A M/S LARSEN AND TOUBRO LIMITED SCOMI ENGINEERING BHD

v.

MUMBAI METROPOLITAN REGION DEVELOPMENT AUTHORITY

B (Arbitration Petition (C) No. 28 of 2017)

OCTOBER 03, 2018

**[R. F. NARIMAN AND NAVIN SINHA, JJ.]**

*Arbitration and Conciliation Act, 1996 – ss. 2(1)(f)(ii), 2(1)(f)(iii) and 11 – International Commercial Arbitration – Contract for development of a Monorail system, between Mumbai Metropolitan Regional Development Authority (MMRDA)-respondent and a Consortium-petitioner (comprising an Indian company and a Malaysian company) – Dispute arose between the parties – Consortium made various interim claims and filed petition u/s.11 of the Act – According to Consortium, since one of the parties to the Arbitration Agreement, was a body corporate, incorporated in a country other than India so it would attract s.2(1)(f)(ii) of the Act and relied upon their status (i.e. an Indian company and a Malaysian company) as independent entities – Propriety of – Held: In another proceeding between the same parties arising out of the self-same agreement, the High Court by order dated 20.10.2016 had upheld the order of the Arbitrator that the particular claim that was made in that case could be made only as a Consortium and not as two entities separately and the said judgment was final inter-parties as no appeal was preferred – Thus, it is not open for the petitioner to rely upon their status as independent entities – This being the case, the un-incorporated "association" referred to in s.2(1)(f)(iii) is attracted on facts of the case and not s.2(1)(f)(ii) as the Malaysian body could not be referred to as an independent entity following the judgment of the High Court – Further, the Indian company was the lead partner and the Supervisory Board constituted under the Consortium agreement made it clear that the lead partner had the determining voice in that, as it appointed the Chairman of the said Board and the fact that the Consortium's office was in Wadala, Mumbai and also that the lead member led the arbitration*

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*proceedings – This all pointed to the fact that the central management and control of the Consortium appeared to be exercised in India and not in any foreign nation – There is no "international commercial arbitration" as defined u/s.2(1)(f) of the Act – Thus, petition filed u/s.11 of the Act dismissed.*

*Arbitration and Conciliation Act, 1996 – s.2(1)(f)(iii) – discussed.*

**Dismissing the Arbitration Petition, the Court**

**HELD: 1. Mumbai Metropolitan Region Development Authority (MMRDA), the respondent, has relied upon an order was passed by the High Court of Bombay, dated 20.10.2016 between the same parties, in which an interim Award dated 18.08.2016 was challenged, which was between the same parties arising out of the self-same agreement. This order upheld the interim Award of the Arbitrators in stating that the particular claim that was made in that case could be made only as a Consortium and not as two entities separately. That order has become final as it has not been challenged by the petitioner before this Court. [Para 3][33-C-D]**

**2. It is clear, as has been held by the judgment of the High Court of Bombay, and which is binding inter-parties, that it is not open for the petitioner to rely upon their status as independent entities while dealing with the respondent and they will have to deal with the respondent as a Consortium only. [Para 9][35-G]**

**3. This being the case, it is clear that the un-incorporated "association" referred to in Section 2(1)(f)(iii) would be attracted on the facts of this case and not Section 2(1)(f)(ii) as the Malaysian body cannot be referred to as an independent entity following the judgment of the High Court of Bombay. [Para 10][35-H; 36-A]**

**4. Section 2(1)(f)(iii) of the Act refers to two different sets of persons: an "association" as distinct and separate from a "body of individuals". For example, under Section 2(31) of the Income Tax Act, 1961, "person" is defined as including, under sub-clause**

**(v), an association of persons, or body of individuals, whether incorporated or not. It is in this sense, that an association is referred to in Section 2(1)(f)(iii) which would therefore include a consortium consisting of two or more bodies corporate, at least one of whom is a body corporate incorporated in a country other than India. [Para 11][36-B-C]**

