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[SHORT ARTICLE]

Power of the Arbitral Tribunal to lift the Corporate Veil: an Analysis of the Judicial Position in India

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Abstract: Arbitration of company law issues, among others, in India is still in its developing stage with the judiciary constantly adding confusing precedents. The views submitted by different courts on this subject are inconsistent with one another and hence, give rise to the need of a settled law. The question of the power of an arbitrator to lift the corporate veil is also muddled in India. The arbitral tribunal under the Arbitration and Conciliation Act, 1996 (as amended) has been provided with the freedom to try and decide all arbitrable disputes, to which the parties have consented freely, by signing a contract having a valid arbitration agreement binding on the parties. However, the Act does not clearly define the power of the arbitral tribunal with regard to lifting of the corporate veil.

The Arbitration and Conciliation Act, 1996 is based on the UNCITRAL Model Law. The UNCITRAL Model Law has enabled arbitrators to pierce the corporate facade. The Act does not have sufficient provisions to govern and acknowledge the idea of lifting the corporate veil by an arbitral tribunal. Consequently, the legislature must take an initiative to clarify the powers of the arbitrators to

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*"Power Of The Arbitral Tribunal To Lift The Corporate Veil: An Analysis Of The
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adjudicate issues relating to company law till the threshold that they do not set foot in the scope of issues specifically adjudicated by the judiciary.

Keywords: arbitration, lifting of corporate veil, 'kompetenz-kompetenz', non-signatories in arbitration.

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INTRODUCTION

"Arbitration is a process by which parties consensually submit a dispute to a non-governmental decision maker selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard."¹ Parties to a dispute choose Arbitration for the various benefits it poses in national and international jurisdictions, such as neutrality, enforceability premium, party autonomy, commercial competence & expertise, and the like.

The commercial transactions these days have become quite complex and widespread, i.e., the transactions are spread out through a long chain and are interdependent on one another. These transactions give rise to third party rights, i.e. claims of parties who are not signatories to the contract. As we are aware that each company is a separate legal entity and is distinct from its members, but it is a group of people who are the beneficiaries of the fruits borne by the Company. Therefore, in certain cases it becomes imperative to pierce through the veil.

The Arbitration and Conciliation Act, 1996² lays down powers of the arbitral tribunals to adjudicate disputes in India. The act is still in its developing stage with unclear competence of an arbitral tribunal in certain cases. An issue also lacking clearance is, the power of an arbitral tribunal to pierce the corporate veil.

This article presents an analysis of the judicial position based on the judgments rendered by the Hon'ble Courts. Analysing how confusion is created by *GMR Energy Limited v. Doosan Power Systems*³ declaring the judgement of *Sudhir Gopi v. IGNOU*⁴ as per

¹ 2 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 246 (2d ed., Kluwer Law International, 2014).

² The Arbitration and Conciliation Act, 1996, Act No. 26 of 1996.

³ 2017 SCC OnLine Del 11625.

⁴ 2017 SCC OnLine Del 8345.

incuriam. Considering all the issues and confusion regarding the power of an arbitral tribunal to lift the corporate veil, the Hon'ble Supreme Court shall come up with a viable, full bench judgement that can be followed by all the courts. Also, other judgements delivered by courts and tribunals in India and abroad along with the various statutes, will be helpful in clearly understanding the issue at hand and citing possible solutions that might promote the 'competence de la competence' doctrine of arbitration and the power thereof to lift the corporate veil.

LIFTING OF THE CORPORATE VEIL

"Corporate Veil is a legal concept by way of which corporate obligations remain the liability of the entity and not of the shareholders, directors, or officers who own and/or act for the entity."⁵ Lifting the corporate veil means to pierce through the false identity of a company so created by its members to enjoy the benefits, which includes, running from their liabilities and standing in shadow for the wrongs committed in the name of the company. The lifting of the veil is to disregard the separate identity of the company and to hold the members of the company responsible for their wrong doings as companies are often created to gain commercial profits or for evasion from taxes.

In *United States V. Milwaukee Refrigerator Co.*,⁶ it was observed that "*a corporation is considered to have a separate legal entity as a general rule.....but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons.*" The Courts have gone behind the veil to depict the exact working of the company and the true intention of its members and directors.

