under Section 11(6) of the Act for appointment of a sole arbitrator to adjudicate the disputes that had arisen in respect of the agreement. Both Subuthi and Indowind resisted the petition. Subuthi claimed that the agreement did not contemplate any transaction between Wescare and itself and no transaction had taken place between them and, therefore, there was no cause of action or any arbitrable dispute between them. Indowind resisted the said petition on the ground that it was not a party to the agreement in question. The Chief Justice of Madras High Court allowed the application under Section 11 of the Act and appointed a sole arbitrator. Indowind challenged the same before the Supreme Court. In this case, there was no dispute that the parties were closely related. Both Indowind and Subuthi had common shareholders and common board of directors. It was also not in dispute that the equipment was purchased by Indowind and not Subuthi. However, the Supreme Court allowed the Indowind's appeal and set aside the order of the Madras High Court appointing an arbitrator in respect of the claims of Wescare against Indowind, for the reason that Indowind was not a party to the Agreement.

27. The Supreme Court explained that "*It is fundamental that a provision for arbitration to constitute an arbitration agreement for the*

purpose of Section 7 should satisfy two conditions: (i) it should be between the parties to the dispute; and (ii) it should relate to or be applicable to the dispute." The Court further held that Subuthi and Indowind were two independent companies and "*each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Directors, will not make the two companies a single entity. Nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other*."

28. The decision of the Supreme Court in the case of ***M/s. Pam Development Pvt. Ltd.*** (*supra*), has no application in the facts of the present case. In that case, there was no dispute as to the existence of the arbitration agreement. The only dispute raised by the appellant (Union of India) was that the arbitrator was not appointed in accordance with the agreement and the disputes entertained were excepted matters and thus, not arbitrable. It is material to mention that the arbitrator was appointed by the High Court under Section 11(6) of the Act and the said decision was not challenged. No objection as to the jurisdiction was taken before the arbitral tribunal. The appellant (Union of India) participated in the arbitration proceedings. It also preferred counter claims and led evidence in defence. It is in these facts that the Supreme Court concluded that the appellant had waived its right to object to the jurisdiction of the arbitrator.

29. The decision in ***Purple Medical Solutions Pvt. Ltd.*** (*supra*) was rendered by the Supreme Court in an application filed under Section 11(6) of the Act. In that case, serious allegations of fraud were made against respondent no.2 (therein), who was not a party to the agreements in question. The said allegations remained uncontroverted. Thus, the Supreme

Court found that the relevant facts justified lifting of corporate veil and referring respondent no. 2 to arbitration. There is no quarrel with the proposition that a court could, in given cases, lift the corporate veil. This decision is not an authority for the proposition that such power could be exercised by an arbitral tribunal.

30. The decision in the case of ***Freeway Marketing (India) (P) Ltd and Anr.*** (*supra*) turned on its own facts. In that case, respondent no.2 was not a party to the arbitration agreement but had consented for reference of disputes to arbitration, in proceedings filed before this court and had also undertaken to this court for being liable for any payment that may be found due against respondent no.1. However, the arbitrator held that respondent no.2 was not a party to the agreement and was not personally liable for the claims made by the petitioner. Noting the facts of the case and finding the decision of the arbitrator to be unsustainable, the Hon'ble single judge (who is coincidently also the sole arbitrator in this case) set aside the arbitral award under Section 34 of the Act. This court has some reservations as to this decision, however notwithstanding such reservations, it is apparent that it is not applicable on the facts of this case as indicated above.

31. It was also suggested by Mr Mirza that the view taken by the arbitral tribunal is a plausible one and, therefore, even if it is considered erroneous, this court would refrain from interfering with the same. This contention is also unmerited. Undoubtedly, the legislative policy in arbitration is one of non-interference by the courts and it is well settled that even if the view of the arbitral tribunal is erroneous, the same cannot be set aside unless it is found that the same is perverse, patently illegal or otherwise in conflict

with the fundamental policy of Indian Law. This court does not sit as an appellate court over the decision of the arbitral tribunal and the scope of interference with an arbitral award is confined to the grounds as set out in Section 34 of the Act.