**5. It would become clear that prior to the deletion of the expression "a company or", there were three sets of persons referred to in Section 2(1)(f)(iii) as separate and distinct persons who would fall within the said sub-clause. This does not change due to the deletion of the phrase "a company or" for the reason given by the Law Commission. This is another reason as to why "an association" cannot be read with "body of individuals" which follows it but is a separate and distinct category by itself, as is understood from the definition of "person" as defined in the Income Tax Act referred to above. [Para 12][37-D-E]**

**6. This being the case, coupled with the fact that the Indian company is the lead partner, and that the Supervisory Board constituted under the Consortium Agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation. [Para 13][37-E-G]**

**7. This being the case, the petition filed under Section 11 of the Act is dismissed, as there is no "international commercial arbitration" as defined under Section 2(1)(f) of the Act for the petitioner to come to this Court. [Para 14][37-G-H]**

*TDM Infrastructure Private Ltd. v. UE Development India Private Ltd.,* **(2008) 14 SCC 271 : [2008] 8 SCR 775 – referred to.**

**Case Law Reference**

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| **[2008] 8 SCR 775** | **referred to** | **Para 12** |

CIVIL ORIGINAL JURISDICTION : Arbitration Petition (C) No. 28 of 2017.

Under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.

Gopal Jain, Sr. Adv., Atul Sharma, Lakshay Khanna, Ms. Parshanti Rao, Gautam Talukdar, Advs. for the Petitioner.

Shyam Divan, Sr. Adv., Pratap Venugopal, A. Sarna, Ms. Niharika, Ms. Remya Raj, M/s. K. J. John And Co., Advs. for the Respondent.

The Judgment of the Court was delivered by

**R. F. NARIMAN, J.**

1. The present petition, under Section 11 of the Arbitration & Conciliation Act, 1996, (in short 'the Act'), that has been filed before this Court, arises out of a contract entered into on 09.01.2009 for the work of planning, design, development, construction, manufacture, supply, testing and commissioning of a Monorail system in two particular earmarked sections in Wadala, Mumbai including operation and maintenance for a period of three years from the date of start of commercial operations. This agreement contains an arbitration clause, which is set out hereunder:-

"Claims, Disputes and Arbitration

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| 20.1 Contractor's Claim | If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions for otherwise in connection with the Contract, the Contractor shall give notice to the Employer/Employer's Representative, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 30 days after the Contractor became aware, or should have become aware, of the event or circumstance.<br><br>If the Contractor fails to give notice of a claim within such period of 30 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer/Employer's Representative shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply. |

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| | The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.<br><br>The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Employer/Employer's Representative. Without admitting liability, the Employer/Employer's Representative may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Employer/Employer's Representative to inspect all these records, and shall (if instructed) submit copies to the Employer/ Employer's Representative.<br><br>Within 45 days after the Contractor became aware (or should have become aware) of the event or circumstances giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Employer/Employer's Representative, the contractor shall send to the Employer/Employer's Representative a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:<br><br>(a) this fully detailed claim shall be considered as interim;<br><br>(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Employer may reasonably require; and |

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| | (c) the Contractor shall send a final claim within 30 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Employer/Employer's Representative.<br><br>Within 45 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Employer/ Employer's Representative and approved by the Contractor, the employer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.<br><br>Each interim payment shall include such amounts for any claim as have been reasonable substantiated as due under the relevant provision of the Contract, unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.<br><br>The Employer/Employer's Representative shall proceed in accordance with Sub-Clause 3.5 (Determination) to agree or determine (i) the extension (if any) of the Time for completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or<br><br>(ii) the additional payment (if any) to which the Contractor is entitled under the Contract. The requirements of this Sub-Clause are in addition to those of any other Sub-Clause, which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the |