⁵ Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV., 1036 (1991).

⁶ 142 F.247 (1905).

The concept of lifting of corporate veil has flown from the English Law and is a universally accepted, foundational principle in many countries. The concept of the corporate distinct identity of the company was enshrined by the English Courts in *Salomon v. A. Salomon and Co. Ltd.* wherein it has been said that *"in inquiries of property and limit, of acts done and rights procured or liabilities accepted along these lines... the characters of the common people who are the organization's corporators is to be disregarded."*⁷ Thus, even though the statutes provide the members and directors of a company the full autonomy to govern its functions, such power cannot be absolute and needs to be curtailed.

The Courts have the power to pierce through the veil and identify the true nature and intention of the parties and the same was held by the Supreme Court in *Balwant Rai Saluja v. Air India*.⁸ Thus, lifting of the corporate veil restricts the power of the members and directors to stand behind the protective shield of the company in order to safeguard their own interests.

The corporate veil is often lifted by the courts when it is clearly stated by the statute or when judicial interpretation is required on the facts of a particular case. It has been rightly held by the Hon'ble Supreme Court that *"It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of public interest, the effect on parties who may be affected, etc."*⁹. However, the circumstances where a

⁷ *Salomon v. A. Salomon and Co. Ltd.*, (1897) AC 22 [HL].

⁸ AIR 2015 SC 375:

'The doctrine of 'piercing the corporate veil' stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation'.

⁹ *Life Insurance Corporation of India v. Escorts Ltd.*, [1986] 59 Comp. Cas. 548.

corporate veil can be lifted have been clearly defined by Munby J. in *Ben Hashem v. Ali Shayif* by laying down the six principles, as found at paragraphs 159-164 of the case and are as follows-
“(i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the Court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must be linked to the use of the company structure to avoid or conceal liability; (v) to justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and (vi) the company may be a 'facade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions.”¹⁰

Our Courts have realised that there is a constant need to keep a check on the unfair and illegal means adopted by the various stakeholders of a company to commit frauds or evade taxes and therefore the concept of veil piercing plays a pivotal role in the administration of justice. However, unlike the Courts, the power of the Arbitral Tribunal to lift the corporate veil has not been clearly defined; rather various theories are used for interpreting the exact scenario.

WHETHER THE CORPORATE VEIL CAN BE LIFTED BY THE ARBITRAL TRIBUNAL

The Hon'ble Supreme Court in *Life Insurance Corporation of India v. Escorts Ltd. and Ors*¹¹ has held that “...the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a

¹⁰ *Ben Hashem v. Ali Shayif*, (2008) EWHC 2380 (Fam).

¹¹ *Supra*, note 9.

beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern."

It is evident that the Courts are to use the power of lifting the corporate veil under exceptional circumstances and for lifting the veil, the facts of each case lay down their foundation for the application of the theory laid down in the *Life Insurance Corporation* case. The courts have aimed at lifting the corporate veil to stop the directors and members of a company from taking undue advantage of the veil of the Company and to avoid their statutory liability.

The issue of lifting the corporate veil by an arbitral tribunal is still faint in the Indian context. A possible reasoning behind the same includes involvement of criminal abstracts to the dispute at hand which shall *solely* be resolved by a court or similar adjudicating authority. In *Booz Allen Hamilton v. SBI Home Finance*¹², the court was of opinion that "*even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.*" The judiciary has carefully guarded the public policy of India and has not granted the power to the arbitral tribunal to adjudicate upon disputes which affect the right against the public at large, but have not specifically barred the arbitral tribunal from doing so.

A. Non Arbitrability of Disputes

Non arbitrability of disputes is one of the grounds for setting aside the arbitral awards under sections 34(2) (b) and 48(2) of the Act; in case the award is against the public policy of India.

¹² (2011) (5) SCC 532.

In consideration of the *Booz Allen*¹³ case, the precedent laid down issues that are 'non-arbitrable'. The judgements specifically enlist: i) Disputes relating to rights that give rise or arise out of criminal offences; ii) Matrimonial Disputes; iii) Guardianship Matters; iv) Insolvency and winding up matters; iv) Testamentary matters; v) Eviction and tenancy matters.