32. Having stated the above, a clear distinction must be made between the errors which are within the jurisdiction of the arbitral tribunal and those that are not. Plainly, the arbitral tribunal is the final authority on determining the questions of fact and unless the findings are perverse or fail the test of reasonableness on the anvil of the *wednesbury* principle, no interference would be warranted. Similarly, even questions of law falling within the scope of reference, would be binding on parties. As an illustration, the arbitral tribunal has jurisdiction to interpret the terms of the contract and even if such an interpretation is erroneous, the same would, nonetheless not warrant any interference by a court unless of course it is perverse or patently illegal (See: ***Steel Authority of India Ltd. v. Gupta Brothers Steel Tubes Ltd.: 2009 (10) SCC 6*** *and,* ***Rashtriya Ispat Nigam Ltd. v Dewan Chand Ram Saran: 2012 (5) SCC 306***). However, when it comes to a question of jurisdiction, there is no ground for sustaining an award which suffers from a jurisdictional error. As indicated above, the jurisdiction of the arbitral tribunal is circumscribed by the agreement between the parties. Thus, if an arbitral award runs contrary to the express agreement between the parties, it would be without jurisdiction and susceptible to challenge. As an illustration, if a contract between the parties proscribes award of interest, an arbitral award for pre-award interest would be liable to be set aside even though the same may be equitable (See: ***Union of India v. Ambica Constructions***: ***2016 (6) SCC 36***).

33. The legislative policy of non-interference does not extend to errors of jurisdiction. Therefore, a party which assails an arbitral award on the ground that it is without jurisdiction will have full right to make good its case and the view of the arbitral tribunal would at best be considered as a *prima facie* view which would be subject to full examination in proceedings under Section 34 of the Act.

34. As stated earlier, the award which is wholly without jurisdiction, would be of little value. In the present case, Mr Sudhir Gopi is not a signatory (party) to the arbitration agreement; this is fundamental condition for an arbitral tribunal to assume jurisdiction in so far as Mr Gopi is concerned. In absence of an arbitration agreement, the arbitral award, in so far as Mr. Gopi is concerned, is without jurisdiction and not binding on him.

35. In the case of ***Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan: [2008] EWHC 1901 (COMM) (U.K.)***, the U.K. Supreme Court upheld the decision of the commercial court not to enforce an arbitral award delivered by a French arbitral tribunal against the Government of Pakistan. In that case, the Government of Pakistan was a party to a Memorandum of Understanding in terms of which Dallah Real Estate and Tourism Holding Company (hereafter 'Dallah') agreed to purchase land to provide accommodation in Mecca to pilgrims from Pakistan. The Government of Pakistan thereafter created a trust which subsequently entered into a formal agreement with Dallah. The arbitral tribunal held that the Trust was only an alter ego of the Government of Pakistan and awarded in favour of Dallah and against the Government of Pakistan. In the proceedings that were

instituted in United Kingdom for the enforcement of the arbitral award (as a foreign award), the High Court of Justice (Queen's Bench Division Commercial Court) declined enforce the award against Government of Pakistan as the Government of Pakistan was not a signatory to the agreement between Dallah and the Trust in question. The U.K. Supreme Court upheld the decision of the commercial court. The U.K. Supreme Court held that the "*tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all".*

36. The Court held that the New York Convention "*may give limited prima facie credit to apparently valid arbitration awards..But that is as far is goes in law... This is not to say that a court seised of an issue under Article V(1)(a) and s.103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination.*"

37. Although, the aforesaid decision was rendered in proceedings for enforcement of a foreign award, the rationale for the view is compelling. An arbitral tribunal, being a creature of limited jurisdiction cannot in exercise of that jurisdiction, extend the same. An error relating to a question of jurisdiction would be fatal to the award and the arbitral tribunal's findings in that regard would be of no value. Thus, when it comes to the question of jurisdiction, the final word does not rest with the arbitral tribunal.

38. In view of the above, it is not necessary to examine, whether the decision of the arbitral tribunal to lift the corporate veil falls foul of Section

34 of the Act on merits as well. Nonetheless, for the sake of completeness, this court has also examined whether the decision to lift corporate veil is otherwise sustainable.

39. The solitary reason for the arbitral tribunal to hold that Mr Sudhir Gopi was a party to the Agreement is that he held almost entire shares of UEIT; thus, exercising absolute control over the affairs of UEIT. The entire business of UEIT was run by Mr Sudhir Gopi. The arbitral tribunal held that Mr Sudhir Gopi was the "face and a cloak" of UEIT for running the business and, therefore, was a party to the arbitration agreement. Consequently, the arbitral tribunal held that Mr Gopi and UEIT were jointly and severally liable for the liabilities of UEIT.