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| | claim, unless the claim is excluded under the second paragraph of this Sub-Clause. |
| 20.2 Dispute to be referred to and settled by Employer's Representative at Site | Should any dispute or difference of any kind whatsoever arise between the Employer and the Contractor, in connection with, or arising out of the Contract, or subject matter thereof, or the execution of Works/commissioning of the System/Operation & Maintenance of the System, whether, during the progress of Works/during Operation and Maintenance of the System or after their completion and whether before or after termination, abandonment or breach of Contract, it should, in the first place, subject to the provision under Sub-clause 14.4 above, be referred to and settled by the Employer's Representative at Site, who shall, within a period of 60 days after being requested in writing by either party to do so, give written notice of his decision to the Employer and the Contractor. The Employer's Representative at Site while considering the matters of dispute referred to him, shall be competent to call for any records, vouchers, information and enforce the attendance of the parties either in person or through authorised representatives, to sort out or clarify any issue, resolve the differences and to assist him to decide the matters referred to him. Subject to arbitration, as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor, who shall proceed with the execution of Works/ commissioning of the System/ Operation & Maintenance of the System (as the case may be) with all due diligence irrespective of whether any of the parties goes in or desires to go in for arbitration. If the Employer's Representative at Site has given written notice of his decision to the Employer and the Contractor and no intimation of reference of any claim to arbitration has been sent to him by either |

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| | the Employer or the Contractor within a period of 60 days from receipt of such notice, the said decision of the Employer's Representative shall remain final and binding upon the Employer and the Contractor and the same shall be deemed to have been accepted by them. The Employer or the Contractor shall not seek any arbitration thereafter. |
| 20.3 Referring of Disputes for Arbitration | If the Employer's Representative at Site fails to give notice of his decision, as aforesaid, within a period of 60 days after being requested as aforesaid or if either the Employer or the Contractor be dissatisfied with any such decision of the Employer's Representative at Site, only then shall the matter in dispute be referred to arbitration as herein provided |
| 20.4 Disputes Due for Arbitration and Settlement of Disputes | Disputes or differences shall be due for arbitration only if the conditions in Sub-Clause 20.2 and 20.3 above fulfilled.<br>Except where otherwise provided in the Contract, all disputes or differences, whatsoever arising between the parties, arising out of or relating to construction, measuring operation or effect of the Contract or the breach thereof, shall be settled by arbitration as detailed in Sub Clause 20.5. |
| 20.5 Nomination of Arbitrators/ Sole Arbitrator | Matters to be arbitrated upon shall be referred to a Sole Arbitrator where the individual claim does not exceed Rs. 5 million or the total value of claims does not exceed Rs. 15 millions. Beyond the above limit(s), there shall be three arbitrators. For this purpose the employer will make out a panel of Arbitrators with the requisite qualifications and professional experience relevant to the field to which the Contract relates and will be residents of India only. In case of a single arbitrator, the Panel will be of three Arbitrators, out of which the Contractor will choose one. In case three arbitrators are to be appointed, the Employer will make out a panel of five. The Contractor and the Employer |

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| | will choose one arbitrator each from the above and the two so chosen will choose the third arbitrator from the above panel only who will act as the "Presiding Arbitration" of the arbitration panel.<br><br>If in a dispute, the contractor fails to choose the Arbitrator within thirty (30) days after the Employer has nominated the Panel, the Employer may nominate an Arbitrator from the same panel of Arbitrators given by the Employer for the matter in dispute.<br><br>If, in a dispute, the two chosen Arbitrators fail to appoint third Arbitrator- Presiding Arbitrator (Arbitration Panel's case) within thirty (30) days after they have been appointed, the Employer may apply to the Indian Council of Arbitration, New Delhi, to nominate the third Arbitrator from the same panel of Arbitrators given by the Employer for the matter in dispute.<br><br>Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Employer's Representative at Site for the purpose of obtaining his decision. No decision given by the Employer's Representative in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator/s on any matter, whatsoever, relevant to dispute or difference referred to arbitrator/s.<br><br>Substitute Arbitrators- If for any reason on arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator. |
| 20.6 Arbitration Venue, Language and Award | In any Arbitration proceedings hereunder:<br><br>(a) Proceedings shall be held in Mumbai, India only.<br><br>(b) English language shall be the official language for all purposes. (Note: English language may be changed to any other language, with the agreement of both the parties) |