Furthermore, in *A. Ayyasamy v. A. Paramasivam*¹⁴, the Hon'ble Supreme Court goes on to say that in cases where it is evident, that serious allegations of fraud have been raised, and a complete in-depth inspection is required and voluminous evidence needs to be produced to prove such fraud, then the courts are to examine the exact situation and the arbitral tribunal has not been given the power to inspect the same. On the other hand, the judgment also dwells on the fact that if the allegations of fraud are not serious and are only touching upon the internal affairs of the said company, then the arbitration agreement need not be disregarded. The Supreme Court has provided an interpretation of the Act for the discussion on arbitrability, however, the Court has not settled the law in this regard while stating "*Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.*"

¹³ *Id.*

¹⁴ (2016) 10 SCC 386.

B. Non-signatories to Arbitration

That sometimes, it so happens that in an arbitration between two entities who are signatories to the contract, a third party who is not a signatory to the agreement but is a part of the same group of companies has a pivotal role to play in the performance of the said contract. A claim is raised against such an entity. In these cases the doctrine of "group of companies" is applied. "This doctrine has developed in many jurisdictions, 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."¹⁵

It has been held by the Supreme Court that a party can be subjected to an arbitration without their prior consent only in exceptional cases and the exception should be based on the direct relationship of the third party with the signatory, the commonality of the subject matter and the transaction being composite in nature. The two theories laying the basis of binding a non-signatory to arbitration have been laid by the Supreme Court and have held that "*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*

¹⁵ Russell on Arbitration (23rd Edn.).

*rely on the parties' intention but rather on the force of the applicable law."*¹⁶

Even though the Courts in India have allowed third parties to be subjected to arbitrations they are not signatories to, the position whether the arbitral tribunal can pierce the veil of incorporation and identify the true character of the entity is still unanswered.

C. The Judicial Position in India

The difficulty that arises in the situation is that the parties have agreed to adapt to the means of Arbitration, for minimum interference of courts and that the courts merely keep a check on the acts and omissions of an arbitrator¹⁷. But *what happens when the power of the arbitral tribunal itself is uncertain?*

The principle of "kompetenz-kompetenz" has been recognized internationally; it does have a negative impact on the courts, i.e., the courts are deprived of their jurisdiction, but serves as a positive feature of arbitration. It is to say that the courts have time and again, as stated above, gone behind the veil to depict the true character of the company against whom there is an allegation of fraud¹⁸. Even though the courts have referred third parties to arbitration, it is based on the facts of the case, the intention of the parties and the validity of the arbitration agreement. The court has held that *"The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its rationed personae scope. Furthermore, the Convention does not*

¹⁶ Cheran Properties Limited vs. Kasturi and Sons Limited and Ors., 2018 (16) SCC 413.

¹⁷ S. 5, The Arbitration and Conciliation Act, 1996, Act No. 26 of 1996.

¹⁸ *Supra*, note 6.

*prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent."*¹⁹

In *Indowind Energy Ltd. v. Wescare*²⁰ it was seen that the parties to the agreement had sought reference to arbitration and had also impleaded a third party for reference. However, the Court observed that even though the companies had a common director and same shareholders, *Indowind* could not be referred to arbitration, because there was no valid agreement between the parties to arbitrate and hence, was not impleaded as a party. However, that was not the case in *Chloro Controls India (p) Ltd. v. Severn Trent Water Purification Inc.*²¹; which laid down the conditions under which the non-signatories could be referred to arbitration, under circumstances where the courts analysed that there was close nexus between the parties and that was evident through the communication exchanged between the parties or their intent. The Court, however, did not address the issue of lifting the corporate veil.

That yet another judgment from Delhi High Court in *Sudhir Gopi v. Indira Gandhi National Open University*²² stated that only courts have the power to lift the corporate veil and not the arbitral tribunal. It goes on to say that the corporate veil can only be lifted in the event that a strong case is made out. However, the mere fact that a party is an alter ego of a company does not mean that the said entity can be referred to arbitration, without even being a party to the agreement and therefore, the corporate veil cannot be lifted only to refer a third party to an arbitration between two other parties. To bedrock the judgement and restrict the power of the Arbitral Tribunal to lift the corporate veil, the court relied on the case of *ONGC v. Jindal*

¹⁹ *Infra*, note 21.