40. As stated above, arbitration is founded on consent between the parties to refer the disputes to arbitration. The fact that an individual or a few individuals hold controlling interest in a company and are in-charge of running its business does not *ipso jure* render them personally bound by all agreements entered into by the company.

41. Arbitration agreement can be extended to non-signatories in limited circumstances; first, where the Court comes to the conclusion that there is an implied consent and second, where there are reasons to disregard the corporate personality of a party, thus, making the shareholder(s) answerable for the obligations of the company. In the present case, the arbitral tribunal has proceeded to disregard the corporate personality of UEIT. The arbitral tribunal has lifted the corporate veil only for the reason that UEIT's business was being conducted by Mr Sudhir Gopi who was also the beneficiary of its business being the absolute shareholder (barring

a single share held by Mr Fikri) of UEIT. This is clearly impermissible and militates against the law settled since the nineteenth century. Any party dealing with the limited liability company is fully aware of the limitations of corporate liability. Business are organised on the fundamental premise that a company is an independent juristic entity notwithstanding that its shareholders and directors exercise the ultimate control on the affairs of the company. In law, the corporate personality cannot be disregarded. Undisputedly, there are exceptions to this rule and the question is whether this case falls within the scope of any of the exceptions.

42. A corporate veil can be pierced only in rare cases where the Court comes to the conclusion that the conduct of the shareholder is abusive and the corporate façade is used for an improper purpose, for perpetuating a fraud, or for circumventing a statute.

43. It is only in exceptional cases that a court would lift the corporate veil. In ***Life Insurance Corporation of India v. Escorts Ltd. and Ors.: (1986) 1 SCC 264,*** the constitution bench of the Supreme Court explained that a corporate veil may be lifted where a statute itself requires lifting of corporate veil or in cases of fraud or where a taxing statute or a beneficent statute is sought to be circumvented.

44. Courts have the power to pierce the corporate veil if the corporate structure has been built only to evade taxes. (See: ***In Re***: ***Sir Dinshaw Maneckjee Petit Bart: AIR 1927 Bombay 371***). In the case of ***Juggi Lal Kamlapat v. Commissioner of Income Tax, U.P.***: ***AIR 1969 SC 932***, the Supreme Court held that "*in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic*

realities behind the legal facade. For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation or to perpetrate fraud".

45. In ***Delhi Development Authority v. Skiper Construction Company (P) Ltd. and Another****: **(1996) 4 SCC 622,*** the Supreme Court observed as under:

> "28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and Family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people."

46. An abuse of corporate form is the bare minimum pre-condition that must be met before the corporate entity can be disregarded to impose the obligations of such entity on its shareholders/directors.

47. As stated earlier, in the present case, there is no foundation that the corporate façade of UEIT was used by Mr Sudhir Gopi to perpetuate a fraud. Mere failure of a corporate entity to meet its contractual obligations

is no ground for piercing the corporate veil. Although the arbitral tribunal has mentioned in the passing that UEIT was used for improper purpose, however, there is no foundation for such observation. It was never IGNOU's case that UEIT was set up or used to perpetuate a fraud on IGNOU and at any rate, no particulars - that are required to be pleaded to set up a case of fraud - to indicate that a fraud had been perpetuated were pleaded by IGNOU. Thus, the decision of the arbitral tribunal to pierce the corporate veil is fundamentally flawed. It falls foul of the fundamental policy of Indian law that recognises that a company is an independent juristic person.

48. Mr Mirza had earnestly contended that the alter ego doctrine would be applicable and the arbitral tribunal had proceeded on the basis of the said doctrine. This contention is bereft of any merit. The alter ego doctrine is conceptually no different from the concept of piercing of corporate veil. These doctrines are applied to disregard corporate personality only in cases where it is found that corporate form is being used to perpetuate a fraud, circumvent statute or for a wrongful purpose. The alter ego doctrine is essentially to prevent shareholders from misusing corporate laws by a device of a sham corporate entity for committing fraud.

49. In cases where it is established that an individual(s) and/or other entities have used a corporate form for a wrongful purpose; to perpetuate a fraud; circumvent a statute; or some other misdeeds, the Courts may decide to ignore the corporate personality and hold the directors, shareholders and/or officers (alter egos) responsible for the obligations of the corporate entity. However, as stated earlier, in the facts of the present case, there is no ground to disregard the corporate form of UEIT.

50. In view of the above, the petition is allowed and the impugned award to the extent that the petitioner is held liable for the awarded amounts, is set aside.

51. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 16, 2017
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