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| | (c) The Arbitration Award shall be final and binding on all parties and shall be enforceable in any Court of competent jurisdiction, and the parties hereby waive any objection to or claims of immunity in respect of such enforcements.<br><br>(d) In Arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.<br><br>(e) The Arbitrator(s) shall always give item-wise and reasoned awards irrespective of the value of claim(s) in the dispute in all cases.<br><br>(f) Where the arbitral award is for payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on which the award is made.<br><br>(g) The cost of arbitration shall be borne by the respective parties. The cost inter-alia includes the fees of the Arbitrator(s) as per the rate fixed by the Employer from time to time. |
| 20.7<br>Rules Governing the Arbitration Proceedings | The arbitration proceedings shall be governed by India Arbitration and Conciliation Act, 1996, as amended, from time to time including provisions in force at the time the reference is made. |
| 20.8<br>No Supervision of Work | The reference to arbitration shall proceed notwithstanding that Works/System shall not then be or be alleged to be complete, provided always that the obligations of the Employer/Employer's Representative and the Contractor shall not be altered by reasons of arbitration being conducted during the progress of Works. Neither party shall be entitled to suspend the work to which the dispute relates on account of arbitration and payments to the Contractor shall continue to be made in terms of the Contract. |

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| 20.9 Limitation of Time | No dispute or difference shall be referred to Arbitration after expiry of 60 days from the date of decision by the Employer's Representative at Site, if notified, or from the date when the Employer's Representative at Site ought to have given his decision in terms of provisions under Sub-Clause 20.2 in case of failure on the part of the Employer's Representative at Site to give notice of decision. |

Since disputes arose between the parties to the agreement, various interim claims had been made by the Consortium of M/s Larsen and Toubro, an Indian company, together with Scomi Engineering Bhd, a Company incorporated in Malaysia, for which the Consortium has filed this petition under Section 11 of the Act to this Court, since according to them, one of the parties to the Arbitration agreement, being a body corporate, incorporated in Malaysia, would be a body corporate, which is incorporated in a country other than India, which would attract Section 2(1)(f)(ii) of the Act.

2. Shri Gopal Jain, learned senior counsel appearing on behalf of the Consortium, has taken us through the agreement, in which he strongly relies upon the fact that the two entities, that is, the Indian company and the Malaysian company, though stated to be a Consortium, are jointly and severally liable, to the employer. Learned senior counsel has also relied upon the fact that throughout the working of the contract, separate claims have been made, which have been rejected by the Mumbai Metropolitan Region Development Authority (hereinafter referred to as 'MMRDA'). He has also further relied upon the fact that by at least three letters, during the working of the agreement, the claims have in fact been rejected altogether and that, therefore, there is no impediment in invoking the Arbitration clause under Section 20.4 of the General Conditions of Contract (hereinafter referred to as 'GCC'), as the procedure outlined by Clauses 20.1 to 20.03 had already been exhausted.

3. On the other hand, Mr. Shyam Diwan, learned senior counsel appearing on behalf of MMRDA, the respondent, has relied upon both the contract dated 09.01.2009 as well as the actual Consortium Agreement dated 04.06.2008 between the Indian company and the Malaysian company, which, when read together, would show that they

are really an un-incorporated association and would, therefore, fall within Section 2(1)(f)(iii) as being an association or a body of individuals, provided the central management and control is exercised in any country other than India. He has also gone on to rely heavily upon the fact that in the Consortium, the lead partner is the Indian company, and the Consortium's office is at Wadala in Mumbai making it clear, therefore, that sub-Clause (iii) of Section 2(1)(f) of the Act would not apply as it is clear that the central management and control, that is envisaged by the said sub-Clause, would not be exercised in a country outside India but in India itself. He has also strongly relied upon an order passed by the High Court of Bombay, dated 20.10.2016 between the same parties, in which an interim Award dated 18.08.2016 was challenged, which was between the same parties arising out of the self-same agreement. This Order upheld the interim Award of the Learned Arbitrators in stating that the particular claim that was made in that case could be made only as a Consortium and not as two entities separately. He has also pointed out that this Order has become final as it has not been challenged by the petitioner before this Court. In answering Mr. Gopal Jain's submission as to Clause 20.4 of the GCC being invoked after the procedure under Clauses 20.1 to 20.3 has been exhausted, he referred to and relied upon a letter dated 22.04.2016 written by the respondent in which, after referring to the various refusals, referred to by Mr. Jain, further information and material was requested from Mr. Jain's client. Instead of furnishing such material straightaway, a notice invoking Arbitration dated 01.07.2016 was sent by Mr. Jain's client. The respondent, by a reply dated 20.08.2016 reiterated its position that Clauses 20.1 to 20.3 had not yet been exhausted, and therefore, on 08.09.2016, rejected the request for arbitration.