²⁰ AIR 2010 SC 1793.

²¹ (2013) 1 SCC 641.

²² *Supra*, note 4.

*Drilling & Industries Ltd.*²³ which also concluded on similar lines that a court and not an arbitral tribunal has the power to lift the corporate veil. *Balmer Lawrie & Co. Ltd. v. Balmer Lawrie Employees' Union*²⁴ and *Great Pacific Navigation (Holdings) Corpn. Ltd. v. M.V. Tongli Yantai*²⁵ were of similar standing and thereby cited. Furthermore, this judgment does not elaborate on any other aspect of veil piercing.

Even though the said judgment is based on a sound reasoning, the same was rendered *per incuriam* by *GMR Energy Limited v. Doosan Power Systems India Private Limited and Ors.* and it was stated that in case the parties have first approached the court and then the matter has been referred to arbitration, the Courts and the Arbitral Tribunal both have the power to go behind the corporate veil. In the court's own words, "*In the present case the arbitration was initiated without the intervention of the Court and only after initiation of the arbitration, GMR Energy filed the present suit invoking the jurisdiction of this Court seeking an injunction against arbitration to proceed against it on the basis of issue of alter ego. The issue of alter ego not falling within the categories of non-arbitrable disputes as specified in A. Ayyasamy (supra) and the nature of parties to the agreement being distinct from the formal validity of the arbitration agreement and a question of merit as held in Chloro Control (supra) would thus fall in the category (2) laid down by National Insurance Co. Ltd. (supra) even if considering that Doosan India has filed an application under Section 45 before this Court which is without prejudice to its right. Thus, the issue of alter ego based on the facts as noted in the present case and not on fraud can be decided by the Court as well as the Arbitral Tribunal.*"²⁶

As evident from the above stated précis, it is certain that the differences of opinions between the courts are recurring in the absence of a settled position on this subject.

²³ 2015 SCC OnLine Bom 1707.

²⁴ (1988) SCC OnLine Bom 97.

²⁵ (2011) SCC OnLine Bom 883.

²⁶ *Supra*, note 3.

CONCLUSION

The debate in most countries other than India, and developed jurisdictions is upon the conditions and criteria that limit the arbitrator's power to lift the corporate veil. India sits a step behind, fixating on the question whether the arbitrator possesses such power or not.²⁷ It is observed that this is a subject that has not been addressed clearly even in the international arbitrations. It is to say that the Indian Courts have taken different approaches to the said problem and have analysed them to an extent but have remained silent on the circumstances under which an arbitral tribunal has the power to lift the corporate veil, thereby the Courts have yet again left this question unanswered. In these modern times it is imperative that the courts or the legislature settle this position and ascertain their degree of control with respect to the arbitral tribunals as it is evident, that even though the arbitral tribunal is autonomous, the Courts are still the protectors of the public policy and keep a check on the jurisdiction exercised by the Arbitral Tribunal in different ways. Furthermore, in domestic arbitrations, the problem is still not that big, but in international arbitration, the situation becomes even more complicated as various issues like choice of law etc. give rise to even bigger problems. Therefore, clarity on this subject will help settle the position in India and will also allow India to get a better perspective with regard to International Arbitrations, which in turn will help in the aim of promoting India as an International Arbitration hub. The same will also define the powers of the Arbitral Tribunal and remove this cloud of constant doubt. The clarity on whether the corporate veil can be lifted by an arbitrator or not will in a way provide a threshold to the powers of the Arbitral Tribunal and also define the powers of the court with regard to their interference in arbitrations. The

²⁷Arnav Maru, *An Arbitral Tribunal's Power to Lift the Corporate Veil: The Judicial Position in India*, 72, (2019) PL October 66.

legislature shall take adequate steps to analyse the situation in the Indian context and amend the Act to clear the stand once and for all. The legislature must release rules or guidelines to clarify the powers of the arbitrators to adjudicate issues relating to company law till the threshold that they do not set foot in the scope of issues specifically adjudicated by the judiciary.