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4. The contract dated 09.01.2009 is between (1) MMRDA and (2) a Consortium, comprising, (a) L&T, an Indian Company, and; (b) M/s Scomi Engineering Bhd, a Malaysian Company. It is true that each of them are jointly and severally responsible to the employer, being collectively referred to as the "contractor."

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5. Under the General Conditions of Contract, the "contractor", in Clause 1.1.2.3 is defined as meaning an Individual, Firm, Company, Corporation, Joint Venture or Consortium, whether incorporated or not.

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"Bidder" is also defined under Clause 1.1.2.10 as meaning an Individual, Firm, Company, Corporation, Joint Venture or Consortium which could submit a bid. What is important to notice is that the contract was signed by the employer, viz., MMRDA and by the contractor under the head sub-Clauses (A) and (B) in which L&T India signed as 'A' and Scomi Engineering Bhd has signed as 'B'. When we come to the consortium agreement that is entered into between the Indian company and the Malaysian company as aforestated, we find in the definition clause that "Consortium" shall mean L&T and Scomi Engineering Bhd, acting in collaboration, for the purpose of this agreement and shall be called "the L&T-SEB" Consortium "un-incorporated." The contract is defined in sub-Clause 6 as meaning, "the contract to be entered by the Consortium with the employer for the execution of the Project". Under sub-Clause 7, "the lead Member of the Consortium" or "Consortium Leader" shall mean L&T, that is, the Indian Company. Under sub-Clause 8, the "Supervisory Board" (hereinafter referred to as 'the SB') shall mean a Board constituted under Clause 11 of the GCC. When we come to Clause 11.2, it is clear that the Members of this Supervisory Board will consist of four members, two appointed by each Member. One of the Members nominated by the Consortium Leader and agreed to by all members shall then act as the Chairman of the Supervisory Board, which is, by Clause 11.5, to decide on various matters relating to the execution of the contract. Clause 21.1(g) provides that the Consortium leader shall lead all arbitration proceedings.

6. As correctly pointed out by Shri Jain, separate claims were made by the Indian company and the Malaysian company which were rejected by the respondent. Nonetheless, by a letter dated 22.04.2016, the respondent referred to these various rejection letters, and stated that documents in support of the list of "delayed events" had not yet been given, and therefore, necessary information and clarification, in response to certain observations, together with all documents in support of the claim, was requested to be furnished. By a letter dated 01.07.2016, the Consortium, instead of responding to this letter, invoked arbitration, stating that interim claims had already been rejected, and all the necessary information had already been furnished, as a result of which, the stage of Clause 20.4 had arrived. This was replied to by a letter dated 20.08.2016 in which the respondent reiterated its position that the remedies

provided under Clause 20.3 has not yet been exhausted, and that therefore, there is no question of appointing an Arbitrator. On 08.09.2016, the notice invoking arbitration was replied to by the respondent, rejecting the same.

7. It is important, at this juncture, to refer to an order made by the High Court of Bombay dated 20.10.2016 which, as has been stated earlier, arises between the self-same parties, under the same contract. An interim Award made by the Arbitrators *qua* different claims arising under the same contract had made it clear that the claim could be filed only in the name of the Consortium and not separately, as was contended by Shri Jain's client. The preliminary issue framed on this count was "whether the claimants are entitled to file this claim as Claimant No. 1 and Claimant No. 2 or only as the Consortium of L&T and Scomi Engineering Bhd?" The High Court of Bombay, agreed with the interim Award of the Arbitrators, and held as follows:-

> "8. Considering the terms and conditions of the contract as well as the decision cited by Mr. Ankhad, in my opinion, in the facts and circumstances of the present case, it is not open for the petitioners to rely upon their independent identities while dealing with the respondent and that they will have to deal with the respondent as a Consortium only. Therefore, there is no infirmity in the impugned order. For the same reason, the present petition as filed would also not been maintainable. Hence, the same is dismissed."

8. Shri Gopal Jain did not dispute the fact that this judgment was final inter-parties as no appeal has been preferred. Therefore, to stress the fact that it pertains only to "this claim" and would therefore, not apply to a different set of claims under the arbitration clause is not an argument that appeals to us.

9. It is clear, as has been held by the judgment of the High Court of Bombay, and which is binding inter-parties, that it is not open for the petitioner to rely upon their status as independent entities while dealing with the respondent and they will have to deal with the respondent as a Consortium only.

10. This being the case, it is clear that the un-incorporated "association" referred to in Section 2(1)(f)(iii) would be attracted on the

A facts of this case and not Section 2(1)(f)(ii) as the Malaysian body cannot be referred to as an independent entity following the judgment of the High Court of Bombay.

11. Section 2(1)(f)(iii) of the Act refers to two different sets of persons: an "association" as distinct and separate from a "body of B individuals". For example, under Section 2(31) of the Income Tax Act, 1961, "person" is defined as including, under sub-clause (v), an association of persons, or body of individuals, whether incorporated or not. It is in this sense, that an association is referred to in Section 2(1)(f)(iii) which would therefore include a consortium consisting of two or more bodies corporate, at least one of whom is a body corporate incorporated in a C country other than India.

12. Further, the expression "a company or" which was originally at the beginning of Section 2(1)(f)(iii) was omitted by Act 3 of 2016. This was for the reason that the judgment of this Court, in ***TDM Infrastructure Private Ltd. v. UE Development India Private Ltd.,*** D **(2008) 14 SCC 271**, held that the expression "a company or" in Section 2(1)(f)(iii) of the Act cannot possibly be said to refer to a company registered and incorporated in India which may be controlled by persons in a country outside India. The Court held:

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

The Law Commission Report No. 246 of August 2014, which made several amendments to the Arbitration and Conciliation Act, 1996, gave the following reason for deleting the words "a company or":

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"(iii) In sub-section (1), clause (f), sub-clause (iii), delete the words "a company or" before the words "an association or a body of individuals.

[NOTE: The reference to "a company" In sub-section (iii) has been removed since the same is already covered under sub-section (ii). The intention is to determine the residence of a company based on its place of incorporation and not the place of central management/control. This further re-enforces the "place of incorporation" principle laid down by the Supreme Court in TDM Infrastructure Private Limited v. UE Development India Private Limited, (2008) 14 SCC 271, and adds greater certainty in case of companies having a different place of incorporation and place of exercise of central management and control]"

It would become clear that prior to the deletion of the expression "a company or", there were three sets of persons referred to in Section 2(1)(f)(iii) as separate and distinct persons who would fall within the said sub-clause. This does not change due to the deletion of the phrase "a company or" for the reason given by the Law Commission. This is another reason as to why "an association" cannot be read with "body of individuals" which follows it but is a separate and distinct category by itself, as is understood from the definition of "person" as defined in the Income Tax Act referred to above.

13. This being the case, coupled with the fact, as correctly argued by Shri Diwan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the Consortium Agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation.

14. This being the case, we dismiss the petition filed under Section 11 of the Act, as there is no "international commercial arbitration" as defined under Section 2(1)(f) of the Act for the petitioner to come to this Court. We also do not deem it necessary to go into whether the appropriate stage for invoking Arbitration has yet been reached.

A 15. The Arbitration Petition is dismissed in the aforesaid terms.

16. It would be open for the petitioner to approach the relevant court on the footing that this is not a case of an international commercial arbitration.

Ankit Gyan Arbitration Petition dismissed.